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**Justice Committee**  
**Comataidh a' Cheartais**

# **Stage 1 Report on the Hate Crime and Public Order (Scotland) Bill**

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# Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



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## **Stage 1 Report on the Hate Crime and Public Order (Scotland) Bill**

### **Introduction**

1. The Hate Crime and Public Order (Scotland) Bill (“the Bill”) was introduced in the Parliament by the Cabinet Secretary for Justice, Humza Yousaf MSP (“the Cabinet Secretary”), on 23 April 2020. The Parliament designated the Justice Committee as the lead committee for Stage 1 consideration of the Bill.
2. Under the Parliament’s Standing Orders Rule 9.6.3(a), it is for the lead committee to report to the Parliament on the general principles of the Bill. In doing so, it must take account of views submitted to it by any other committee. The lead committee is also required to report on the Financial Memorandum and Policy Memorandum, which accompany the Bill.
3. A motion for a financial resolution in relation to the Bill was lodged in the name of Kate Forbes MSP, Cabinet Secretary for Finance.

### **General policy objectives of the Bill**

4. The Policy Memorandum<sup>1</sup> accompanying the Bill states that:

“This Bill provides for the modernising, consolidating and extending of hate crime legislation in Scotland. Legislation in this area has evolved over time in a fragmented manner with the result that different elements of hate crime law are located in different statutes, there is a lack of consistency, and the relevant legislation is not as user-friendly as it could be. The new hate crime legislation will provide greater clarity, transparency and consistency.”
5. According to the Scottish Government, in addition to consolidation, the Bill seeks to modernise and extend existing hate crime legislation by:
  - including age as an additional characteristic in new provisions for the aggravation of offences by prejudice under Part 1 of the Bill (existing aggravations, which the new provisions will replace, apply only in relation to disability, race, religion, sexual orientation and transgender identity);
  - creating new offences relating to stirring up hatred in Part 2 of the Bill that will apply in relation to all listed characteristics, including age, disability, race, religion, sexual orientation, transgender identity and variations in sex characteristics (existing offences, which these new offences largely replace, apply only in relation to race);

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<sup>1</sup> [Hate Crime and Public Order \(Scotland\) Bill Policy Memorandum](#)

- updating the definition of transgender identity in Parts 1 and 2 of the Bill, including removing the term ‘intersexuality’ and creating a separate category for variations in sex characteristics; and
  - including a power to enable the characteristic of sex to be added to the lists of characteristics referred to in Parts 1 and 2 of the Bill by regulations at a later date, once the Bill has passed.
6. The Bill also abolishes the common law offence of blasphemy.

### **Structure of the bill**

7. The Bill is divided into five main Parts:

**Part 1** makes provision relating to the aggravation of offences by prejudice. It provides that a criminal offence is aggravated if either: the offender evinces malice and ill-will towards the victim based on the victim’s membership of a group defined by reference to a listed characteristic, or the offence is motivated (wholly or partly) by malice and ill-will towards any such group. The listed characteristics are age, disability, race (and related characteristics), religion, sexual orientation, transgender identity and variations in sex characteristics.

**Part 2** creates offences of stirring up hatred against a group of persons based on the group being defined by reference to a listed characteristic. It also creates offences of possessing inflammatory material with a view to communicating the material in circumstances where there is an intention to stir up hatred. The listed characteristics are the same as those in Part 1.

**Part 3** sets out further provision to assist with the interpretation of the characteristics that are listed sections 1(2), 3(3) and 5(3). It also provides a power for the Scottish Ministers to make regulations adding the characteristic of sex to any of these lists of characteristics.

**Part 4** abolishes the common law offence of blasphemy.

**Part 5** contains general provisions, including a power for Scottish Ministers to make ancillary provision by regulations

### **Justice Committee’s consideration**

8. The Committee undertook a call for written evidence between 4 May and 24 July 2020<sup>2</sup>. It received over 2,000 submissions of which the majority were received from individuals. Around 150 submissions were received from organisations. The written submissions that have been accepted by the Committee as formal evidence are available online<sup>3</sup>.

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<sup>2</sup> [Justice Committee call for written evidence 4 May 2020](#)

<sup>3</sup> [Written submissions received by the Justice Committee](#)

9. The Committee began taking oral evidence on the Bill on 27 October 2020<sup>4</sup>. Given that, very unusually, the Cabinet Secretary indicated before our inquiry commenced that he proposed to make amendments to the Bill at Stage 2. The Committee began its evidence-taking by hearing from the Cabinet Secretary for Justice, Humza Yousaf MSP, and his officials.

10. The Committee continued taking oral evidence throughout November. On 3 November 2020<sup>5</sup> it heard evidence from

- Roddy Dunlop QC, Dean of the Faculty of Advocates
- Michael P Clancy OBE, Director, Law Reform, The Law Society of Scotland
- Dr Andrew Tickell, Lecturer in Law, Glasgow Caledonian University

And then from:

- Assistant Chief Constable Gary Ritchie, ACC Partnership, Prevention and Community Wellbeing, Police Scotland
- Calum Steele, General Secretary, Scottish Police Federation
- Anthony McGeehan, Procurator Fiscal, Policy and Engagement, Crown Office and Procurator Fiscal Service.

11. On 10 November 2020<sup>6</sup> the Committee took evidence from two panels, the first representing arts and media organisations, and the second representing faith and non-faith groups. It heard from:

- John McLellan, Director, Scottish Newspaper Society
- Lisa Clark, Project Manager, Scottish PEN
- Fraser Sutherland, Chief Executive, Humanist Society Scotland
- David Greig, Artistic Director, The Lyceum Theatre, Edinburgh

And then from:

- Anthony Horan, Director, Catholic Parliamentary Office of the Bishops' Conference of Scotland
- David Bradwell, Associate Secretary (Global Justice and Public Witness), Faith Impact Forum, Church of Scotland
- Kieran Turner, Public Policy Officer, Scotland, Evangelical Alliance
- Rev Stephen Allison, Minister & Assistant Clerk to the General Assembly, Free Church of Scotland
- Ravi Ladva of the Hindu Forum of Britain (Scotland Chapter)
- Isobel Ingham-Barrow, Head of Policy, Muslim Engagement and Development (MEND)
- Ephraim Borowski, Director, Scottish Council of Jewish Communities

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<sup>4</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020](#)

<sup>5</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020](#)

<sup>6</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020](#)

- Neil Barber, spokesperson for Scotland, National Secular Society
- Hardeep Singh, Deputy Director, Network of Sikh Organisations.

12. On 17 November 2020<sup>7</sup>, the Committee took evidence from three panels with witnesses representing the protected hate crime characteristics in the Bill. The first panel focussed on victim support and hate crime characteristics including disability, sexual orientation and age. The Committee heard from:

- John Wilkes, Head of Scotland, Equality and Human Rights Commission
- Oonagh Brown, Policy & Implementation Officer (Parenting), Scottish Commission for People with Learning Disabilities
- Adam Stachura, Head of Policy and Communications, Age Scotland
- Kevin Kane, Policy and Research Manager, Youthlink Scotland
- Tim Hopkins, Director, Equality Network
- Colin Macfarlane, Director, Stonewall.

13. The second panel focussed on race and the Committee heard from:

- Dr Jennifer Galbraith, Policy and Research Officer, Coalition for Racial Equality and Rights (CRER)
- Danny Boyle, Senior Parliamentary and Policy Officer, BEMIS Scotland
- Amy Allard-Dunbar, Anti-Racist and Pro-Black Ambassador and Educator, Intercultural Youth Scotland.

14. The third panel focussed on transgender identity and variations in sex characteristics and the Committee heard from:

- Lucy Hunter Blackburn of Murray Blackburn Mackenzie
- Becky Kaufman, Justice Policy Officer, Scottish Trans Alliance
- Clare Graham, Strategic Advisor - Public Understanding, dsdfamilies
- Paul Dutton, Intersex & Study Liaison - Committee Support Group, Klinefelters Syndrome Association UK.

15. Finally, on 24 November 2020<sup>8</sup> the Committee took evidence from:

- Emma Ritch, Executive Director, Engender
- Dr Marsha Scott, Chief Executive Officer, Scottish Women's Aid
- Susan Smith, Director, For Women Scotland

and then from:

- the Cabinet Secretary for Justice, Humza Yousaf, and the Scottish Government Bill Team and officials.

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<sup>7</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020](#)

<sup>8</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020](#)



## **Research commissioned by the Committee**

16. To assist further in their scrutiny and to provide wider context, the Committee commissioned a short piece of independent research by Professor Chalmers and Professor Leverick of the University of Glasgow to advise on approaches taken to hate crime laws in other jurisdictions. In relation to selected jurisdictions, the report provides a summary of hate crime laws including relevant criminal offences and aggravators including the range of hate crime characteristics covered and commentary, the interaction between hate crime laws and free speech and recent development and debate in the area. The jurisdictions covered by the report include England and Wales as well as comparators from outwith the UK, including Canada and EU countries. The report also gives a summary of ECHR decisions in so far as they are relevant to the development of hate crime law in Scotland including the interaction between hate crime laws and freedom of expression. The report is published online and can be accessed [here](#).

17. The Committee also commissioned research from Dr Hannah Bows of the University of Durham as part of previous work on elder abuse which has subsequently fed into its scrutiny of the Bill. The report is published online and can be accessed [here](#).

18. The Scottish Parliament Information Centre (SPICe) has produced a briefing on the Bill which is available online, which can be accessed [here](#).

## **Consideration by other committees**

19. On 27 August 2020, the Delegated Powers and Law Reform Committee reported its views on the Bill<sup>9</sup>. The Committee considered each of the delegated powers in the Bill and whether they are framed appropriately (for example, the power being conferred is not too broad) and that the Parliament is afforded sufficient scrutiny of the exercise of this power.

20. The Delegated Powers and Law Reform (DPLR) Committee published its report on 27 August 2020. It reported that it was content with the delegated powers provisions contained in the Bill.

21. The Finance and Constitution Committee issued a call for evidence in June 2020. Six written submissions of evidence were received<sup>10</sup>. The Finance and Constitution Committee agreed to take no further action in relation to the Bill.

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<sup>9</sup><https://sp-bpr-en-prod-cdnep.azureedge.net/published/DPLR/2020/8/27/Hate-Crime-and-Public-Order--Scotland--Bill--Stage-1/DPLRS052020R46.pdf>

<sup>10</sup> <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/115297.aspx>

### **Membership changes**

22. On 25 August 2020, Adam Tomkins MSP joined the Justice Committee becoming its Convener and replacing Margaret Mitchell MSP.

23. On 1 September 2020, Annabelle Ewing MSP replaced Alasdair Allan MSP as a member of the Justice Committee.

24. On 25 November 2020, James Kelly MSP resigned from the Justice Committee. He was replaced by Rhoda Grant MSP.

## **Background to Hate Crime legislation and policy in Scotland**

### **Current hate crime legislation in Scotland and the impact of this Bill**

25. Current hate crime legislation in Scotland includes statutory aggravations specifying when an existing offence may be aggravated by prejudice in respect of one or more of the characteristics of race, religion, disability, sexual orientation and transgender identity (which includes 'intersexuality').

26. The statutory aggravations are not offences in themselves but make the existing offence (e.g. robbery, assault or breach of the peace) more serious and apply where the offender evinces (demonstrates) or is motivated by malice and ill will towards a group of persons defined by reference to one or more of the hate crime characteristics.

27. The existing 'hate crime' statutory aggravations are:

- race: section 96 of the Crime and Disorder Act 1998 ('the 1998 Act');
- religion: section 74 of the Criminal Justice (Scotland) Act 2003 ('the 2003 Act');
- disability: section 1 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 ("the 2009 Act");
- sexual orientation: section 2 of the 2009 Act;
- transgender identity: section 2 of the 2009 Act.

28. For each of the statutory aggravations, evidence from a single source is sufficient to prove that an offence is aggravated by prejudice.

29. Where any such statutory aggravation is proven, the court is required to state on conviction that the offence is aggravated by prejudice relating to the characteristic in question; record the conviction so that it shows the relevant aggravation and take the aggravation into account in sentencing, stating the extent of any difference, the reasons for the difference or, if there is no difference, the reason for this.

30. In addition, there exist standalone hate crime offences which criminalise behaviour specifically because it involves racial prejudice.

- racially aggravated harassment: section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995;
- stirring up of racial hatred: sections 18 to 23 of the Public Order Act 1986. These provisions deal with conduct which is threatening, abusive or insulting and is intended, or in all the circumstances is likely, to stir up racial hatred.

31. The following table shows the impact that the provisions in this Bill, as introduced, if enacted, would have on current offences relating to stirring up hatred.

**Table 1: the stirring-up offences, what is consolidated and what is new**

*The following aspects of the stirring-up offences, provided for in the Bill, consolidate provisions already in force:*

- It is an offence under the Public Order Act 1986, section 18, to use threatening, abusive or insulting words or behaviour if you intend thereby to stir up racial hatred or if, having regard to all the circumstances, racial hatred is likely to be stirred up.
- It is an offence under the Public Order Act 1986, section 19, to publish or distribute written material that is threatening, abusive or insulting if you intend to stir up racial hatred or if, having regard to all the circumstances, racial hatred is likely to be stirred up.
- It is an offence under the Public Order Act 1986, section 23, to possess material that is threatening, abusive or insulting if you intend thereby to stir up racial hatred or if, having regard to all the circumstances, racial hatred is likely to be stirred up.
- In England and Wales (but not, currently, in Scotland) it is an offence under the Religious and Racial Hatred Act 2006, as amended, to use threatening words or behaviour intending thereby to stir up religious hatred or hatred on the grounds of sexual orientation.

*The following aspects of the stirring-up offences, provided for in the Bill, extend the law beyond provisions already in force:*

- Under section 18 of the Public Order Act 1986 it is a defence if the words or behaviour were used by a person inside a dwelling and are not heard or seen except by persons in that dwelling. There is no equivalent defence in the Bill.
- Under sections 18 and 19 of the Public Order Act 1986 a person who is not shown to have intended to stir up racial hatred is not guilty of an offence if he did not intend his words or behaviour to be, and was not aware that it might be, threatening, abusive or insulting. There is no direct equivalent provision in the Bill; instead, the Bill provides that it is a defence for a person charged with a stirring-up offence to show that their behaviour was reasonable in the particular circumstances.
- Under Part IIIA of the Public Order Act 1986, as inserted by the Racial and Religious Hatred Act 2006, only threatening words or behaviour intended to stir up hatred fall within the scope of the criminal law; under the Bill, threatening or abusive words or behaviour will fall foul of the criminal law if they are intended to stir up hatred on grounds of age, disability, religion, sexual orientation, transgender identity, or variations in sex characteristics.
- Under the Religious and Racial Hatred Act, freedom of speech is expressly protected as regards “discussion, criticism or expressions of antipathy, ridicule, insult or abuse ...”. Under the Bill, freedom of speech is expressly protected in sections 11 and 12 as regards “discussion or criticism”. It should be noted, however, that the Cabinet Secretary for Justice informed the Committee on 24 November 2020 of his intention to amend these sections at Stage 2 to strengthen the protection the Bill affords to freedom of expression.

## **Independent Review of Hate Crime Legislation in Scotland**

32. In January 2017, the Scottish Government appointed Lord Bracadale to carry out an independent review of hate crime legislation in Scotland. His report and recommendations were published in May 2018 and are available online.<sup>11</sup>

33. In response to publication of the report, the Scottish Government accepted his recommendation to consolidate all Scottish hate crime legislation into one new hate crime statute and committed to consult on the detail of what would be included.

## **Hate Crime Definition**

34. There is no single accepted definition of hate crime. Lord Bracadale used the following definition:

“Offences which adhere to the principle that crimes motivated by hatred and prejudice towards particular features of the victim’s identity should be treated differently from ordinary crimes”

## **Scottish Government’s Consultation**

35. In November 2018, the Scottish Government launched a consultation on amending hate crime legislation. The consultation can be accessed [here](#).

36. An analysis of responses was published by the Scottish Government in June 2019 with the executive summary noting that:

“a total of 1159 responses were received: 105 from organisations (third sector bodies, public sector and partnership bodies, faith groups and other organisations) and 1051 from individuals. The analysis of responses showed that organisations and individuals often had differing perspectives and views on the issues under consideration”.

37. The executive summary highlights what it describes as two key perspectives within the responses:

“A substantial proportion of respondents (including most individuals) had concerns about the impact of hate crime laws on freedom of speech and religious expression and about laws designed to protect specific groups. Many called for the repeal of hate crime laws, or, at least, did not want such laws to be extended. These views shaped their responses to the consultation”.

“Other respondents (including most organisations) saw hate crime laws as important in protecting vulnerable groups and sending out a message about the

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<sup>11</sup> [Lord Bracadale’s Independent Review of Hate Crime Legislation in Scotland](#)

unacceptability of prejudice-based content. Within this group there was a range of perspectives on how to ensure the protection of particular groups”.

## Key issues in the Committee's consideration of the Bill

### **Part 2 – Offences related to the stirring up of hatred**

#### *Approach to legislating on hate crime and fundamental rights*

38. Legislating on hate crime inevitably touches on fundamental rights—most obviously the right to freedom of speech, but also the right to privacy and the right to liberty and security of the person. The Committee asked the Cabinet Secretary for Justice whether he agreed or disagreed with the proposition that, when making law on the subject of fundamental rights, rights such as freedom of speech and privacy should be interpreted and applied generously and that restrictions to the exercise of those rights should be legislated for narrowly and only where shown to be necessary in the public interest.

39. In response, the Cabinet Secretary said “Broadly, I agree. It is important to remember that we will look to ensure that any Bill we pass is compatible with the European Convention on Human Rights. A variety of articles of the ECHR are important, in particular the article on freedom of expression is vitally important”. He added “I think that the changes I promised get the balance just about right”. Mr Yousaf went on to say “We should remember that people have the right to live their lives without having prejudice or hatred directed against them. The criminal law must protect people from such hatred”<sup>12</sup>.

40. How far the right to freedom of speech extends was explored by the Committee, particularly as to whether the right extends to the right to offend. In written evidence, The Law Society of Scotland cited with approval a dictum from Lord Justice Sedley that “Freedom only to speak inoffensively is not worth having”<sup>13</sup>.

41. The Faculty of Advocates cited Lord Rodger who said that freedom of speech applies to “ ‘Information’ or ‘ideas’ that... ‘offend, shock or disturb’ ”.<sup>14</sup>

42. In his evidence, the Cabinet Secretary agreed with these comments, stating “That is why there is not a word in the Bill that deals with offence”. He added that “People should have the right to be offensive and to express controversial views. The Bill does not intend to deal with people who have offensive views”.<sup>15</sup>

43. Furthermore, the Cabinet Secretary emphasised that, in his words, “I do not want there to be any self-censorship. I do not want people to be unsure and start censoring their behaviour, particularly those in the artistic field, or journalists”<sup>16</sup>.

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<sup>12</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 3-4](#)

<sup>13</sup> [The Law Society of Scotland, written submission](#)

<sup>14</sup> [Faculty of Advocates, written submission](#)

<sup>15</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 4](#)

<sup>16</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 12](#)

**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.**

*Section 3 - Offences of stirring up hatred*

45. Existing offences in Scots law of stirring up hatred apply to race only and are set out in sections 18 to 23 of the Public Order Act 1986. They cover a range of circumstances including the spoken word, written material, sound and visual recordings.

46. The Bill seeks to replace most of those existing offences with a single offence set out in Section 3(1) of the Bill. This provides that an offence is committed if a person (i) behaves in a threatening, abusive or insulting manner or (ii) communicates threatening, abusive or insulting material to another person; and either intends to stir up hatred against a group of persons defined by reference to race or it is likely that hatred will be stirred up against such a group.

47. The Scottish Government's policy memorandum suggests that the intention is to cover a similar range of behaviour provided for in the Public Order Act 1986 with the same legal threshold for criminal liability.

48. Sections 3(2) and (3) of the Bill create a new single offence which could be used in relation to any of the hate crime characteristics, excluding race. The proposed offence follows the same approach but notably does not include reference to "insulting" for either behaviour or communicating material.<sup>17</sup>

*Proposed amendments to the Hate Crime and Public Order (Scotland) Bill by the Scottish Government*

49. On 23 September 2020, the Cabinet Secretary wrote to the Convener of the Justice Committee<sup>18</sup> setting out a number of amendments that the Scottish Government proposed to lodge at Stage 2, and which were thereafter outlined in a statement to Parliament on the same day.

50. The statement indicated that the Scottish Government intended:

- To make the new stirring up hatred offences in Part 2, Sections 3 and 5 "intent only". This change would not apply to offences in relation to stirring up racial hatred where liability bases on intent or a likelihood of hatred being stirred up would continue to apply;
- To give further consideration to such matters as the operation of the "reasonableness" defence and the provisions concerning freedom of expression; and

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<sup>17</sup> Lord Bracadale's review recommended that all stirring up offences including ones dealing with racial hatred be restricted to threatening or abusive behaviour.

<sup>18</sup> [Letter from the Cabinet Secretary to the Convener of the Justice Committee dated 23 September 2020](#)



- To give further consideration to certain aspects of the language contained in the bill such as “evincing malice and ill-will”.

51. On 20 October 2020, the Cabinet Secretary wrote to the Convener of the Justice Committee<sup>19</sup> setting out the amendments in further detail and providing confirmation that the offences in sections 3 and 5 in relation to protected characteristics excluding race would be restricted to intent only.

52. In relation to Part 2 Offences of stirring up hatred, the proposed amendments would:

- remove Section 3(2)(b)(ii) “as a result it is likely that hatred will be stirred up against such a group.”

53. In relation to Part 5 Offences of possessing inflammatory material the proposed amendments would:

- remove Section 5(2)(b)(ii) “it is likely that if the material were communicated, hatred would be stirred up against such a group”

*Striking the balance between protection for individuals and freedom of expression*

54. Central to the Committee’s scrutiny of this Bill is the need to balance the rights of individuals to be protected from being subjected to threatening or abusive behaviour and the rights of individuals, the press and religious groups to express themselves freely, without fear of investigation or criminality.

55. Part 2 of the Bill has been the most controversial in seeking to balance those competing rights. Respondents to the Committee’s call for written evidence raised concerns both about the impact of the proposed legislation on freedom of speech and whether the Bill sought to protect some groups over others. Others welcomed the proposals viewing the proposed legislation as being capable of changing the cultural landscape, sending out the correct message and in protecting groups who were most likely to be impacted by hate crime in Scotland.

56. A significant number of respondents raised concerns in relation to the “likely to stir up” hatred provisions contained within Section 3 and 5. Following his statement to Parliament that Section 3(2) and 5(2) (i.e. stirring up offences for characteristics other than race) would be amended to intent only, the Cabinet Secretary told us that the proposed amendment would provide clarity saying that “There is a “triple lock” in relation to the new offences. They must be proven beyond a reasonable doubt, the behaviour must be threatening or abusive and, importantly, the behaviour must have the intent behind it - there must be *mens rea*<sup>20</sup>. If we maintain the reasonableness defence, you could potentially argue that there is a quadruple lock”.<sup>21</sup>

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<sup>19</sup> [Letter from the Cabinet Secretary to the Convener of the Justice Committee dated 20 October 2020](#)

<sup>20</sup> The intention or knowledge of wrongdoing that constitutes part of a crime, as opposed to the action or conduct of the accused.

<sup>21</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 12](#)

57. The majority of witnesses we heard from supported the Scottish Government's proposed amendments. Roddy Dunlop said the Faculty of Advocates welcomed the proposed amendments which addressed a number of their concerns about the potential damage that might be done by the 'likely to stir up hatred' provision which allowed for "unintentional criminalisation in an area in which that would not be welcome".<sup>22</sup>

58. Dr Andrew Tickell considered that "while some free speech anxieties in respect of the Bill are "well founded", some are "exaggerated" and "excessive", so considered that moving to an intent only model would allay the anxieties that most people had with the Bill.<sup>23</sup> Michael Clancy of the Law Society of Scotland agreed, saying the amendments would "relieve much of our anxiety about the provisions in sections 3 and 5".<sup>24</sup>

59. Police bodies we heard from were also broadly supportive of the Scottish Government's proposed changes. Assistant Chief Constable Gary Ritchie of Police Scotland thought that the model would give "consistency for policing", and having intent as the basis for all interventions would provide "a very strong threshold" and make things "a lot clearer in practice."<sup>25</sup> Callum Steele of the Scottish Police Federation described the amendments as "a substantial move towards alleviating a lot of the concerns that would arise for police officers"<sup>26</sup> Anthony McGeehan of the Crown and Procurator Fiscal Service said the amendments would provide "welcome clarification of the behaviour that will be criminal"<sup>27</sup>. He highlighted, however, that a consequence of the restriction was to expand the difference between the approach taken to race from the majority of the protected characteristics.

60. Those representing media, writers and arts welcomed the move to intent only but voiced continuing concerns in relation to the freedom of expression provisions. Lisa Clark of Scottish PEN told the Committee that their written submission focused a great deal on their concerns about freedom of expression and the potential for Part 2 to have a chilling effect on writers in Scotland, so the amendments had "eased a lot of our anxieties" but raised a number of other issues.<sup>28</sup>

61. John McLellan of the Scottish Newspaper Society told us the amendment was welcome as it "indicated a sense of direction" but indicated that "our main concerns remain". He added that "There is a significant danger that institutions such as ours that are involved in communication will still be open to investigation and action. Even if those actions are subsequently unsuccessful, the process and consequences of the investigation are as serious as being convicted".<sup>29</sup>

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<sup>22</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 2](#)

<sup>23</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 4](#)

<sup>24</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 4](#)

<sup>25</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 35](#)

<sup>26</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 36](#)

<sup>27</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 36](#)

<sup>28</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 2](#)

<sup>29</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 5](#)

62. While witnesses from both faith and non-faith groups voiced support for the amendments, Rev Stephen Allison shared Mr McLellan's view stating "We are concerned that people would have to prove defences. Also, that they might face being interviewed and having material confiscated or looked at extensively under offences of possessing inflammatory material even if it does not ultimately lead to conviction".<sup>30</sup> Likewise, Neil Barber of the National Secular Society thought the reconsideration was a "step in the right direction," yet did not think it would provide any comfort to writers, artists or playwrights who "anticipate lengthy, expensive, stressful, sleepless months before court cases." In his view, "The fact that a court case is required to prove intent is not helpful. It will intimidate free speech from the start."<sup>31</sup>

63. Lucy Hunter Blackburn of Murray Blackburn Mackenzie agreed, describing the proposed amendment as an improvement but one that far from answered her concerns which were about "the long shadow that the legislation will cast. By removing likelihood you will slightly reduce the long shadow over freedom of speech which we worry about, but it will remain". She believed "There is much work to be done to make it work safely around freedom of expression".<sup>32</sup>

64. In its written evidence, Victim Support Scotland said that categorisation as a crime of 'intention only' would ensure that the legislation acknowledges that the impact of hate crime is frequently more devastating and longer lasting than that of other types of crime because an aspect of an individual's core identity and sense of belonging is attacked. In its view, abusive behaviour forms part of a number of microaggressions that not only negatively impact individual victims, but whole communities and marginalised groups.<sup>33</sup>

65. Claire Graham of dsdfamilies voiced different concerns around freedom of expression. She said, "We have reservations about who defines what is hateful in general for people who are intersex and the impact that it will have on our freedom of expression to talk about ourselves"<sup>34</sup>

66. A contrary view was provided by Ephraim Borowski of the Scottish Council of Jewish Communities who thought that the concern should be about protecting people and not beliefs or ideologies. On the specific question of intent and effect, he commented "I think the amendment announced by the Cabinet Secretary is retrograde and essentially provides a get-out-of-jail-free card for something that we might often see in hate filled posts on the internet. Having posted their hatred, people will then end their comments with "just saying" or "just asking". They are now being given a get-out-of-jail-free card because they can say that they did not intend to cause offence but that they were merely asking a question". He argued that the right to freedom of speech is not unqualified and what is appropriate and what is not needs to be made on a case by case basis.<sup>35</sup>

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<sup>30</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 25](#)

<sup>31</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 32](#)

<sup>32</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 48](#)

<sup>33</sup> [Victim Support Scotland, written submission](#)

<sup>34</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 48](#)

<sup>35</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 27](#)

67. There were also calls to address the underlying cause of hate crime. Ravi Ladva of the Hindu Forum (Scotland Chapter) argued “There are grey areas in the Bill which would impact implementation and enforcement. For us, it speaks to an essential part of our social contract, as citizens in the UK and Scotland, which is about being good to one another. I do not want someone to be good to me simply out of fear of what a piece of legislation can do”. He added “Although we welcome aspects of the Bill, we think that we should aim to address the root causes of hate speech. To that end, I hope the discussions can be broadened out so that we can engage and develop this conversation further”.<sup>36</sup>

68. Others, like John Wilkes of the Equality and Human Rights Commission, believed the amendments should apply across all characteristics (i.e., including race). Tim Hopkins of the Equality Network welcomed the extension of the offence of stirring up hatred to other protected characteristics. He referenced a case in England that resulted in a prosecution following the distribution of leaflets depicting a cartoon of a gay man being hanged. He said, “It is that kind of wrong that the offence of stirring up hatred is targeted at”, and added “I think that, in such cases, the court can infer from what has been happening that there is an intention to stir up hatred, so I think that the justice secretary’s proposed amendment does not diminish the utility of the offence”. He emphasised the importance that the offence covers threatening and abusive behaviour referring to propaganda produced by the Nazis about Jewish people which were used as a mechanism to stir up hatred but which was not necessarily directly threatening. He further added “We think that it is important that such behaviour would also be caught by the offence”.<sup>37</sup>

69. Becky Kaufmann of the Scottish Trans Alliance thought the amendment provided the correct balance. She stated that “We broadly support the proposed amendment. We feel fairly comfortable that the ability to prosecute something depending on evidence that a person intended to stir up hatred or be threatening or abusive is an appropriate and useful threshold, and we feel it represents an appropriate protection for freedom of expression.”<sup>38</sup> She added “I have been subject to a fair bit of debate that makes me extremely uncomfortable and which is often very disrespectful of my identity, yet I would not encourage that behaviour to be made criminal. What we would like to see, what we believe that the current structure, with the amendment to intent that has been proposed by the Cabinet Secretary does, is for the legislation to capture the behaviour motivated by prejudice that is elevated to the level of threatening and abusive behaviour. That is where we think that the law belongs.”<sup>39</sup>

**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.**

<sup>36</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 34](#)

<sup>37</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 2](#)

<sup>38</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 48](#)

<sup>39</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 53](#)

### *Retention of Insulting*

71. The offence of stirring up racial hatred is provided for differently in the Bill than for offences committed against the other protected characteristics. Section 3(1)(a) retains “insulting” and at 3(1)(b) “likely to” in respect of offences of stirring up hatred motivated by race.

72. A key focus within the evidence, and for the Committee, was whether retaining the word “insulting” was necessary. There was also the question as to whether the Bill’s retention of this word for race created a hierarchy of characteristics. Witnesses we heard from expressed differing views on both its retention and removal.

73. Lord Bracadale told us “I recommended the removal of the word “insulting”. I come back to the line, that divides offensive and abusive behaviour. On the face of it, insulting behaviour seems to me to lie on the non-criminal side of that line, which is why I thought it was inappropriate to retain it”.<sup>40</sup>

74. In his evidence, the Cabinet Secretary defended the Scottish Government’s decision to retain “insulting” in relation to racial hatred which, he said, was present in current legislation (the Public Order Act 1986) and had been in place for 34 years. He told us that “I will be interested to hear the committee’s evidence from groups that represent those who are most targeted by racial stirring up offences and by racial hatred. Those groups will tell you that they do not want any perceived dilution or weakening of the current stirring up of racial hatred offence, which has existed for 34 years with barely any controversy whatsoever”. He added “We must remember that there must also be an intent to stir or the likelihood of stirring up hatred. If it does not do so, it is not an offence under the legislation” and those drafting the legislation “should not and must not discount the real life experiences of the victims of such crimes”.<sup>41</sup>

75. Roddy Dunlop said he found it difficult to see what the use of “insulting” added. “It is difficult to see a situation in which words are used that are not ‘threatening’ or ‘abusive’ yet might still be thought worthy of criminalisation under reference to ‘insulting’”. He asked why only one characteristic should be protected against insult and not others. He considered that the term “insult” is subjective whereas “threatening” and “abusive” are quintessentially objective. The issue, he said, raises concerns that material might be criminalised that should not be.<sup>42</sup>

76. Mr Dunlop also questioned how many convictions there had been on the notion of “insulting” and surmised it was probably none or almost none. He told us that he would not be concerned about dilution if the word was to be removed. “My concern lies the other way round - it is that the subjective notion of “insulting” would be ripe for abuse” in that the provision would be subject to abuse and misuse such as malicious complaints. “It would be an easy way to get back at a neighbour you do not like – you

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<sup>40</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 45](#)

<sup>41</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 6-7](#)

<sup>42</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 3](#)



make a complaint and their computers are seized... I do not see removing the term as a dilution, rather as a necessary fortification of the protection for freedom of speech".<sup>43</sup>

77. Andrew Tickell agreed arguing that the legislation should be reviewed from the perspective of what was required, stating "The argument that, because it is in the Public Order Act 1986, it should be in the Bill is not convincing in relation to any aspects. We should be considering the matter from a first-principles perspective and asking whether those protections, restrictions or extensions are necessary. I struggle to imagine circumstances in which communication or comment would be insulting, but not abusive, as "abusive" is a pretty capacious concept".<sup>44</sup>

78. In his evidence, Michael Clancy argued that the term "insulting", "lowers the bar for criminality a bit too far" and that, not only is it subjective, but it also creates a hierarchy between stirring up racial hatred and the other characteristics.<sup>45</sup>

79. A number of other witnesses believed that insulting should be removed including Calum Steele of the Scottish Police Federation, and ACC Gary Ritchie of Police Scotland. Mr Ritchie considered "it could create a hierarchy of discrimination and because it is inconsistent. It makes it more difficult for the officer to understand what types of behaviour and what circumstances cross the criminal threshold"<sup>46</sup>.

80. In terms of the ability to prosecute offences, we were told there would be no material difference if insulting were removed. Lord Bracadale said "When I looked into the issue I asked the Crown Prosecution Service in England for assistance. The word "insulting" has been deleted from section 5 of the Public Order Act 1986, which relates to a harassment offence. The CPS told me that it had been unable to find any case that could not be characterised as abusive as well as insulting. It took the view that, from the perspective of the prosecution, the word "insulting" could safely be removed from that legislation."<sup>47</sup>

81. This was echoed by Anthony McGeehan of the Crown Office and Procurator Fiscal Service who explained that policy officials conducted a review of relevant cases in relation to the 1986 Act since 2009 and found that "the removal of the word 'insulting' would not diminish the ability of the Crown to take appropriate prosecutorial action in relation to those reported offences"<sup>48</sup>. He argued that, if there was a risk in removing it, that would be mitigated by securing public confidence through responding effectively to hate crime. He said, "I would also suggest that there is a consequential and different risk if the insulting offence is retained in relation to racial hate crime, whereby there is understood to be a difference in the behaviour that is allowed in relation to other protected characteristics but not in relation to race crime."<sup>49</sup>

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<sup>43</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 25](#)

<sup>44</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 5](#)

<sup>45</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 4](#)

<sup>46</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 37](#)

<sup>47</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 46](#)

<sup>48</sup> [Justice Committee Official Report, 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 39](#)

<sup>49</sup> [Justice Committee Official Report, 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 47-48](#)

82. In its written evidence, Victim Support Scotland said that it had previously stated support for the recommendations in Lord Bracadale's report which considered the inclusion of 'insulting' to be a technicality that had not resulted in a prosecution of a racial hatred offence as it had already been found 'threatening' and/or 'abusive.' On this basis, provided the inclusion or exclusion of behaviour as 'insulting' does not adversely impact anyone affected by crime, Victim Support Scotland can support this language change.<sup>50</sup>

83. Witnesses representing race organisations argued strongly in favour of retaining "insulting".

84. In its written evidence, CRER said it "strongly disagreed" with Lord Bracadale's views that insulting' should be removed. It referred to the Scottish Government's Equality Impact Assessment (EQIA) of the Bill which noted that: "Removal of insulting could be perceived as suggesting it was in some way acceptable to insult on the basis of race in a manner that previously it would not have been. Such a perception, even if based on an incomplete understanding of the operation of criminal law, is not a perception that the Scottish Government is willing to risk arising". Furthermore, it was reasoned in the assessment that "its removal could be particularly damaging in terms of tackling racial hatred within Scottish society if such a removal could be perceived as a weakening of criminal law protection in the area of race. The Scottish Government is of the view that, due to the historical and structural nature of racism, the prevalence and seriousness of race hate crime and the impact that this has on community cohesion, a separate approach is justified". CRER considered that the explanation given in the Bill's accompanying policy memorandum reflected the Scottish Government's EQIA and welcomed this as positive evidence of mitigating action taken following an Equality Impact Assessment.<sup>51</sup>

85. In oral evidence, Dr Jennifer Galbraith emphasised CRER's position, and that removal could lead to people thinking it was permissible to insult people on the basis of their race. She said "We have significant concerns about that. We agree that its removal would dilute those protections. 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."<sup>52</sup> She went on to state that "Insulting has been part of the legislation for decades. If there was an issue with it, I am sure that we would have found out by now. If other groups want the protections to be extended, and there is evidence that they are needed, we would have no objection to that."<sup>53</sup>

86. Amy Allard-Dunbar of Intercultural Youth Scotland agreed. She said "Micro-aggressions are daily instances of racism that add up to cause significant racial trauma. A lot of them come under the term "insulting" and it would be hard to understand their impact if the term was not included in the Bill. That provision needs to be kept."<sup>54</sup>

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<sup>50</sup> [Victim Support Scotland, written submission](#)

<sup>51</sup> [CRER, written submission](#)

<sup>52</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 31](#)

<sup>53</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 36](#)

<sup>54</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 33](#)

87. Danny Boyle of BEMIS argued, not only that the term had international associations, but that insulting behaviour, if perceived to have been given the green light, can escalate over time. He said “That term is pertinent because we are linking the international system to our domestic challenges. We have incorporated a broad definition from the international system into our domestic legal regime because we know that the issue of racism and race is ubiquitous around the globe”. He explained that the reason the Public Order Act 1986 contained an offence of stirring up racial hatred was in response to the significant increase of far-right groups in the UK at the time. He added “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.”<sup>55</sup>

88. In written evidence, Children in Scotland said: “It is the view of Children in Scotland that given the historic and systemic nature of racism, which has been brought to the fore of global debate once again in recent months by the Black Lives Matter movement, we would support retaining the threshold of threatening, abusive or insulting”.<sup>56</sup>

89. MEND argued that protection against insulting behaviour should be extended to cover religion, stating “Islamophobia frequently manifests itself as a form of racism, but Muslims are not defined as a race and are not entitled to the protection against racially motivated hate crimes in the same way as Jewish and Sikh communities. However, just as insulting behaviours on the grounds of race can contribute to discrimination and institutional racisms that create barriers to minority participation within social, civic, economic and political life, such propagating of insulting Islamophobic hatred can have these consequences for Muslims”.<sup>57</sup>

90. The Scottish Council of Jewish Communities highlighted the different levels of protection for Jewish and Sikh communities (as Jews and Sikhs are regarded as a race in addition to a religion) as compared with other religious communities and suggested that protection against insulting should be extended to cover all characteristics.<sup>58</sup>

91. Kevin Kane of Youthlink Scotland thought that conversations with the affected groups must continue. He said, “We cautiously share the Scottish Government’s view that the threshold should be retained as ‘threatening’, ‘abusive’, and ‘insulting’. He understood, however, Lord Bracadale’s argument for the removal of insulting. Having listened to the affected groups, their view was that the removal of insulting would weaken the proposed legislation. He stated that “We believe we need to keep discussion going and continue to listen to the views of that community”, and that when taking into account the “sheer number of people affected by it...there is a case for a slightly lower threshold, perhaps on symbolic grounds”, but “unless there is a clear majority from the affected communities that backs its removal, we would not be prepared to take that step.”<sup>59</sup>

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<sup>55</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 30-31](#)

<sup>56</sup> [Children of Scotland, written submission](#)

<sup>57</sup> [MEND, written submission](#)

<sup>58</sup> [Scottish Council of Jewish Communities, written submission](#)

<sup>59</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 4-5](#)



92. In his final appearance before the Committee, the Cabinet Secretary reiterated his view that there is justification for treating the offence of stirring up racial hatred differently from the other offences. He told us that, while he recognised the purity of the legal argument for the removal of “insulting”, and that some may argue it could create a hierarchy, two thirds of hate crime related to race. He added that “It is exceptionally important that we listen and give weight to all views but it is important to give additional weight to those who are often the victims of a particular hate crime”. In his view, removing the word insulting would make Scotland the only jurisdiction in the UK that did not have it as part of the legal threshold. He concluded “there would be a perception at least that Scotland had the weakest offence of stirring up racial hatred at the same time as racial hatred offences make up two thirds of all hate crime”.<sup>60</sup>

93. In response to evidence we heard that, operationally the current wording on “insulting” may make enforcement more difficult, the Cabinet Secretary told us that the offence has been in operation for 34 years and that Police Scotland had not expressed to him that they had encountered any difficulties. He recognised that removal of the word “insulting” would make no material difference to the Crown’s ability to prosecute but argued “at the very least there is a perception among those who are targeted most by racial hatred that the Bill would be weakened and diluted if the word “insulting” was removed”, and that perception alone could be damaging. He told us “Public perception and confidence in the law are also exceptionally important”.<sup>61</sup>

**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.**

*The definition of “abusive”*

95. The Criminal Justice and Licensing (Scotland) Act 2010 at section 38<sup>62</sup> sets out a general offence of threatening or abusive behaviour. It requires that the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and the person charged with the offence intends by the behaviour to cause fear or alarm, or is reckless as to whether the behaviour would cause fear or alarm.

96. The Committee explored whether the Bill should provide for “abusive” to have an objective standard, as is provided for in the 2010 Act. For example, which as indicated above requires that abusive behaviour generates in “a reasonable person fear and alarm”. There is no such requirement in the Bill. The argument is whether an

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<sup>60</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 22-23](#)

<sup>61</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 25](#)

<sup>62</sup> [The Criminal Justice and Licensing \(Scotland\) Act 2010 Section 38 states that a person commits an offence if they behave in a threatening or abusive manner, the behaviour would be likely to cause a reasonable person fear or alarm and they intend the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.](#)

amendment providing a specific definition for “abusive” is required or whether the word is well-understood and clear in meaning in the Bill.

97. In his evidence to the Committee, Mr Dunlop queried whether such an amendment was necessary. He said that in many contexts there was an express provision making that clear that the word “abusive” has an objectivity anyway that does not exist with “insulting”. Abusive he considered already imports an objective test.<sup>63</sup>

98. Police Scotland and the Crown Office were broadly content with the approach taken by the Scottish Government. ACC Gary Ritchie told us that “abusive” behaviour is common parlance for police officers in the execution of their duties and that if those provisions remained, police officers would have no difficulty in interpreting and applying the legislation.

99. Anthony McGeehan agreed and stated that threatening and abusive behaviour are familiar concepts in Scots law and familiar concepts to Scottish prosecutors. He stressed if there was concern that the term abusive was not sufficiently clear or risked a subjective assessment of behaviour there are precedents for defining abusive behaviour not only in relation to Section 38 of the 2010 Act but in relation to the Domestic Abuse (Scotland) Act 2019, which introduced a definition of abusive behaviours. The Crown Office would not, however, object to a definition of abusive should it be proposed.

100. Others argued that a specific definition would provide clarity. Michael Clancy asked “If we leave the Bill without any specific definition, there might be a question as to why there is no definition of ‘abuse’ in this legislation, whereas there is in other legislation. It raises questions and it would be neater, particularly in the context of an attempt to consolidate our law, if there was a definition in the Bill.”<sup>64</sup>

101. Calum Steele agreed, stating “In many instances that objective test against things immutable is easily applied but I am not so sure the same objectivity could be applied to things that are much more opinion held, religion being the obvious manifestation”. He said “it would probably be helpful for an objective test to be written into the legislation”<sup>65</sup>.

102. Tim Hopkins stressed the importance of the term “abusive” being interpreted in an objective way and considered the suggestions that one way to do that might be for the Bill to require that the abusive behaviour would be likely to stir up fear or alarm. He argued, however, that was not the correct solution because it mixes up two offences – the offence in section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 which is the offence of threatening or abusive behaviour that is likely to cause fear and alarm and the offence in the Bill of threatening and abusive behaviour that is intended to stir up hatred which he said is a different thing.

103. He presented an alternative solution, stating “If we want the Bill to say specifically that the term ‘abusive’ should be interpreted objectively, I suggest using

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<sup>63</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020, col 6](#)

<sup>64</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020, col 7](#)

<sup>65</sup> [Justice Committee Official Report, 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 38](#)

the solution in section 60 of the Sexual Offences (Scotland) Act 2009, which ensures that the word 'sexual' is interpreted objectively for the purposes of that Act. If we copied that across to the Bill, we would have a provision that said that behaviour or material is abusive if a reasonable person would, in all the circumstances of the case, consider it to be abusive. That would ensure that the term 'abusive' was interpreted by everybody in the criminal justice system in an objective way and would allay the concerns that people are going to be investigated or prosecuted because one person said that they found something offensive."<sup>66</sup>

104. The Cabinet Secretary told us he had listened to the evidence that abusive was a familiar and well understood concept in criminal law and was "not convinced that there has to be a definition of "abusive" in the Bill. He committed to reflecting on the evidence that has been provided and on any recommendations made by the Committee. Were a definition to be included in the Bill, he said that "it must absolutely capture all the behaviour we want it to capture. That could be challenging, whereas I see no reason why the ordinary meaning of the word abusive, its dictionary definition, cannot be used or would not be well understood"<sup>67</sup>.

**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.**

### *Dwelling defence*

106. The Public Order Act 1986 includes several specific defences or exceptions, including one for behaviour in some private settings:

"An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling." (section 18(2))

"In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling." (section 18(4))

107. An equivalent provision is not provided in the Bill.

108. Written responses commenting on a lack of a similar provision in the Bill included one from Dr Stuart Waiton who said "This Bill is an attack on the very idea of privacy. Unlike past acts that protect what is spoken in private, here we find no such protection of speech in a private dwelling."<sup>68</sup>

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<sup>66</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 6](#)

<sup>67</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 26](#)

<sup>68</sup> [Dr Stuart Waiton, written submission](#)

109. The Christian Institute also commented, stating “Someone could be reported to the police for a remark made around the dinner table if a guest or even a member of their family objected to what they said. It is not too difficult to imagine a Christian family inviting a stranger into their home who takes offence at the parents expressing their biblical beliefs and later alleges to police that they are stirring up hatred in their children”.<sup>69</sup>

110. In his evidence to the Committee, Lord Bracadale was asked if he had any concerns about a move to remove what have been understood to be public order offences into a purely private setting. He responded that the concern was “well founded” and that the Committee “should do some further work on that”. He noted that he had not recommended the removal of the dwelling exception in his report. He indicated that no suggestion had been made to him in his consultation that the existence of the exception had inhibited the use of the provisions in the Public Order Act 1986.<sup>70</sup> Lord Bracadale referred the Committee to the Law Commission of England and Wales on this point.<sup>71</sup>

111. The majority of witnesses who provided oral evidence were content with the approach from the Scottish Government. Many witnesses cited circumstances where the state steps into the home.

112. Mr Dunlop considered both positions stating, “... on the one hand, for the state to step in and interfere with freedom of expression in the home seems rather draconian but, on the other hand, there are many instances in which the state does just that. I suppose that the countervailing view would be that we want to stop, for example, the radicalisation of children within the home by hate speech being propagated within the home in the same way that we would want to stop it being propagated by someone on a soap box on the street corner”.<sup>72</sup>

113. Mr Dunlop went on to raise concerns that the provision had potential to be abused and that “there could be a situation where, as has been suggested in the media, one’s least favourite uncle becomes the subject of a complaint to the police because of what he said over the Christmas turkey. That is not what we are looking at here, but equally, should it be the case that you are able to breed hatred within the home without repercussion? It is more difficult to say that that should be allowed given the pernicious effects of hate speech and the laudable aims of the Bill, which I remind the Committee that the Faculty of Advocates is supportive of.”<sup>73</sup>

114. This was a view shared by Michael Clancy who said, “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”.<sup>74</sup>

115. Dr Tickell noted too that most criminal offences do not have a dwelling defence and most domestic abuse, rapes and murders happen within dwellings.

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<sup>69</sup> [The Christian Institute, written submission](#)

<sup>70</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 46-47](#)

<sup>71</sup> [Law Commission of England and Wales Consultation paper on hate crime laws](#)

<sup>72</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 8](#)

<sup>73</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 6](#)

<sup>74</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 9](#)

116. ACC Gary Ritchie agreed and stated that some of the potential offences “are so insidious that it goes a bit too far for the public expectation to be that people would be considered to be protected just because they committed them in their own homes”. He told us “It is not unusual to see that crimes of such significance would not carry a dwelling defence. My view and I think the view of the police service would be that that should not apply”.<sup>75</sup> These views were echoed by both Anthony McGeehan and Calum Steele who highlighted that there is no general defence for people committing crime in their own home and that the absence of a dwelling defence in the wider context of Scots criminal law was not remarkable.

117. Were a defence considered necessary in order to allay concerns, Dr Tickell suggested this could be one where an element of publicity was required. He told the Committee that:

“If the committee is attracted to the idea it would be much more coherent to have a requirement of publicity. In 2009, the high court in the case of *Harris v HMA* decided that in future the common law crime of breach of the peace would require an element of publicity in order to comply with the ECHR.”

He added:

“A requirement that is based on the limits of the household strikes me as rather unpersuasive. A requirement that conduct should have a public element – to echo the test of from the common -law crime of breach of the peace -would at least seem to be more coherent than an artificial distinction relating to households”.<sup>76</sup>

118. The Cabinet Secretary defended the decision not to include a dwelling defence. He said “The effect that threatening or abusive behaviour with the intent of stirring up hatred could have on other family members, children in particular is insidious. Are we saying that as a society we are comfortable with no criminal sanction being applied to people because that is being done in the confines of their dwelling whereas if they stepped on to the street that would be a criminal offence. I am not convinced as a point of policy or principle, that I agree with that defence.”<sup>77</sup>

119. In his evidence of 24 November, the Cabinet Secretary reiterated these views. He said, “In listening to the evidence from the legal experts and from the operational partners I found that the majority of them were robust in relation to concerns about a so-called dwelling defence”. However, he acknowledged that a number of stakeholders wished to see a dwelling defence and that he would “continue to listen to the arguments on the question of there being a public element to any offence.”<sup>78</sup>

**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**

<sup>75</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 37](#)

<sup>76</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 9](#)

<sup>77</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 9-10](#)

<sup>78</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 31](#)



**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.**

*Section 4 – Culpability where an offence is committed during the public performance of a play*

123. Section 4 of the Bill replaces Section 20 of the Public Order Act 1986<sup>79</sup> and makes provision for certain persons associated with the public performance of a play to be held criminally liable for committing an offence of stirring up hatred.

124. Section 4(1) and (2) provide that the director or presenter of a play in addition to the performer will commit an offence under section 3(1) or (2) where they have consented to or connived in the performer's commission of the offence or have been guilty of neglect resulting in the performer committing the offence. Section 4(3) provides a person is to be taken to have directed a performance of a play given under the person's direction even if the person was not present during the performance.

125. This section generated a particularly strong response from those in theatre, performing arts and comedy groups who raised concerns about freedom of expression, the fear of their performances being criminalised and the inevitable chilling effect that the section could have. Many called for it to be removed entirely.

126. The Cabinet Secretary addressed those concerns when giving evidence on 27 October and stated, "If a performer is playing a racist character, that behaviour is not likely to be threatening or abusive with the intention of stirring up hatred. That has been suggested, but that is not the case. Both parts of the two-part test must be met for someone to be prosecuted for that offence. That is very important"<sup>80</sup>

127. Witnesses we heard from were unconvinced. Michael Clancy told us "We have concerns about section 4 which will replace section 20 of the Public Order Act 1986 but is much more stringent. We think that it presents a threat to freedom of expression

<sup>79</sup> [Public Order Act 1986 Section 20](#)

<sup>80</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 15](#)

in the arts”.<sup>81</sup> This view was echoed by Mr Dunlop who said “why is that being addressed specifically? Nowadays, a far more pressing concern would be things that are said on social media or via YouTube.” He added “I wonder if it might be appropriate simply to leave section 4 out of the bill on the basis that an offence could be committed under section 3 if there was threatening or abusive behaviour with a view to stirring up hatred against a particular protected characteristic. If that happened in the course of a play, would that not adequately cover the concerns that might lie behind that aspect of the Bill?”.<sup>82</sup>

128. Dr Tickell agreed, stating “It is completely unnecessary and another good example of a red rag that has been unnecessarily waved at the culture war bull of this hate crime issue”. “Section 4 is there” he said, “because it is in the 1986 act – it is another good example of copying and pasting bits of the 1986 act resulting in yet more backlash for the Bill. It distracts from the fundamental points and issues here”.<sup>83</sup>

129. Representatives from the theatre expressed particular concern. David Greig of the Royal Lyceum Theatre said “Broadly speaking, that section is unnecessary. Theatre is the only art form that the Bill specifically identifies. By doing so it is as if it is seeking a solution for a problem that does not exist. Theatre could be covered by a general purpose provision”.

130. He added “I was not able to find examples either in Britain, or abroad, of plays that would have stirred up hatred against groups but were successfully censored so that we would now think, “phew it was great that they did that”. I could think of no such examples, whereas, I could think of many examples of plays that, in some way, wished to promote, protect or put forward the point of view of a group with a protected characteristic but which had been censored. We now look back and regard that as foolish.”<sup>84</sup>

131. Mr Greig wondered if the result might be malicious attempts to use this with people who probably will not be found guilty. He cited examples of plays that had been picketed for their content and often closed as a result. He told the Committee that “It would be incredibly easy for such organised picketing events to be supported by the claim that the play under discussion sought to promote hatred against the group in question” he said. “That is another reason why putting theatre in its own category in that way almost creates a target”<sup>85</sup> He reiterated that “Scotland is not just a place where theatre gets made; because of the Edinburgh festivals and, indeed more broadly, we are a place that theatre comes to.”<sup>86</sup>

132. Lisa Clark said it was not clear why plays and public performance were singled out. She said, “Scottish Pen would come down more on the side of removing the section. We have no amendments to propose”.<sup>87</sup>

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<sup>81</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 13](#)

<sup>82</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 14-15](#)

<sup>83</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 15-16](#)

<sup>84</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 4-5](#)

<sup>85</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 9-10](#)

<sup>86</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 22](#)

<sup>87</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 11](#)

133. In response to whether the section was needed at all, the Cabinet Secretary said “Where there is an intention by a far-right group to put on a performance for a limited audience of their supporters where the behaviour is threatening or abusive with the intention of stirring up religious hatred that should result in prosecution not just of the performer but of the director. It would be important that those involved were prosecuted”.<sup>88</sup>

134. The Cabinet Secretary, when asked about defences which existed in the Public Order Act but were not in the Bill, said he had an “open mind” but had concerns about unintended consequences. He clarified that albeit a reasonableness defence was not specifically included in section 4, culpability would only apply if an offence is also committed under section 3 therefore a performer would have to commit a section 3 offence to be liable for a section 4 one.<sup>89</sup>

135. In his final appearance before the Committee on 24 November, the Cabinet Secretary said that he had reflected on the evidence heard by the Committee and had agreed that section 4 of the Bill could be removed via an amendment at Stage 2. He told us “I recognise the concerns of the performing arts community that the provision appears to single it out, and the anxiety that it has caused. The evidence that the committee has heard has led me to conclude that section 4 can be removed from the Bill. We also accept that neglect on the part of a director or presenter of a play is too low a threshold for criminal sanction in such a case”.<sup>90</sup>

**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.**

#### *Section 5 – Offences of possessing inflammatory material*

137. An existing offence of possessing racially inflammatory material is set out in Section 23 of the Public Order Act 1986. The Bill seeks to partially replace this with a similar offence on racial hatred set out in section 5.

138. Section 5 creates two offences of possession of inflammatory material. At Section 5(1) it would be a crime if a person has possession of threatening, abusive or insulting material with a view to communicating it to another person and either the person intends to stir up hatred against a group of persons defined by reference to race or it is likely that hatred will be stirred up against such a group.

139. Section 5(2) creates a similar offence in relation to the other hate crime characteristics but is restricted to threatening or abusive material. The proposed amendments would restrict the offence to intent only. In relation to both offences,

<sup>88</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 16](#)

<sup>89</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 17](#)

<sup>90</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 21](#)



section 5(4) provides a defence if it can be shown that the possession of the material was, in the particular circumstances, reasonable.

140. The Committee noted that the term “inflammatory” is used in the section header only and is not referred to in the body of the section where “threatening, abusive (and “insulting” in the case of racial hatred)” material are used instead.

141. Concerns were raised in written evidence that religious material might be destroyed as a consequence of these clauses. It should be noted, however, that there are no incidents of this having occurred under the equivalent provisions already in force in England and Wales (i.e. Part IIIA of the Public Order Act 1986, as inserted by the Racial and Religious Hatred Act 2006).

142. For an offence to be committed, the inflammatory material must be held with a view to stirring up hatred through communicating the material to another person and not simply possessed for its own sake.

143. Lisa Clark told the Committee that Section 5 created a concern for writers. She said that writers may self-censor subjects that they explore and the research they undertake if there was suggestion that possession of certain materials would be held against them in some way. Scottish PEN, she said, were “keen to make sure that clear guidance is given” to ensure “that an unnecessary chilling effect on the issues that writers and journalists explore is not allowed to develop”.<sup>91</sup>

144. There were calls also for the term “inflammatory” to be clarified and defined. For example, Anthony Horan had concerns about the word “inflammatory” but felt the move to intent only would protect people from being prosecuted. He thought that the term “inflammatory” should be clarified.

145. Kieran Turner said that the Evangelical Alliance had questions about inflammatory material and asked “At what point does possession become a view to communicate? How is that proved?”.<sup>92</sup> Isobel Ingham-Barrow agreed that a clear definition was needed particularly for ownership of material for academic research. Many others, including Anthony Horan of Catholic Parliamentary Office of the Bishops’ Conference of Scotland, Ephraim Borowski of Scottish Council of Jewish Communities and David Bradwell of the Church of Scotland, argued that clarification on the definition of the word “inflammatory” was required and would be useful.

146. Rev Stephen Allison thought it was important that historical context should be taken into account as the definition of what is inflammatory changes over time. He stated, “Our concern is that over time, people could see things as abusive and make more use of inflammatory material than may be the case today”.<sup>93</sup>

**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**

<sup>91</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 6](#)

<sup>92</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 31](#)

<sup>93</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 37](#)

**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.**

#### *Section 6 – Powers of entry with a warrant*

149. Section 6 of the Bill provides for powers of entry to police under warrant in circumstances where there are reasonable grounds to suspect that an offence under section 3 or 5 has been, or is being, committed at the premises or there is evidence at the premises of the commission of an offence under sections 3 or 5.

150. Section 6(1) provides that a sheriff or justice of the peace may, where there are such reasonable grounds, grant a warrant authorising a constable or a member of the police staff to enter the premises in question.

151. Section 6(2) sets out what a constable or member of police staff may do under such a warrant – that is, enter the premises (by force if necessary), search the premises and any person found on the premises, and seize and detain any material found there. But material may only be seized and detained if the constable or member of police staff has reasonable grounds for suspecting that it may provide evidence of the commission of an offence under section 3 or section 5.

152. In written evidence, the Faculty of Advocates raised concerns about malicious complaints and the seizing of devices for long periods. The Law Society of Scotland highlighted the lack of a specified time period in the provisions.

153. Mr Dunlop told us that some of the Faculty’s concerns were somewhat allayed by the proposed amendment and that taking the “likely to” out for most characteristics, would narrow the scope for malicious complaints. Nevertheless, he argued “We should consider whether we need a search and seizure provision that is far more aligned with other areas of the law and not quite as widespread as the one in the Bill. If the “insulting” provision were also to go that would also water down our concerns”.<sup>94</sup>

154. Michael Clancy agreed, commenting that in the Law Society’s view, Section 6 lacks a lot of specification in that a warrant that was granted under the provisions would lack scope. He said “We consider the provision to be unduly oppressive. We would want the terms of the provisions in section 6 to be tightened in order to make them clearer and more effective”.<sup>95</sup>

155. Police bodies and the Crown Office were broadly content with the approach taken, particularly in light of the proposed amendment making the stirring up offences intent only (other than for race).

<sup>94</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 16](#)

<sup>95</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 17](#)

156. ACC Gary Ritchie said “My reading of section 6 is that it seems to provide for a fairly traditional power of search which requires a warrant and that police officers would need to ensure that the evidence is compelling or convincing enough to take to a sheriff to seek a warrant. “Receiving one anonymous phone call about the possibility of somebody having materials that crossed over into the realms of being an offence would be insufficient for us even to approach a sheriff to seek a warrant. Therefore, I do not really have an issue with the power of search as it is framed”.<sup>96</sup>

157. Calum Steele agreed, commenting that the removal of the “likely to” provisions significantly ameliorated concerns surrounding Section 6. He said, “I cannot envisage any occasion on which a non-warranted individual would be going through a door and seizing equipment from members of the public”.<sup>97</sup>

158. Anthony McGeehan shared the view that concerns had been mitigated by the proposed Scottish Government amendment. He provided a fuller explanation of the process, stating that “In the real world situation, the police would consider an application for a warrant where the officers involved thought it was a proportionate response. They would not take a warrant directly from a sheriff but would apply to a procurator fiscal for an assessment of whether there were reasonable grounds to approach a JP or sheriff for one. The sheriff would make the final assessment on whether granting a search warrant was an appropriate and proportionate response. Therefore, some concerns would be mitigated by the systemic approach that is taken to the consideration and granting of a search warrant.”<sup>98</sup>

159. In response to the argument that there was no time limit specified to be attached to search warrants granted under section 6, Mr McGeehan told us that there are both statutes that impose time limits on search and a majority of others that do not. He said that “The fact that a time limit is not attached is not remarkable”. If a time limit were to be attached, he added “I don’t think that would cause a practical problem.”<sup>99</sup>

160. The Cabinet Secretary told us he was satisfied with the power set out in the Bill but thought that the question as to whether that power should be time limited was worthy of further consideration.<sup>100</sup>

**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.**

<sup>96</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 42](#)

<sup>97</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 43](#)

<sup>98</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 44](#)

<sup>99</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 44](#)

<sup>100</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 29](#)

### *Freedom of expression*

162. Sections 11 and 12 the Bill seek to provide additional protection for freedom of expression in relation to religion and sexual orientation (sexual conduct and practices).

163. Section 11(2) provides that behaviour or material is not to be treated as threatening or abusive solely on the basis that it includes discussion of criticism of religious beliefs or practices, proselytising or urging of persons to cease practising their religions. Section 12(2) provides the same approach in relation to sexual conduct or practice or the urging of persons to refrain from or modify sexual conduct or practices.

164. Concerns were raised in evidence why these provisions do not protect freedom of speech as broadly as the equivalent provisions in English law. In response, the Cabinet Secretary stated that our freedoms are protected under the ECHR so whatever is in the Bill is supplementary to that. He indicated that he was open to expanding not only the breadth but also the depth of the provisions on freedom of expression.

165. On breadth he said, “a number of people have argued that they should not be limited to two areas to which they are currently limited but should cover other protected characteristics, I am open to that suggestion which I am considering”. On depth he said he would consider whether the current freedom of expression provisions could go further for example to include similar (English) provisions from the Public Order Act 1986 which includes “expressions of antipathy dislike, ridicule, insult or abuse”. The exception he said would be on “abusive behaviour” which would remain. Some of the provisions in England apply to threatening behaviour only.<sup>101</sup>

166. In relation to these clauses, Lord Bracadale considered there were two approaches that could be taken. The first was not to include them at all and rely purely on the court applying the ECHR. If they are to be used they should “reflect the approach of the ECHR and make it clear where the line is drawn between offensive behaviour that has not been criminalised and the type of behaviour that is being criminalised”. Referencing the formula used in Section 29J the Public Order Act 1986 and in section 7 of the (now repealed) Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 Lord Bracadale thought the formula used in those Acts had more strength than the formula found in the Bill. “I recommended that there should be freedom of expression clauses and I would have expected them to extend across all protected characteristics because I was trying to avoid any kind of hierarchy of protected characteristics” he said <sup>102</sup>.

167. Lord Bracadale was asked if the Cabinet Secretary should broaden the protection to apply to all characteristics and deepen the protection to apply not only to criticism and discussion but also to the expression of antipathy, dislike, ridicule and insult. He told us that his recommendation was effectively that the protection of freedom of expression should “mirror” the English provisions.

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<sup>101</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 13](#)

<sup>102</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 12-13](#)

168. In his evidence, Anthony McGeehan confirmed that the Crown Office, when assessing cases would consider any case with reference to the ECHR right to freedom of expression albeit that right is not unqualified. He said that “If the Parliament decides to broaden or deepen the provisions relating to freedom of expression those provisions would be reflected in prosecutorial guidance and would continue to be reflected in prosecutorial decision making”<sup>103</sup>.

169. ACC Gary Ritchie agreed and told us that Police Scotland were used to ensuring that Article 10 protections were “built into our policing plans and responses”. He said “It is helpful to police officers to have that freedom of expression provision included in the legislation. However, that is for Parliament to decide how extensive it is”. He was not opposed to a non-exhaustive list commenting that “it is always more helpful to us if the people who we are policing understand the legislation so if the provisions lay out in clear terms what is permitted and what is not, that is helpful”.<sup>104</sup>

170. Calum Steele took a different view. He said “This is where law at the prosecution stage and the law at the stage at which it is applied by the police clash. The point was made that it would be almost impossible for prosecutions to take place against the backdrop of article 10 rights even without an exhaustive list of freedom of expression defences. However, we face the situation where in the absence of an express freedom of expression provision in the bill it will be used as a vehicle to criticise the police for not acting on concerns that certain kinds of behaviour might be perceived by certain groups as being threatening or abusive.”. He continued “Therefore extending the list would be helpful from a police perspective but not particularly informative from a prosecutorial perspective.”<sup>105</sup>

171. Fraser Sutherland also argued that the Bill should try to echo the freedom of expression provision contained in English law which “is much wider in scope than the freedom of expression section of the Bill”<sup>106</sup>. Alternatively, he suggested that the Scottish Government might consider replicating the work of the United Nations Human Rights Committee and the Rabat plan of action<sup>107</sup> when looking at how to protect people from incitement to hatred and trying to balance that with protecting freedom of expression. He told the Committee that there was “a lot of work done on the six part test which requires legislature to consider the context of the speech, who the speaker is, their position and status in society, whether the person has intent, the content and form of the speech, the extent of the speech in terms of how many people it is likely to reach and the likelihood including imminence of harm”.<sup>108</sup>

172. A number of witnesses considered the freedom of expression clauses created a hierarchy with those protected being treated differently. Anthony Horan took this view. He said, “These provisions should cut across all protected characteristics to ensure equity”.<sup>109</sup> He made a number of other suggestions stating that he agreed with Lord Bracadale that the freedom of expression provisions should be broadened to

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<sup>103</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 40](#)

<sup>104</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 41](#)

<sup>105</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 41-42](#)

<sup>106</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 3](#)

<sup>107</sup> [OHCHR and The Rabat Plan of Action](#)

<sup>108</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 9](#)

<sup>109</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 24](#)



include expressions of antipathy, dislike, ridicule and insult. Rev Stephen Allison considered that more protected characteristics should be covered by the freedom of expression provisions and agreed with Mr Horan that the provision on religious belief must be broadened to include other beliefs and those of no belief at all. He said “At the moment it could be read as protecting those who have religious belief but not atheists whom we regularly want to debate engage and discuss issues with. As the bill is drafted they might not get the same protections as religious groups”.<sup>110</sup>

173. He raised a further concern that “The current wording of the sexual orientation provision focuses very much on practice and does not talk about some of the wider issues of identity. A concern that we have as a church is that it does not mention any ability to criticise and make comments about same sex marriage. Given that religious groups have protections that enable them not to conduct same sex marriages and to hold views against same sex marriage, we think that there should be some reference in the Bill to that as there is in the equivalent English legislation which is the Public Order Act 1986”.<sup>111</sup>

174. Hardeep Singh agreed that the provisions need to be strengthened, highlighting the language in relation to the protections in Sections 11 and 12 is limited to “criticism” and “discussion”. He said, “we do not think that goes quite far enough and it would be good to follow parallel legislation in England and Wales and add words such as antipathy, dislike and ridicule.” He argued also that some of the words in the Bill required to be clarified stating that the terms “abusive”, “hatred” “insulting” and “inflammatory material” are subjective and can have broad interpretation. He added that “It is difficult to imagine a scenario in which someone says something insulting that is not abusive at the same time”.<sup>112</sup>

175. Kieran Turner agreed saying there is a hierarchy of defence or protection and this “needs to be better”. He asked why, where terms which are already applicable from the Public Order Act 1986, these were not transferred across particularly when Lord Bracadale had suggested that a similar provision be included. While welcoming the proposed amendments he told us they “are not a magic bullet and we still have other concerns. We need absolute clarity about what the bill is trying to catch and what it is not trying to catch”.<sup>113</sup> Neil Barber of the National Secular Society echoed this, stating “We would certainly like to see better protections for free speech in keeping with those in England where expressions of antipathy, dislike, ridicule, insult and abuse go much further than the quite polite discussion and criticism that we are allowed in Scotland”<sup>114</sup>.

176. The difficulty in getting the balance right was illustrated by David Bradwell. He said “The witnesses today are agreed that the right to insult and be insulted and the right to cause offence should be acceptable parts of freedom of expression. It is about where you draw the line around the right to hold strong beliefs that may not fit with the

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<sup>110</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 26](#)

<sup>111</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 40](#)

<sup>112</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 30](#)

<sup>113</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 30-31](#)

<sup>114</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 38](#)

mores of wider to society to the extent that they can be seen to be causing anger upset and hatred”.<sup>115</sup>

177. Tim Hopkins suggested a possible improvement to the Bill would be to include a section similar to the one provided in the Marriage and Civil Partnership (Scotland) Act 2014 which says, for the avoidance of doubt, nothing in the act affects your rights under articles 9 and 10 of the ECHR with regard to freedom of religion and freedom of expression. In his view, “The ECHR applies anyway because it applies to prosecutors and courts but putting it in the Bill in those terms might give people some reassurance on that matter.”<sup>116</sup>

178. In relation to the Bill covering only two protected characteristics he pointed out that section 11 on religion does not cover criticism of non-religious belief and section 12 on sexual orientation does not cover criticism of same sex marriage. He thought a more general provision was needed which would have the benefit of covering all the protected characteristics and a wider range of behaviour.

179. He told us that The Law Commission for England and Wales had considered this issue in their consultation on hate crime law in England. He said “It points out that the provisions in English law that are similar to sections 11 and 12 have a general purpose; first to clarify “that the law applies to hatred against persons, not against institutions, or belief systems, secondly to clarify “that criticism of behaviour is permitted” and thirdly to maintain “a space for discussion of public policy on potentially controversial issues”. It seems to us that that should be the purpose of a freedom of expression provision in the Bill”.<sup>117</sup>

180. Kevin Kane agreed, stating that “We were supportive of section 16 of the Marriage and Civil Partnership (Scotland) Bill. The reference to equal marriage is a good one -the wording is framed well, and I would commend it to the committee to consider,” He pointed out, however, that the Bill should be “convention-ready” anyway and that protections including on freedom of expression are laid out in any legislation via the convention.<sup>118</sup>

181. Colin Macfarlane told us Stonewall would also support replacing sections 11 and 12 with a more general freedom of expression protection.

182. In his final evidence session on 24 November, the Cabinet Secretary indicated he was considering the issue of freedom of expression and the wording of sections 11 and 12. He said, “We are happy to deepen the freedom of expression provisions around religion and I will lodge amendments at Stage 2 to that effect”. He added “Many witnesses including those from faith groups have indicated that the current provision in section 11 should be more closely aligned with the equivalent provision in England and Wales under the 1986 Act. We will propose amendments to the provision to cover the absence of religious belief, and to clarify that mere expressions of antipathy,

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<sup>115</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 46](#)

<sup>116</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020 Tuesday 17 November 2020 col 8](#)

<sup>117</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020 Tuesday 17 November 2020 col 8](#)

<sup>118</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020 Tuesday 17 November 2020 col 9](#)

dislike, ridicule and insult are not, on their own, criminal behaviour”<sup>119</sup>. With regard to other freedom of expression provisions, he stated that “we have to think a little more carefully about how to do that, we are still very much actively exploring the issue”.<sup>120</sup>

**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.**

#### *Reasonableness defence*

185. Existing stirring up hatred provisions are provided in the Public Order Act 1986 which provides a number of specific defences and exemptions. The Bill as introduced places greater reliance on the general defence of reasonable behaviour. At sections 3(4), 3(5) and 5(4) and 5(5) the Bill provides that it is a defence to the charge of stirring up hatred to show that the behaviour in question was reasonable in the circumstances.

186. Views heard by the Committee on the issue of the reasonableness defence were invariably interlinked with the Bill’s provisions on freedom of expression. Comparisons were drawn in the way in which legislation is framed in England and Wales where there are specific freedom of expression protections linked to each characteristic.<sup>121</sup>

187. A number of witnesses called for the reasonableness defence to be fleshed out to provide more clarity including Rev Stephen Allison of the Free Church of Scotland who called for the defences to be broadened and made clearer. Lisa Clark from Scottish PEN argued that it would be helpful to strengthen the reasonableness defence by including a new section in the Bill that would “take account of the literary, artistic, journalistic, comic or scholarly character of behaviour or communication” and that, by doing so, assurance would be provided to writers that those would be taken into consideration”.<sup>122</sup> Fraser Sutherland echoed the points that Lisa Clark made. He told us that “the change to intention was very welcome as his initial concern was that “likely to” would have a chilling and worrying effect”.<sup>123</sup>

<sup>119</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 21](#)

<sup>120</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020 Tuesday 24 November 2020 col 28](#)

<sup>121</sup> [Part IIIA of the Public Order Act 1986](#)

<sup>122</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020 Tuesday 10 November 2020 col 3](#)

<sup>123</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020 Tuesday 10 November 2020 col 3](#)



188. Dr Tickell emphasised that, albeit the freedom of expression protections in the Bill are limited to two of the protected characteristics, whatever the Bill said about free expression the European Convention on Human Rights would apply. He suggested that “one effective way to address the issue is to consider and try to flesh out the reasonableness defence and to have a non-exhaustive list of factors to be taken into account with regard to artistic, journalistic scholarly and academic expression. That is the only way I could devise of bumping up and making more robust the sense of free expression protections in the legislation”.<sup>124</sup> He also considered that there may be scope in relation to the reasonableness defence to make clearer and to communicate that certain factors should be considered with the stirring up offences in relation to whether behaviour should be regarded by the court as reasonable or not.

189. Mr Dunlop considered that option but was of the view that a non-exhaustive list could create further problems. He said that “The difficulty with non-exhaustive lists is where to stop. You could have a never-ending series of factors that might be taken into account”. He stressed that any interpretation of the Bill or any piece of legislation must be Convention compliant. The result being that if the court arrived at an interpretation of any section of the Bill that contravened the Convention, that interpretation would be unlawful. The desired protection would already be there regardless of whether a non-exhaustive list was provided. He said “The non-exhaustive list can then become more a problem than a solution as there is a tendency to consider them as tick box exercises. Leaving the provisions with a requirement to be compliant with article 10 of the convention might be enough.”<sup>125</sup>

190. In his evidence, the Cabinet Secretary accepted that there were compelling arguments for providing further clarification including the possibility of a non-exhaustive list. He said, however, that “Now that we are moving to intent only, I struggle with the idea of a non-exhaustive list of factors. I find it difficult to envisage a situation where behaviour could be threatening or abusive and with the intent of stirring up hatred and yet be justified as reasonable”<sup>126</sup>. He told us that consideration would be given as to whether a non-exhaustive list was needed and ensure there would be no unintended consequences.

191. An alternative suggestion was put forward by Mr McLellan who thought the problem lay with the protections as set out in that they are framed as defences rather than exemptions and consequently do not prevent investigations taking place. He told us he would like exemptions provided instead to prevent “the tortuous process of proving that the defences were legitimate and that charges should not be brought or indeed that a case would ultimately fail if it were to go to court”. He described that process as “a significant concern” citing the possibility of those against whom a complaint was made being interviewed under caution and “their lives put on hold” because police would be bound to investigate<sup>127</sup>. He said that “The Bill poses clear dangers for us” and that “I am seeking an exemption for legitimate news publishing. We do not see the need to apply the Bill to our industry”.<sup>128</sup>

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<sup>124</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 11](#)

<sup>125</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 11](#)

<sup>126</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 8](#)

<sup>127</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020 Tuesday 10 November 2020 col 5](#)

<sup>128</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 19](#)

192. Lucy Hunter Blackburn agreed, highlighting what she considered the wider impact could be on all, not only those who may ultimately be prosecuted. She said “I want to reinforce the evidence that you got from John McLellan about what he calls the chilling effects of the law. When you legislate in this regard you are not just legislating for the very small number of people who are likely to be prosecuted, you are casting a long shadow because people will worry about investigation. John McLellan spoke about the effect of the fear of investigation or even just of being contacted by the police at that level even if the charges are not pursued or are dropped before they come to court after the investigation”.<sup>129</sup>

193. She further clarified her concerns, stating:

“it is not just about how hard it is to get a prosecution, as the thresholds in the Bill might be high enough in that regard, it is about the wider side effects on behaviour which are important”.. “The reliance on training of our guidance to prosecutors or police officers is not a strong protection for people in my situation and others who might be worried about being caught up in the wider shadow that the Bill casts”.<sup>130</sup>

194. Claire Graham questioned how such a defence would be applied in relation to those with variations in sex characteristics. She told us “On reasonable behaviour I go back to the fact that variations in sex characteristics are badly understood. People might often say things because they do not know. How do we judge what is reasonable? Who decides what is offensive?”.<sup>131</sup>

195. She added “What concerns me is that there is not even consensus within intersex groups on how we talk about ourselves. I remember once reading an article that described intersex people as “queer bodied” I find that offensive as a label for me but other people with VSC do not like the way I talk about myself as having a medical condition. If we as a group that is being talked about cannot agree on what is meant by “unreasonable” or “reasonable” how will that be interpreted by other people”.<sup>132</sup>

196. Paul Dutton of Klinefelters Syndrome Association UK disagreed stating “a reasonable person does not need to know a huge amount about intersex but should know that their behaviour in society must meet certain standards”.<sup>133</sup>

197. He agreed, however, that terminology was problematic commenting that “Generally we cannot list 40 odd different conditions in legislation. What we need is an umbrella term. A lot of us have come to the conclusion that IVSC is a better umbrella term than anything else that exists”.<sup>134</sup>

198. Becky Kauffman was content with the approach, saying “The reasonableness defence is very well established. Basically it is a requirement for the proof of intent. If

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<sup>129</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020 Tuesday 17 November 2020 col 57](#)

<sup>130</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020 Tuesday 17 November 2020 col 58](#)

<sup>131</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020 Tuesday 17 November 2020 col 54](#)

<sup>132</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020 Tuesday 17 November 2020 col 55](#)

<sup>133</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020 Tuesday 17 November 2020 col 55](#)

<sup>134</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020 Tuesday 17 November 2020 col 56](#)

a reasonable person would not have intended to stir up hatred or to motivate others to behave threateningly or abusively the threshold for proving intent would not be met and it would not be a criminal act. It seems to me that the reasonableness defence is an integral part of how a prosecutor would approach prosecuting intent.”<sup>135</sup> Lucy Hunter Blackburn stressed that “The limitation of the reasonableness defence arises when people do not agree on what is hateful.”<sup>136</sup>

**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 for 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.**

## **Part 1 – Aggravation of offences by prejudice**

### *Use of statutory aggravators*

201. Part 1 of the Bill relates to the aggravation of offences by prejudice. It provides that a criminal offence is aggravated if either of the following apply: the offender evinces malice and ill will towards the victim based on the victim’s membership of a group defined by reference to a listed characteristic, or the offence is motivated (wholly or partly) by malice and ill will towards an such group.

202. Where an offence has been proved to have been aggravated by prejudice based on any of the hate crime characteristics section 2 provides that the court must state that the offence is aggravated by prejudice with reference to the hate crime characteristics involved, record the offence as aggravated by prejudice including identification of the hate characteristic involved and take the aggravation into account in sentencing.

203. Lord Bracadale recommended that statutory aggravations should continue to be the core method of prosecuting hate crime in Scotland. He explained his reasoning on this recommendation stating “I thought that the statutory aggravations scheme had

<sup>135</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020 Tuesday 17 November 2020 col 55](#)

<sup>136</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020 Tuesday 17 November 2020 col 56](#)

worked effectively. It makes for simplicity and consistency. Prosecutors told me that the use of aggravations was an effective means of prosecuting hate crime and that the annual statistics were building up into good quality data.”

204. Witnesses were broadly in agreement with Lord Bracadale’s recommendation and supportive of the approach taken in the Bill. Mr Dunlop commented that it does exactly what Lord Bracadale suggested in that there should be a continuation of the status quo in which statutory aggravation is seen to be the most appropriate way of dealing with most hate crime in Scotland. He said, “The vast majority of hate crime in Scotland already accompanies other criminality and it is appropriately dealt with as an aggravation”. He added that “Part 1 extends the existing list of aggravations to a wider range of protected characteristics. That seems to be consistent with the Bill’s aim”<sup>137</sup>.

205. Dr Tickell agreed, considering Part 1 to be the most important part of the Bill in that it applies to behaviour that is already criminal to which an aggravator is attached on the basis of what the accused person has done in the perpetration of that criminal behaviour. He said, “If someone picks their victim on the basis of their perception of their characteristics, that is one of the critical ways in which hate crime is realised and effected in our country and I think that it is critical that the Bill recognises that”.<sup>138</sup>

206. The suggestion to extend the list was echoed by some witnesses, including Age Scotland and Equality Network. Adam Stachura supported the inclusion of a vulnerability element and, while recognising difficulties in reaching a definition of the term, considered this element warranted further exploration.<sup>139</sup> Tim Hopkins shared this view stating that “it is widely agreed that crimes that are motivated by vulnerability are different from crimes that are motivated by prejudice”. He also said, “I support further exploration of whether there should be a general aggravator that relates to vulnerability” He conceded, however, “that is outwith the scope of the Bill I think”.<sup>140</sup>

207. Crown Office and Police witnesses were also content with the approach. Anthony McGeehan said the continued approach of addressing hate crime by way of statutory aggravations was a well-established one in Scotland familiar to the police and prosecutors and the Bill made effective provision for that. ACC Gary Ritchie agreed, and told us that Police Scotland are well used to dealing with statutory aggravators. He considered it would make it easier for police officers to understand and make training and communication of the new provisions easier.<sup>141</sup>

208. Ephraim Borowski was broadly supportive but thought one drawback of the statutory aggravation model was that there had to be an offence that was aggravated so it would not apply to certain ongoing behaviours. He said “Our concern is with repeated incidents not just one off incidents that could be down to stupidity. It relates to instances where a particular individual has undertaken a course of conduct that involves low level harassment which might actually have a relevant context. None of these incidents as one offs would amount to a crime or classed as aggravated and

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<sup>137</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 18-20](#)

<sup>138</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 19](#)

<sup>139</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 18](#)

<sup>140</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 18](#)

<sup>141</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 46](#)

taken to court on that basis.” He went on “There needs to be a specific provision, a sort of Moorov<sup>142</sup> doctrine for hate crime if somebody consistently indulges in low level incidents so they can be aggregated into something that would itself constitute a crime that could then be aggravated.”<sup>143</sup> He believed that there should not be a hierarchy of protected characteristics but that the same protections should apply to all.

209. This was a view shared by Isobel Ingham-Barrow who told us “I want to reiterate the importance of those harassment provisions being extended to cover all protected characteristics. That is important due to the hierarchy of inequality but also because, to take the case of Muslims, there needs to be an understanding of the fact that certain forms of hatred such as Islamophobia are a form of racism and that certain groups such as Muslims are not covered by existing provisions on the ground of race”.<sup>144</sup> She also supported the extension of protections across all protected characteristics.

210. The Committee understands that this type of relatively low-level but persistent harassment is criminalised now, either under the racial harassment offence in section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 or under the offence of threatening or abusive behaviour (with or without a statutory aggravator) set out in section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.

211. Fraser Sutherland supported statutory aggravations as the main way of dealing with offences but also highlighted gaps in what is currently included in the scope of religiously motivated aggravations. He cited the case of the murder of Mr Asad Shah in Glasgow which was not considered to be a hate crime and told us that people who leave a religious group are often subject to attacks from the closed religious community. He said, “There is a question about whether so called “apostates” would be prosecuted under the Bill”. He added that “Anyone who is targeted because they have left a religious group should be protected in the same way as someone who is targeted because of their religion”. He also said that “If someone’s beliefs are perhaps unusual or unique they are not protected under the statutory aggravations in part 1. I argue that they should be. If someone’s car is vandalised because they are an apostate of a religion that is not considered to be a hate crime and it should be. I cannot think of a better example of a hate crime than the Shah case but it was not classified as one for the statistics.”<sup>145</sup>

212. Tim Hopkins was also supportive of the approach in the Bill drawing attention to the flexibility they offer. He said “We completely agree that the use of statutory aggravation is the core of hate crime law. Prosecutions for aggravated offences are hundreds of times more frequent than prosecutions for the stirring up offence. An illustration of how flexible statutory aggravations are is the fact that they cover offences such as abusive or threatening behaviour and assault right up to the most serious offences. The aggravation is absolutely crucial in identifying offences that are

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<sup>142</sup> The Moorov doctrine is a mechanism which applies where a person is accused of two or more separate offences, connected in time and circumstances. In such a case, where each of the offences charged is spoken to by a single credible witness, that evidence may corroborate, and be corroborated by, the other single witnesses, so as to enable the conviction of the accused on all the charges.

<sup>143</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 41](#)

<sup>144</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 42](#)

<sup>145</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 16](#)



motivated by prejudice and ensuring they are recorded in that way. The recording of that enables repeat offenders to be identified”.<sup>146</sup> Colin Macfarlane agreed, stressing that there are low levels of confidence in reporting so the aggravator is critical.

213. In their written submission, Intercultural Youth Scotland raised the issue of intersectionality and the failure in the current system to recognise multiple characteristics. They said that “It is essential that aggravation of prejudice is understood in terms of multiple characteristics and is recorded and prosecuted as such. The current legislation only allows for consideration of one protected characteristic and restricts the true understanding of a victim’s identity. We need to understand, record and prosecute based on a person’s identity in its entirety: a Black transgender disabled man’s experience and marginalisation is fundamentally different from that of a white gay man - and that should be reflected in the law. Intersectionality seeks to understand a person’s lived experience through the interconnectedness of multiple and overlapping systems of discrimination. Unless such a frame of understanding is built into reporting bodies and organisations across Scotland, the systems currently in place will not have the capacity to adequately take into account race as a factor in hate crimes or incidents.”<sup>147</sup>

**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.**

### *Age*

215. On the suggestion that it would more helpful if the exploitation of vulnerability including elder abuse was highlighted through a statutory aggravation linked to the perceived vulnerability of the victim, John Wilkes of Equality and Human Rights Commission, told us “The commission does not consider that age be a listed characteristic as it thinks that there will not be sufficient evidence to meet the threshold of a statutory aggravation” Adam Stachura of Age Scotland disagreed and was supportive of age being included as a statutory aggravator.

216. As noted previously in this report (see paragraph 17), the Committee commissioned research from Dr Hannah Bows on the issue of whether or not it was sensible to add age to the list of protected characteristics in the Bill. The report concluded that “the conceptual ambiguities concerning ‘elder abuse’, the lack of agreed definitions of older/elderly, and the inconsistent use of these terms to refer to different forms and contexts of violence and abuse against older people render any attempts at legal reform impossible”.<sup>148</sup>

217. Dr Bows added that:

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<sup>146</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 15](#)

<sup>147</sup> [Intercultural Youth Scotland, written submission](#)

<sup>148</sup> Dr Hannah Bows’ research on elder abuse which was commissioned as part of previous work by the Committee fed into their scrutiny of the Bill. Her report is available [here](#).

“Even if these definitional and conceptual problems could be addressed, there is limited evidence that legal reform through specific criminal offences of ‘elder abuse’ is required to achieve the intended objectives of increasing prosecutions, improving awareness and driving political attention. Laws already exist which capture the various forms and contexts captured by the broadest ‘elder abuse’ definitions, and any introduction of new offences would duplicate the existing criminal provisions.”

218. In his evidence, the Cabinet Secretary said:

“In the current climate in which we live, if we take into account a number of factors, such as the age demographics of how people voted in various referendums, including on Brexit and on Scottish independence, or how the virus and the global pandemic that we are in the midst of has affected younger and older people, unfortunately, it would not be hard to envisage that people could be targeted in an unpleasant or unsavoury way because of their age. We will continue with an age aggravator in the bill for those reasons. Of course, that was recommended by Lord Bracadale, too. I am always happy to look at evidence papers, and the committee will make stage 1 recommendations, but I would be keen to keep the bill as it is in relation to an age aggravator at this stage.”<sup>149</sup>

219. The Committee considers the issue of the addition of age as a protected characteristic in more depth in a subsequent section, see paragraphs 338-344.

#### *Data collection and monitoring*

220. Another issue which emerged from evidence was the need for a system of data collation and disaggregation across all characteristics that are covered by the proposed legislation. Calls were made by BEMIS and others in their written submissions for a legal requirement to be integrated into the Bill that places a duty on the Scottish Government, Police Scotland and other relevant duty bearers to develop a bespoke system.

221. Danny Boyle clarified BEMIS’s position. He told us “When the regional police forces were amalgamated into Police Scotland we lost the ability to have any disaggregation. Rather than getting block figures we need to know which ethnic groups are being targeted. It is incredibly important that we have the data on a rolling basis because the nature of racially aggravated hate crimes evolves in different circumstances and in different times. It is important that we have an annual disaggregation of data not only to inform non-judicial interventions but to forecast potential vulnerabilities for different groups due to geopolitical situations”.<sup>150</sup>

222. The call was echoed by Dr Galbraith and Amy Allard-Dunbar. Dr Galbraith went further, calling for a reporting requirement stating “I believe that having a requirement to produce data alone might not work in practice because that requirement is already in place for the public sector equality duties and we already see that that does not

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<sup>149</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 34](#)

<sup>150</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 40](#)

work in practice. If there was to be a data requirement it would have to be strict. We included in our submission that there should be a reporting requirement on ministers. We want an annual report to be produced which would include a breakdown of statistics and disaggregated data on the ethnicity of the accused and victims using the census categories”.<sup>151</sup>

223. Becky Kaufmann agreed, commenting that “it is difficult to plan and build broader community programmes that encourage cohesion and ultimately get to the root cause of hate crime without having a reasonable picture of where the crimes are taking place. We are aware that Police Scotland does not have a particularly efficient method of collating, reporting and disaggregating data which would be useful for equalities organisations” She went on “Data is incredibly useful and powerful and we would like to see an improvement in the data and its availability”.<sup>152</sup>

224. The issue of underreporting of hate crime was also highlighted and the need to improve trust between protected groups and the police. Becky Kaufmann told us “The most recent piece of hate crime research that the Equality Network and Scottish Trans Alliance carried out identified that about 74 percent of LGB people and 80 percent of trans people have experienced a hate crime with nearly two thirds of those within a year of our research being conducted. 71 percent of our respondents said they never report it”.<sup>153</sup>

**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.**

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<sup>151</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 41](#)

<sup>152</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 61-62](#)

<sup>153</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 61](#)



*Equality of approach across protected characteristics*

226. Part 1 Section 1(2) of the Bill sets out the protected characteristics. These are listed as age, disability, race (and related characteristics), religion, sexual orientation, transgender identity, and variations in sex characteristics.

227. David Greig supported having a list of protected characteristics and told us that he found them helpful in his work, saying that “we identify how many plays we put on with regard to certain characteristics, in order to make sure that we are looking after people with protected characteristics as we welcome them to the theatre. We support such a consistent way of understanding things.”<sup>154</sup>

228. Tim Hopkins commented that “We strongly support the adjustments that the Bill makes to the definitions of some of the protected characteristics particularly those that are LGBTI related” and that “it is important that people can see themselves in the Bill”.<sup>155</sup>

229. Oonagh Brown was supportive of the offence of stirring up hatred but stated the Scottish Commission for People with Learning Disabilities would welcome explicitly including learning disability within the category of disability and that specific guidance be provided for media outlets as to what would constitute stirring up hate speech in related to protected groups and what kind of dialogue is appropriate.

230. She added that “I highlight that that approach is in line with the general comment from the Committee on the Rights of Persons with Disabilities which says that state parties “should undertake measures to encourage, inter alia, the media to portray persons with disabilities in a manner consistent with the purpose of the Convention and to modify harmful views of persons with disabilities, such as those that portray them unrealistically as being dangerous to themselves and others, or sufferers and dependent objects of care without autonomy who are unproductive economic and social burdens to society.”<sup>156</sup>

231. Lucy Hunter Blackburn told us about alternative models that have been used in other countries. She described a system used in New Zealand and a couple of other jurisdictions which start with a list but then leave it open ended and say that it is about difference. She said that “The New Zealand model offers a more open-ended thinking about the matter It does not tie jurisdictions into having a single set of characteristics under which they have to list who is in and who is out”.<sup>157</sup>

**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.**

<sup>154</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 17](#)

<sup>155</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 22](#)

<sup>156</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 11](#)

<sup>157</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 68](#)

### *Clarity of language and terminology*

233. Lord Bracadale recommended that the term “evinces malice and ill will” be replaced with “demonstrating hostility”. However, the Scottish Government chose to retain the wording. Many witnesses considered the language out of date and said it would benefit from being modernised. Others felt words used within other clauses lacked clarity. The Committee also heard views cautioning against this change, saying there may be unintended consequences to what may appear a minor change. Overall, there was no consensus reached on what wording, if any, should replace the current drafting in the Bill.

234. Michael Clancy said, “the use of “evinces” is anachronistic and a bit old fashioned”. He added that the law ought to be written in a way that makes it easy to understand, be accessible and clear and the use of language such as “evinces” that is not currently in common usage probably does not meet those objectives. He did not have an issue with the use of “malice and ill will” however, considering it a “well understood phrase”.<sup>158</sup>

235. Dr Tickell disagreed. He said “evinces malice and ill will” sounds old fashioned. I do not see how changing from that to demonstrating hostility is likely to dramatically change the scope of aggravators not least because aggravators must be attached to underlying criminal behaviour. The term demonstrating hostility is much clearer”.<sup>159</sup>

236. The use of the word “malice” was considered by Roddy Dunlop to be more problematic. “Malice can mean more than one thing and means different things under the law of fair comment from what it means under the law of qualified privilege. Malice can mean intent to harm. It can also mean having an ulterior motive. To that end, if the aim is to make things simpler for the man in the street, I see considerable merit in getting rid of the more Dickensian language and using the term demonstrating hostility because that is an easily understood concept that does not have the wriggle room that the notion of malice might have”.<sup>160</sup>

237. The Cabinet Secretary told us the concern he had of moving to Lord Bracadale’s recommendation was that it would “weaken the threshold slightly”. He said, however, that he was open minded and suggested a hybrid such as “demonstrates malice and ill will” might be considered as a replacement.

**238. The Committee supports the view that accessibility of the law to the lay-person 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”.**

<sup>158</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 18](#)

<sup>159</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 23](#)

<sup>160</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 24](#)

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

239. Part 1 Section 2(2) of the Bill states that the court must make it clear what difference the aggravation has made to the sentence that is imposed. There is a view that this can lead to increased transparency in sentencing. Lord Bracadale recommended removing this requirement but the Scottish Government chose to retain it. The requirement is found in other legislation so a decision to remove it within this context could have suggested a need to review its inclusion more widely.

240. In his evidence, Lord Bracadale explained the reasoning behind his recommendation to remove this requirement. He said “I thought it was important that an aggravation be taken into account in sentencing and that an aggravation attach to the previous convictions of the convicted person. It is important that the court would state in sentencing that the offence was aggravated and that that should be recorded. I found evidence that the recording was uneven. However, when it came to the requirement to state what the sentence would have been but for the aggravation I was told by a number of practitioners and sheriffs that it was quite difficult to specify precisely what the difference was between what the sentence would have been and what the sentence ended up being.”<sup>161</sup>

241. He accepted that some victims might feel let down if there was not a sufficient difference expressed between the two, stating “I thought it was important that the aggravation was recorded and noted on previous convictions but that it was just too difficult to specify the convictions in the context of sentencing”.<sup>162</sup>

242. Its retention was also questioned in responses to the call for written evidence from the judiciary. In their written submission, the Senators of the College of Justice noted “Lord Bracadale concluded that such a requirement was over-complicated, did not serve a clear purpose, and should be repealed. His conclusion was consistent with the view previously expressed by the judges that recording what a sentence would have been without the aggravation was likely to be a somewhat artificial exercise”.<sup>163</sup>

243. When asked why the Scottish Government chose to depart from Lord Bracadale’s recommendation, the Cabinet Secretary said he disagreed with it because “it is important to engage with victims of hate crimes”, and “it is important for victims’ sake to know the additionality to the sentence from the statutory aggravator”.<sup>164</sup>

244. Witnesses who supported the approach taken by the Scottish Government included CRER, BEMIS and Intercultural Youth Scotland. Dr Galbraith told us “we believe that it is helpful, and we agree with keeping transparency around additional sentencing that aggravation adds on because it gives validation to victims that their complaints have been heard and that racism is being treated appropriately”.<sup>165</sup>

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<sup>161</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 41](#)

<sup>162</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 41](#)

<sup>163</sup> [Senators of the College of Justice, written submission](#)

<sup>164</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 18](#)

<sup>165</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 41](#)

245. Victim Support Scotland said that retaining the requirement for the explanation of the difference an aggravation has made is vital to ensuring victims of hate crime feel their experience has been considered when a sentence is imposed. Its view was that this is of even greater significance when the opportunity to provide a Victim Impact Statement has not been available.

**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.**

### **Different approach to race**

247. The Cabinet Secretary has signalled that the Scottish Government will lodge amendments at Stage 2 to make the new offences of stirring up hatred based on intent only. They will not, however, be seeking to make this change for offences of stirring up racial hatred provided for at Section 3(1)(b). Liability would be based on an intention to stir up hatred or a likelihood to stir up hatred setting them apart from offences committed against the other protected characteristics. The decision by the Scottish Government to retain the word “insulting” in relation to offences of stirring up racial hatred is considered at Paragraphs 71-94. Concerns were raised as to whether this creates a hierarchy of characteristics.

248. In addressing this issue, Lord Bracadale considered there was now more difficulty in retaining not only “insulting” in the offence of stirring up racial hatred but also the likelihood threshold. He said “The position is that there is a significant difference between the approach to race and the approach to other characteristics. If insulting were to be removed there would be similarity at least at that threshold level”.<sup>166</sup>

249. The Cabinet Secretary said he believes there is justification in treating race differently. He told us that two thirds of hate crimes relate to racial hatred, adding that “The approach can also be justified on the basis of the nature and severity of the crime” and the fact that “structural racism has existed for years and continues to exist”.

250. A number of witnesses considered that all protected characteristics should be treated in the same way. Ephraim Borowski considered there should be a level playing field for all protected characteristics. He commented that race is singled out and the provision relating to insulting behaviour had never been used so there is no reason to separate it out. His view was that the list of protected characteristics should be taken out and anybody who is attacked on the basis of their belonging to any identifiable group should be protected. He said “What defines hate crime is that it undermines

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<sup>166</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 45](#)

individuals because of their membership or perceived membership of the same group as the initial victim. There should not be a hierarchy of protected characteristics, the same protections should apply to all.”<sup>167</sup>

251. John Wilkes of the Equality and Human Rights Commission agreed that racial hatred should be dealt with in the same way as stirring up offences against the other protected characteristics.

252. Representatives supporting race organisations, however, supported the Cabinet Secretary’s position. Danny Boyle of BEMIS made the case for treating race in a very specific way stating “that does not reflect a hierarchy but the reality of the prevalence of contemporary and historical racial hatred”<sup>168</sup>. He explained that the Public Order Act 1986 provided an offence of stirring up racial hatred in response to a significant increase at the time in the manifestation of far-right groups in the UK targeting people based on the colour of their skin, ethnicity and religion. Insulting was included in the Bill, he told us, because of awareness that insulting behaviour can escalate into significant human rights violations over a period of time.

253. Lucy Hunter-Blackburn agreed saying “we can see why race is being treated separately. It has a much longer history as a protected characteristic. To us treating race separately seems justifiable because of the scale and history of the issue and the political circumstances around racial hatred”.<sup>169</sup>

254. Becky Kauffman supported the view that groups should be treated on what was appropriate for their needs. She said “We recognise that historically marginalised groups are not homogeneous and that the experiences of hate crime within groups can vary from group to group. The current structure around race seems appropriate. Similarly, we think that the proposed stirring up offences as they apply specifically to LGBT people including trans identities is appropriate for our needs as a community. We do not see anything problematic in the fact that race is treated differently”.

255. She added that “It is really important that we focus the conversation on the fact that we are talking about a piece of legislation that talks about the tiny subset of behaviour that elevates to being something criminal. We have often shifted this conversation to a broader philosophical conversation about how different groups feel about the existence of other groups”.<sup>170</sup>

256. Isobel Ingham-Barrow raised an issue relating to the categorisation and recording of offences. She told us there is often confusion about whether to categorise an offence as being racially or religiously motivated and this causes a problem when it comes to Muslims. She told us MEND believe that Islamophobia should be recorded as a separate category by the police because when it comes to analysing data and understanding the scale of the problem it would give an accurate picture of what is going on, on the ground. “We are not arguing that there should be a separate protected

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<sup>167</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 39](#)

<sup>168</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 30](#)

<sup>169</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 49](#)

<sup>170</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 50 -52](#)



characteristic to deal with islamophobia purely how the police record such incidents".  
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*Section 50A and the offence of racially aggravated harassment*

257. Lord Bracadale recommended repealing the offence of racially aggravated harassment which is currently provided under Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995. The Scottish Government chose, however, not to accept the recommendation.

258. In his evidence, the Cabinet Secretary told us "My initial consideration was that we should repeal that section, but I changed my mind because of strong representations from a variety of racial equality groups. They saw the repealing of the offence as weakening the current protections for racial minorities. Recognising that there is an argument that retaining section 50A there is still an element of fragmentation rather than consolidation". He added that "The counter to that is the argument that I just talked about that those affected most by racial hatred and those who represent them would argue that does not outweigh their concerns that there could be a weakening of protection for them".<sup>172</sup>

259. Several witnesses were not convinced that the Scottish Government had made the correct decision. Andrew Tickell told us: "If we are to keep the offence of racially aggravated harassment there is no argument for it not to be in the Bill. If one of the key reasons for the Bill is to consolidate the law I find it crackers that the offence is not present in the consolidating measure"<sup>173</sup>.

260. Michael Clancy shared this view saying "I agree that consolidation should mean consolidation. The continuance of section 50a is out of kilter with the concept of consolidation".<sup>174</sup>

261. Roddy Dunlop argued "I wonder to what extent there continues to be a need for the section 50A offence given what would be enacted by the Bill. What additional element would not otherwise be caught by what is struck at by the Bill.. I agree with the others it really ought to be included in the Bill." He wondered if the concern was that we would be getting rid of a legislative provision that has been used regularly by prosecutors and which has provided protection. He told us that "The aim of a consolidating statute is to have the whole law in one place so that one can go to the act and find out what is allowed and what is not allowed. The suggestion that we have a hangover offence in which we have to go to a completely different statute does not seem to me to be coherent".<sup>175</sup>

262. Police and prosecution bodies broadly agreed. Calum Steele stated "I suppose it comes down to whether the retained offence would be libelled in its own right or would be libelled as an alternative to the new offence in section 3(1). I am not entirely

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<sup>171</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 45](#)

<sup>172</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 28](#)

<sup>173</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 21](#)

<sup>174</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 22](#)

<sup>175</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 22](#)

sure like the others what is gained by its retention. The consolidation and simplification of legislation should be just that.”<sup>176</sup>

263. We heard that the repeal of Section 50A would have no material impact on the ability to prosecute offences. For example, Anthony McGeehan told us that repeal would have no impact on the ability to address criminal conduct. He said “To leave Section 50A outstanding, to leave it as an outlier would arguably be inconsistent with the approach to consolidating all relevant hate crime law in a single place. Lord Bracadale recommended the repeal of Section 50A and in doing so he observed that it would not diminish the ability of the police or prosecutors to respond to racial hate crime. That is the experience of COPFS”<sup>177</sup>.

264. Fraser Sutherland also supported Lord Bracadale’s recommendation, saying it would be a welcome approach rather than trying to maintain other legislation if we are trying to bring together the offences in one piece of legislation.

265. Some organisations sought similar protection for people covered by other hate crime characteristics. In their written submission, Inclusion Scotland stated, “Noting that the Bill does not intend to repeal section 50A on racial harassment Inclusion Scotland urges the committee to consider whether a similar stand alone harassment clause would provide additional protection for other protected characteristics including disability”.<sup>178</sup>

266. We asked the Cabinet Secretary if the Scottish Government had taken the correct approach or whether Section 50A should be subsumed into the Bill. He told us that the only reason the Scottish Government would not consolidate it was because it would not fit in with the hate crime framework. He added that if the Committee was of the view that it should be retained as part of this set of hate crime laws, that could be considered as a stage 2 amendment.

**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.**

**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.**

<sup>176</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 47](#)

<sup>177</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 47](#)

<sup>178</sup> [Inclusion Scotland, written submission](#)



## **Other hate crime characteristics including sex and misogynistic harassment**

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

269. Lord Bracadale's review recommended that sex (referred to in his report as gender) should be added to the list of protected characteristics covered by hate crime legislation. The Bill does not seek to implement his recommendation. Instead, Section 15 provides a mechanism which would allow the Scottish Government to add sex to the list of protected characteristics via secondary legislation. This could be used to add sex to the characteristics covered by the statutory aggravation in section 1 and/or the offences relating to stirring up hatred in sections 3(2) and 5(2).

270. The policy memorandum outlines the reasoning behind the Scottish Government's decision to exclude sex from the Bill. It highlights opposition from some women's organisations to the approach recommended by Lord Bracadale. A number of groups representing women's rights instead called for a new offence of misogynistic harassment to be created. The Scottish Government thereafter indicated its intention was to establish a separate Working Group on Misogynistic Harassment to consider these issues. On 24 November, when giving evidence, the Cabinet Secretary announced that the Working Group would be chaired by Baroness Helena Kennedy QC.

271. In his evidence to the Committee on 27 October, the Cabinet Secretary told us that Engender, Zero Tolerance, Scottish Women's Aid and Rape Crisis Scotland all opposed the introduction of a sex aggravator. Engender, he said, made some compelling arguments not to introduce a sex aggravator, particularly as it does not take account of the gendered nature of violence against women. He said Engender was "worried as is Scottish Women's Aid that a sex aggravator could be used by perpetrators of domestic abuse to further cause challenge and difficulty for victims of domestic abuse".<sup>179</sup>

272. Lord Bracadale told us that "An aggravation would be in keeping with the general approach and would meet the requirements of undermining harm, sending a message and having practical benefits"<sup>180</sup> However, he acknowledged the reasons for the Scottish Government's decision in that "quite formidable organisations that represent women's interests were arguing for that approach" He considered the non-inclusion of such a provision in the Bill was "perhaps a missed opportunity".<sup>181</sup>

273. Dr Marsha Scott of Scottish Women's Aid commented that she was instinctively in favour of adding the characteristic of sex as an aggravation but having looked at the evidence said that "our assessment of the impact of adding sex as an aggravation for women who are experiencing violence would not do those groups any favours. In fact, it might have unintended negative consequences" She said there is a gap in protection for women in that an aggravation works only in the context of legislation in which

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<sup>179</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 21](#)

<sup>180</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 38](#)

<sup>181</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 40](#)

something is against the law. She added, “Those laws are in place now, the aggravation will not fill an existing gap”.<sup>182</sup>

274. She explained that Scottish Women’s Aid “struggle with women being treated as a minority” and that, instead, something “much bolder needs to happen in order to turn the very large ship of misogyny and misogynistic crime”. Introducing sex as an aggravator but doing nothing else would, in her view, create the possibility that a “lot of folk will tick the box and will say that they have added gender to the aggravation and so do not have to worry about women or the fact that it is theoretically impossible to put the aggravation in place in the context of their Equally Safe<sup>183</sup> policy”.<sup>184</sup>

275. She said that there is no evidence that adding a sex aggravation would work to protect women, stating “We have strong concerns that if a sex aggravator were added it would be another tool for perpetrators of domestic abuse to use in their abuse of women. We are very familiar with perpetrators accusing women of abusing them as part of their controlling behaviour”.<sup>185</sup>

276. This view was shared by Emma Ritch of Engender, who told us they also initially favoured the addition. However, Engender identified four risks in doing so at this stage. Firstly, she told us it is fundamentally contradictory to say that some incidents of violence against women are a product of discrimination on the grounds of sex and some are not. She said, “That is just not how we understand violence against women, so such an approach has the potential to undermine Equally Safe which is our world leading violence against women strategy”.<sup>186</sup> Secondly, she told us that Scotland is committed to human rights frameworks for women’s and girls’ equality rights including those set out in the Convention on the Elimination of All Forms of Discrimination Against Women and in the Istanbul Convention. Those operate on the basis that the presumption should be against gender-neutral laws that protect men and women in exactly the same way and believe that a symmetrical approach to violence against women is likely to harm women. Thirdly, she identified “legislative and policy inertia” where “even if something is not an appropriate or relevant solution and will not do anything for women but symbolise the justice that remains functionally out of reach, it can be satisfying, particularly when we are dealing with things that are as complicated as hate crime and women’s equality and rights”.<sup>187</sup> The final risk, she said, was that evidence from around the world showed us that hate crime is poorly understood in the context of women and “rushing to legislate runs the risk of entrenching that misunderstanding further in criminal justice bodies and public understanding and in women’s perception of what the state will or will not tolerate for them”.<sup>188</sup>

277. In relation to statutory aggravations, she added “They are demonstrably not working for women in other jurisdictions” and “I urge the Scottish Parliament to align

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<sup>182</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 3-4](#)

<sup>183</sup> Equally Safe is a joint Scottish Government and COSLA strategy to prevent and eradicate violence against women and can be accessed [here](#).

<sup>184</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 4](#)

<sup>185</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 8](#)

<sup>186</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 5](#)

<sup>187</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 5](#)

<sup>188</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 5](#)

with other jurisdictions that have looked at statutory aggravators and seen how ineffective they would be for women, and have gone in a different bold and ambitious direction”.<sup>189</sup>

278. She spoke about a pilot of a hate crime approach in Nottinghamshire which encouraged women to report misogynistic street harassment. In the space of two years, in a population of one million there were 174 reports of which only one led to prosecution and only 73 were categorised as crimes. She said that “The Nottinghamshire example has given us some good detail on why this stuff just will not work” In her view, evidence from international jurisdictions reported similar outcomes, commenting that “The model or concept does not really do anything to address gender-based violence so we need different approaches”.<sup>190</sup>

279. Many other witnesses supported the inclusion of sex as a protected characteristic and spoke of the need for equality across the characteristics. They questioned whether the correct message was being conveyed.

280. Susan Smith of For Women Scotland was of the view that, as long as there is a statutory aggravation model, women need to be protected and that can be done by adding the category of sex. She said, “An issue in recent conversations around transgender identity and women’s sex-based rights is the feeling that if there is no mirror aggravation for sex women are left exposed”. She said that conversations on this issue had been going on for a very long time and “even if the suggestion is not the perfect solution it gets things started and gets the ball rolling. It might well be that a stand-alone working group could come up with something far better but there is a genuine risk that we will be here in another 12 years with nothing having been proposed or an unworkable proposal”.

281. She spoke of one compelling argument that had been fed back to them from a network that deal with abuse survivors was that they want guaranteed protection now, not possible protection in months or years. She said “Knowing as we do that hate crime is on the cards and the Scottish Government want to legislate in that area, we believe that it is very important that women are not ignored”<sup>191</sup>.

282. This sentiment was shared by Lucy Hunter Blackburn who told us “It is really important that people see themselves in the Bill. A group of people who cannot see themselves in the Bill are those who are subjected to any kind of abusive behaviour or harassment based on their sex”. She said “the more obvious it is which characteristics are not covered the issue becomes what forms of hate are and are not acceptable and what messages we send. Lord Bracadale believes that there is a strong symbolic quality to hate crime legislation especially when it comes to stirring up and I would not dispute that. Women are nowhere to be seen in the Bill as it stands”.<sup>192</sup>

283. Lucy Hunter Blackburn disagreed with the views of Engender and Scottish Women’s Aid. She told us “I have looked at and understand the arguments of those

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<sup>189</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 18](#)

<sup>190</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 9](#)

<sup>191</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 6-7](#)

<sup>192</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 65-66](#)

who argue for sex not to be included but I do not find clear and compelling their arguments on why we should not include sex as a characteristic that is covered. The misogyny working group could continue and do the work that is planned but that will take some time. Our strong view is that the default position should be for sex to be included”.<sup>193</sup>

284. Anthony Horan expressed concern that the approach adopted by the Scottish Government appeared to be a bit fragmented in that sex has been dealt with differently to other protected characteristics. He could not see why it should not be included. Rev Stephen Allison agreed and highlighted that the exclusion of sex together with the inclusion of transgender created a hierarchy suggesting one characteristic was more valuable than the other. “There is a lot to be said for sex being treated on the same level as transgender issues”.<sup>194</sup>

285. Several witnesses highlighted the need to consider intersectionality, including MEND. Isobel Ingham-Barrow of MEND thought it did not make sense that sex was not included and stressed the need to protect people’s rights when there are conflicts between those of different groups. She called for a greater discussion to be had around where different characteristics intersect, saying that “We would highlight that there is an interplay between misogyny and Islamophobia. Islamophobia is a gendered phenomenon and misogyny definitely plays into the attacks that we see. Women are overwhelmingly the victims of particularly violent instances of hate crime against Muslims”.<sup>195</sup>

286. Lucy Hunter Blackburn explored this further: “I want to pick up on what MEND said. She made a point about the intersectionality between religion and sex. Earlier, Danny Boyle mentioned the intersection between race and sex. If sex is not covered, we will not see that. I am keen for the committee to interrogate why the default position is not to start with sex. If the working group come up with a better option that will need primary legislation sex could be taken out”.<sup>196</sup>

287. Becky Kaufmann of the Scottish Trans Alliance told us that it would support any approach that would provide increased protection for women. “We, as an organisation, are quite aware that we have not done that research and that there is an ongoing discussion and debate. Personally, and organisationally, we would like to see that conversation play out as a fairly large number of women’s organisations have a range of options.”<sup>197</sup>

288. The Committee notes that the ability to prosecute would not be impacted by the decision of the Scottish Government not to include sex as a protected characteristic. In this respect, Anthony McGeehan of the COPFS confirmed that “the absence of a specific statutory aggravation in relation to gender does not prevent the COPFS from taking prosecutorial action in relation to gender and its addition would not aid our ability to address those offences”.<sup>198</sup>

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<sup>193</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 66](#)

<sup>194</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 49](#)

<sup>195</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 49](#)

<sup>196</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 66](#)

<sup>197</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 67](#)

<sup>198</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 50](#)

289. Emma Ritch was clear that equality did not mean identical treatment for groups. She said “I want to correct the misapprehension that equality involves treating all the protected groups in the same way. In the Equality Act 2010, protected characteristics and protected groups are not all treated the same. Different provisions relate to different groups contingent on the experiences they have. For example, the equal pay elements relate to sex but not to other protected characteristics. There are protections for pregnancy and maternity as well as for disabled people that do not apply to other groups”. She stressed “I urge the committee to resist the tempting narrative that sex should be included in the Bill for equality reasons. A real equality approach would be to treat women and misogynistic harassment in the way that the evidence suggests that they should be treated, which is what we are advocating for”.<sup>199</sup>

290. In relation to support for victims and addressing crimes that tackle women, Dr Marsha Scott commented that the legislation is “not a panacea” and “only as effective as the enabling environment”. She told us that there are so many indications that public sector professionals and organisations across Scotland do not understand gender inequality. She said “Dislodging and challenging gender stereotypes and holding ourselves and officials accountable for robust and confident equality impact assessments are the kinds of things that will help to create an enabling landscape”<sup>200</sup>. Emma Ritch agreed adding that hate crime against women had been a subject of conversation for about five years and “One of the messages that constantly comes back is that women do not think the decision makers and the criminal justice system understand the extent and level of sexism that women face in every aspect of their lives. Some of the Bill feels as if it tinkers around the edges rather than engaging with the core issue”. She welcomed the move to incorporate CEDAW into Scots law, stating “To have that minimum standard of women’s rights will be profoundly transformational if Scotland can make it work”<sup>201</sup>.

291. Susan Smith agreed that CEDAW<sup>202</sup> needs to be incorporated. She said that “we have to be able to talk about women as a sex class and we are currently prevented from doing so... One of the biggest reasons that women get attacked online is their standing up for their sex-based rights, and we are not seeing support either from Government or from the national women’s organisations to enable that conversation to take place. That needs to change.”<sup>203</sup>

**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**

<sup>199</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 18](#)

<sup>200</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 19](#)

<sup>201</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 19](#)

<sup>202</sup> The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is an international treaty adopted in 1979 by the United Nations General Assembly. Described as an international bill of rights for women, it was instituted on 3 September 1981 and has been ratified by 189 states. Further information can be found [here](#).

<sup>203</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 20](#)



**a hate crime characteristic. The Committee calls on the Working Group to complete its work within a year.**

*Separate offence of misogynistic harassment/Working group*

293. As well as or, perhaps, as an alternative to adding sex as a hate crime characteristic, a separate, new offence of misogynistic harassment could be created.

294. Lord Bracadale was not in favour of this idea. He told us: “It seemed to me that there was no gap in the law that required to be filled by an offence of misogynistic harassment, because threatening or abusive behaviour under section 38 or communications under the Communications Act 2003 could have a statutory aggravation attached to them. Therefore, I considered that it was not necessary to add a new offence as that would cause confusion. It was also extremely difficult to pin down a precise definition of misogyny laws and I found that different groups had different understandings of what the term meant”.<sup>204</sup>

295. The Scottish Government committed to setting up a working group on misogynistic harassment. On its remit, the Cabinet Secretary told us it would “address the lack of administrative data that might provide quite detailed information to fully understand women’s experiences of misogynistic harassment” and look at “the legal context and potential gaps in the existing law including the potential for a sex aggravator and whether a stand-alone offence of misogynistic harassment could fit within a legal framework and be an effective tool”.<sup>205</sup>

296. Both Dr Marsha Scott and Emma Ritch strongly supported the setting up of the working group and were keen to engage with it. Emma Ritch hoped that the group would first consider the evidence base, stating “We think that there is some data out there that suggests that women are having an almost universal experience of public sexual harassment. We are also seeing a significant increase in online harassment”. She explained that they were seeing increasing links between misogyny and terrorism particularly in relation to a subsection of misogyny known as incel ideologies. These, she told us, are associated with a number of murders and other offences around the world. She added that “There are questions about whether we need to look at misogyny in the context of securitisation as well as what might be seen as much lesser offences relating to police harassment”.<sup>206</sup> She thought it vital that the working group consider the question of stirring up hatred and hate speech as there are not many court cases dealing with sexist hate speech.

297. Dr Scott told us she worked on the development of the Domestic Abuse (Scotland) Act which she described as being “held up as the world’s gold standard domestic abuse legislation”. She considered “if anybody were capable of creating a misogyny offence that was sufficiently nuanced and sophisticated to make a difference to the women and girls of Scotland, it would be the Scottish Parliament”. She emphasised that collaborative work between victim organisations such as Scottish

<sup>204</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 38](#)

<sup>205</sup> [Justice Committee Official Report 25<sup>th</sup> Meeting 2020, Tuesday 27 October 2020 col 22](#)

<sup>206</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 10](#)



Women's Aid and officials in Government was key to finding a way to understand survivors' experiences and embed them in a complex piece of legislation that reflected a very complex social phenomenon.<sup>207</sup>

298. Susan Smith considered it was perfectly reasonable to have a working group as "misogyny is endemic and ignored" but added that we must consider the delay in not including sex at this stage. In her view, "Even though we know that there is an epidemic of violence against women and harassment of women, as a Parliament or as a country we are content to put off addressing that until an unspecified and possibly remote later date".<sup>208</sup>

299. In response to Lord Bracadale's assertion that there was no gap in the law which required to be filled, Emma Ritch told us she did not know if this was the case as there has been no systematic evaluation. That would be something that the working group should pick up as a matter of urgency. She told us "I read Lord Bracadale's evidence to the Committee and I did not hear him speak about the potential links between misogyny and terrorism, specific sub-strands of misogyny or public street harassment". She added "I would dispute the extent to which the existing law is working for women. We see epidemic levels of online harassment that have a material impact on women's lives and wellbeing. We see women experiencing anxiety and sleepless nights, deciding not to enter technology-related professions and choosing to study different subjects at school not availing themselves of leisure opportunities that are open to them and deciding to go to different places and do different things due to the fear of online attack and harassment. If the law is considered to cover those areas of life. I am not sure why it is not working for women".<sup>209</sup>

**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.**

*Use of secondary legislation and the timetable for parliamentary scrutiny*

301. Section 15 of the Bill provides that sex may be added as a protected characteristic at a later date. Concerns were raised in evidence as to whether this procedure will enable Parliament adequately to scrutinise what will be a sensitive and detailed matter. As the legislative vehicle proposed for making this addition is an affirmative instrument, the timescales for scrutiny (40 days) are substantially less than would be the case for primary legislation. Concerns were also expressed by some about the appropriateness of creating new criminal offences via secondary, rather than primary legislation.

302. In his evidence, Mr Dunlop said he was not concerned that adding sex as a characteristic was not being dealt with at the same time as long as it was given the consideration required. He said we need to merely glance at twitter or any other form of social media to see that there are difficulties with misogyny in the same way that there are with other species of hate crime that the bill directly addresses. Lisa Clark

<sup>207</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 11](#)

<sup>208</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 12](#)

<sup>209</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 13](#)

agreed and said the Scottish Parliament would be keen to hear from the working group before it took a view on the offence of misogynistic harassment. She said “For women writers, there are specific issues around online harassment. We have no objections to the time that it takes to fully consider such serious issues”.<sup>210</sup>

303. Others were more sceptical. Michael Clancy, for example, said that the Law Society was looking forward to hearing what the working group will produce and said “The way in which the matter is being approached is potentially problematic. It should receive the fullest scrutiny of the parliament that would suggest primary legislation for implementing any change. If the government is insistent on using regulations, those regulations should be subject to the super affirmative procedure so that there is an opportunity for the relevant committee to take evidence”.<sup>211</sup> Dr Tickell agreed, commenting that the process was unsatisfactory. He said scrutiny is important and it would have been far preferable to deal with these matters at the same time instead of approaching them in what is a fragmented way.<sup>212</sup>

304. Giving evidence on 27 October, the Cabinet Secretary said that Parliament would have the opportunity to consider the statutory instrument with the weight of the evidence that the working group submitted on whether the instrument should be made.

305. However, in further evidence on 24 November, the Cabinet Secretary said that he had reflected further and suggested a process known as a “super affirmative” procedure, whereby the Scottish Government consults initially on a draft instrument before it is lodged in Parliament. He said “As the Bill stands we are proposing an affirmative procedure. We could possibly consider a super affirmative procedure whereby there would also have to be a consultation if an order making power were enacted. There is scope to consider the issue further to address concerns that Members may have about parliamentary scrutiny”.<sup>213</sup>

**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.**

### *Transgender identity*

307. For the purposes of current hate crime aggravations set out in Section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009, transgender identity is defined as “(a) transvestism, transsexualism, intersexuality or having by virtue of the Gender Recognition Act 2004 changed gender or (b) any other gender identity that is not standard male to female gender identity”

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<sup>210</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 21](#)

<sup>211</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 31](#)

<sup>212</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 32](#)

<sup>213</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 41](#)

308. Section 14(7) of the Bill updates this definition to (a) female-to-male transgender person (b) male-to-female transgender person (c) a non-binary person, (d) a person who cross-dresses.

309. In addition, the Bill replaces the previous inclusion of intersexuality as part of transgender identity with a separate protection for variations in sex characteristics. This issue is dealt with separately below.

310. The Committee received a number of written submissions welcoming the updated definitions used in the Bill including one, for example, from Equality Network who described the new definitions as “a substantial improvement on previous legislation terminology”. and said they “strongly support that the Bill follows Lord Bracadale’s acknowledgment and recommendation that intersex is not a sub category of trans/transgender and welcome that a separate category has been created that encompasses those who have a variation in biological sex characteristics”. They stated that their preference would have been to use “trans man” and “trans woman” in place of “female to male transgender person” and “male to female transgender person”.<sup>214</sup>

311. A number of other responses raised concerns about the definition of transgender identity. For Women Scotland, in their written submission stated, “we would suggest that both non-binary and cross-dressing categories are removed from the transgender identity characteristic”.

312. In evidence, Susan Smith of For Women Scotland explained in more detail their call to remove the cross-dressing definition. She said one of their concerns was that the inclusion of cross-dressing was there to protect men as “it is hard to think of circumstances in which a woman might be considered to be a cross-dresser”. She also questioned why one set of people are being afforded protection for the way they dress when others, for example, ‘goths’ are not. Additionally, she told us that “at one extreme cross dressing can be dress sense but, at the other, it can be a paraphilia. Therefore, we get the quite bizarre situation where something that might be done for purposes of arousal is being protected under a hate crime law”. She highlighted a “quite extraordinary situation” where “Glasgow Life was openly advocating that cross dressers could access the female changing rooms at its facilities. The policy states that if women objected, the policy should be explained to them and, if they continued to object, a hate crime report could be filed”. This, she said, can be used as a “weapon against women”.<sup>215</sup>

313. Some witnesses giving evidence to the Committee suggested that, because transgender identity is a protected characteristic under the Bill, campaigning that sex is immutable, could become caught by Scotland’s new hate crime legislation. In their view, campaigning for a certain definition or understanding of what a woman is, or campaigning for particular women’s rights to have a certain scope could run into problems under the Bill. A number of witnesses expressed fear that these matters will be harder to debate openly and freely in Scotland if the Bill is enacted in its current form.

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<sup>214</sup> [Equality Network, written submission](#)

<sup>215</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 13-14](#)

314. Examples suggested to the Committee included instances where those setting out arguments about gender recognition and the immutability of sex have been accused of transphobia.

315. Other witnesses and organisations disputed this. For example, Becky Kaufmann said that “There has been robust political debate for years and years about the roles that different groups play in society and we would never, ever support any legislation that would put any damper on those discussions”. She added:

“What we are specifically talking about in the Bill is behaviour that clearly elevates to the level of generating hatred or encouraging others to threaten or abuse other people. Those are widely accepted principles. The Law Society of England and Wales is reviewing the current legislation down there and one of the principles that it is looking at is about making sure that the legislation sufficiently captures threatening and abusive behaviour to different groups”.<sup>216</sup>

316. She said that she had been subject to a fair bit of debate that made her extremely uncomfortable and which is often very disrespectful of her identity, yet she would not encourage that behaviour to be made criminal.

317. The Cabinet Secretary disagreed that the Bill could be used to criminalise the expression of the opinion that biological sex is immutable. He said “simply expressing the opinion is not in itself criminal. If it is proved beyond reasonable doubt that the behaviour that accompanies that expression was intended to stir up hatred and was also threatening or abusive, a person may well face a criminal sanction...That would follow an extensive objective analysis by the courts. Therefore, expressing an opinion by saying that a trans woman is not a woman would not in itself lead to a prosecution”.<sup>217</sup>

**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.**

<sup>216</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 52](#)

<sup>217</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 32](#)

**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.**

*Variations in sex characteristics or intersex*

321. Variations in sex characteristics (VSC) is also referred to as intersex (I) or differences in sex development (DSD).

322. In addition to the Equality Network, written submissions expressing support for the approach in the Bill included one from a coordinator of the CAH support group,<sup>218</sup> which stated “Time and again I have talked with adults whose lives have been nearly destroyed by the shame and stigma being born with I/VSC has resulted in, much of which was and is due to a trail of abuse, bullying and discrimination from childhood through the life span and “Including I/VSC in the Hate Crime Bill would have a powerful impact on people’s life experience as it would contribute to making us visible and giving a voice after the crimes against us have been rendered invisible for so long.”

323. Klinefelters Syndrome Association UK shared this view and welcomed the approach to include I/VSC as a distinct category. In their written submission, they stated “we recommend that the terminology used within Scottish hate crime legislation should reflect both international practice and the preferred terminology of those with a variation in sex characteristics living in Scotland and the rest of the UK. Therefore, we recommend the abbreviation ‘I/VSC’, the use of ‘Variations of/ in Sex Characteristics’ (VSC) and the use of ‘intersex’ as terminology within legislation”<sup>219</sup>.

324. A different view was expressed in the submission from dsdfamilies who said “Dsdfamilies opposes the inclusion of a protected characteristic of ‘variations of sex characteristics’ under hate crime legislation. Singling out a biological condition in this way reinforces stigma rather than working towards understanding and societal acceptance and that: “We do not favour the term ‘variations of sex characteristics’ (VSC). It is unknown outside a small group of policymakers, LGBT groups and academics and is not recognised by those living with DSD (or those using intersex) as ‘related to them’.”

325. In oral evidence, Clare Graham of dsdfamilies told us “We have no clear understanding of what we mean when we talk about intersex. The Scottish Government’s equality unit website describes intersex as being male, female, in-between or neither. There are intersex people who would find that offensive. Until the Government has a real solid understanding of what intersex is, there cannot be an understanding of what hate crime or insulting behaviour towards intersex people might look like”.<sup>220</sup>

326. She questioned who would be captured where there was no clear definition. She agreed that it needs to be separated out from ‘trans’ in definitions but argued that there is no evidence to show that it needs to be included as a separate characteristic

<sup>218</sup> CAH stands for Congenital Adrenal Hyperplasia.

<sup>219</sup> [Written submission, Klinefelters Syndrome Association UK](#)

<sup>220</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 53](#)



and discussed the frustrations dsdfamilies have. She said “When we talk to the Scottish Government, intersex is always taken as a political identity and we are directed towards inclusion. We feel that the places where improvements need to be made for people with variations of sex characteristics are in healthcare and peer or psychological support. None of what is being done here will address that”.<sup>221</sup>

327. In his evidence, Paul Dutton of Klinefelters Syndrome Association UK disagreed and was content with the approach taken. He said “I think that there is a clear definition of intersex or variations of sex characteristics which is given by the Office of the United Nations High Commissioner for Human Rights. It is quite a persuasive definition that covers gonads, genitals, sex chromosomes, body shapes and so on”.<sup>222</sup>

328. The Cabinet Secretary said he was aware and respected the views of dsdfamilies and was happy to continue to engage with them but that a number of stakeholders hold a different view and agree that variations in sex characteristics is the right term to use. He told us “terminology can be really difficult and challenging and I have no doubt we will have further discussions on that, and that there should be an aggravator that covers those variations in sex characteristics. That does not take away from anything that dsdfamilies said about the need for greater physical and mental health support not just for the children but for their parents. We can give that support as well as having an aggravator”.<sup>223</sup>

**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.**

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

331. Lord Bracadale’s consultation gathered evidence of significant discrimination against the Gypsy, Gypsy Travellers, Roma and Traveller community, often fuelled by negative stereotypes portrayed in the media. In his view, much of the conduct which was described amounts to discrimination which can, and should, be tackled under the civil law (for example, the refusal by a GP practice to register a new patient; barring from pubs etc.). However, Lord Bracadale noted that there was also anecdotal evidence of significant criminal conduct against members of the Gypsy, Gypsy Travellers, Roma and Traveller community.

332. His report concluded by stating that:

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<sup>221</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 64](#)

<sup>222</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 64](#)

<sup>223</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 40](#)



“Romany gypsies have long been recognised as an ethnic racial group, and other more recent court decisions have treated Irish travellers and Scottish Gypsy/Travellers as ethnic groups too. While these decisions have been made in relation to the civil law definition of ‘race’ in the Race Relations Act (the precursor to the Equality Act 2010), I can see no reason why the same analysis would not apply to the criminal legislation. I note also that Gypsy/Traveller was included as a sub-category of ‘white’ ethnicity in the 2011 census. I am therefore satisfied that such offending behaviour can and should be treated as racially aggravated under the existing race aggravation.”<sup>224</sup>

333. In relation to asylum seekers and refugees, Lord Bracadale stated that he considered that it is likely to be the case that some offending against those who are not British nationals is motivated by hostility relating to their immigration status or involves the demonstration of such hostility. In his view, refugees, asylum seekers and former asylum seekers whose applications have been rejected are often in a particularly vulnerable situation.

334. He concluded that offending behaviour which is motivated by hostility relating to immigration status or involves the demonstration of such hostility should be a hate crime. However, he did not think any change in the law is needed to achieve this: such offending should already be treated as racially aggravated under the existing law. In his view, the current race aggravation is concerned with malice and ill-will towards a racial group, and racial group is defined by reference to “race, colour, nationality (including citizenship) or ethnic or national origins.”

335. Most of the other witnesses we heard from, including those representing race groups were satisfied that Gypsy, Gypsy Travellers, the Roma community, asylum seekers and refugees would be covered under the protections relating to race or ethnic group. Roddy Dunlop said “it seems to me that the wording that is used will adequately protect the groups that you have mentioned. I think I am right to say that Irish travellers and Romany gypsies have both been recognised as ethnic groups and would fall under the definition in the Bill for race, colour, nationality, ethnic or national origins. It is sufficiently wide.”<sup>225</sup>

336. However, John Wilkes said that “We consider that the definition of race in the bill would definitively include colour, nationality and ethnic origins and would therefore draw in groups such as Scottish Gypsy Travellers, but case law relating to the Equality Act 2010 is less supportive of an assumption that the characteristic of race would cover refugees and asylum seekers. That is something that the committee might want to consider”.<sup>226</sup>

**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**

<sup>224</sup> [Lord Bracadale's Independent Review of Hate Crime Legislation in Scotland](#)

<sup>225</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 28](#)

<sup>226</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 22](#)

**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.**

*Age or vulnerability?*

338. As noted previously (see paragraphs 215-225) the Bill seeks to add age to existing hate crime characteristics. Lord Bracadale recommended that the Scottish Government should consider the introduction, outwith the hate crime scheme, of a general aggravation covering exploitation and vulnerability.

339. Written submissions expressing support for the addition of age included ones from Age Scotland and COSLA. Age Scotland stated that “We know from our work with older people throughout Scotland that they may feel discriminated against because of their age, and whilst there is separate equality legislation it is important that older people are recognised as a group who may experience hostility due to their age, indeed as may younger people. This aggravation will help to underline that there is no place in Scottish society for age hostility as well as give older people who experience age hostility confidence to report this to the police”<sup>227</sup>.

340. Responses sought to highlight the distinction between hostility based on age and offending which targets the vulnerability or perceived vulnerability of older people. COPFS in their written submission noted “There is a distinction between offences which demonstrate hostility towards someone’s age and offences where the accused has exploited someone because of their age and perceived associated vulnerability. The aggravation relating to age in the Bill captures the former but not the latter. Prosecutorial experience is that there are relatively few cases of age hostility”<sup>228</sup>.

341. This distinction was acknowledged by Age Scotland. In oral evidence Adam Stachura supported age being included as a statutory aggravation. He said “First age is missing as a protected characteristic and this tidies up hate crime legislation, secondly the provision will give older people more confidence in reporting crimes and thirdly it will give prosecutors more tools to progress cases as corroboration is not necessary for a statutory aggravation”<sup>229</sup>.

342. During his evidence to the Committee, the Cabinet Secretary was questioned on this issue and about the conclusions of the research produced for the Committee by Dr Bows. In response, he said “The evidential base is incredibly important but so too are the voices of those who are often impacted. There was support for an age aggravator right the way through the spectrum of organisations who have an age concern from Youth Scotland to Age Scotland. The calls of those who represent the real life experience of people must be given sufficient weight”<sup>230</sup>.

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<sup>227</sup> [Age Scotland, written submission](#)

<sup>228</sup> [COPFS, written submission](#)

<sup>229</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 19](#)

<sup>230</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 34](#)

343. In response to whether the Scottish Government would consider the creation of an aggravation covering exploitation and vulnerability, the Cabinet Secretary told us “my understanding on the question of vulnerability is that Lord Bracadale thought that the issue of people being exploited because of their vulnerability should be looked at but not in the framework of hate crime. He asked me to look at that outwith the hate crime framework and I am happy to do that”<sup>231</sup>.

**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.**

### *Sectarianism*

345. The Bill does not include any specific provisions dealing with sectarianism. The policy memorandum (para 233) states that:

“The Scottish Government consultation exercise and wider engagement with stakeholders found that there was no clear consensus on the benefits, or otherwise of including specific protections for sectarianism in the new hate crime legislation therefore provisions for a sectarianism statutory aggravation have not been included in this legislation”.

346. Witnesses we heard from broadly agreed with this approach. Roddy Dunlop told us “the provisions in the Bill are sufficiently flexible to deal with problematic sectarianism. If the question is whether the Bill will sufficiently catch sectarianism that should be criminalised, then the answer is yes”.<sup>232</sup>

347. Representatives from police bodies and the Crown Office agreed. Calum Steele told us “I am fairly comfortable that the Bill would cover behaviour that is threatening or abusive in a religion or sectarian sense in environments like football stadiums.” He said that “The challenge relates to the appetite for policing of what would be criminal behaviour in certain environments.”<sup>233</sup> Anthony McGeehan commented “Lord Bracadale’s assessment is that the current statutory aggravations in relation to race and religion are sufficient to address these behaviours and COPFS agreed with that assessment.”<sup>234</sup>

348. Faith and non-faith groups on the whole shared that view. Fraser Sutherland said “I do not agree with the attempt to legislate for sectarianism as a separate characteristic. The easiest course is to restrict that to religious hatred. To legislate for

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<sup>231</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 34](#)

<sup>232</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 291](#)

<sup>233</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 48](#)

<sup>234</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 49](#)

one particular type when other sectarianism also exists would be a mistake”<sup>235</sup> Anthony Horan was also satisfied with Lord Bracadale’s view that sectarianism is adequately covered.

349. Ravi Ladvi offered an alternative to legislation. He told us that, as a relative newcomer to Scotland he was oblivious to the fault lines in Scotland but was aware of those that exist in his own background. He said that one of the things that we could look at is the provision of funding to our respective organisations to do consistent outreach work, break down some of those barriers, engage with people in different areas such as sport, food and other aspects of our culture and try to bridge some of the gaps and bring people together along different lines. In his view, “that is a serious alternative that we should consider”.<sup>236</sup>

350. In written evidence, organisations expressing support for the decision not to have a separate hate crime characteristic of sectarianism included the COSLA who said, “our view in relation to sectarianism is that current legislation tackling offences motivated by racial and religious prejudice appears to capture the nature of sectarian behaviour, making the addition of an ad-hoc statutory aggravation superfluous”.<sup>237</sup>

351. Others such as The Law Society of Scotland sought further clarity, stating “We consider that the issue of sectarianism has not been addressed clearly. We are not advocating that there necessarily needs to be the inclusion of a statutory aggravation but there needs to be clarity about the criminalisation of relevant offending behaviour”.<sup>238</sup>

**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.**

### *Homelessness*

353. A small number of witnesses also suggested that people who were homeless should be added to the list of protected characteristics because of a number of crimes said to be committed against them because of this. For example, Andrew Tickell stated that he was “very sympathetic to the characteristic of homelessness being added to the list. We know that people who are perceived to be homeless are much more likely to be victims of not just street harassment or abuse in the street but assault by members of the public, simply by dint of the fact that they do not have a home to go to”.<sup>239</sup>

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<sup>235</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 20](#)

<sup>236</sup> [Justice Committee Official Report 27<sup>th</sup> Meeting 2020, Tuesday 10 November 2020 col 52](#)

<sup>237</sup> [COSLA, written submission](#)

<sup>238</sup> [Law Society of Scotland, written submission](#)

<sup>239</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 19](#)

354. He added that “It might be at least worth contemplating whether other things might, and perhaps should, feature in the list of aggravating factors on the basis of the social experience in Scotland and the experience of the people whom we know tend to be the predominant victims of crime. That, after all, is what the bill is mainly about”.

355. During his consultation, Lord Bracadale noted that some respondents said that there was an increasing vilification of people experiencing poverty, and referred to examples of verbal abuse, harassment and physical assaults, particularly against homeless people. He also highlighted the contrary argument was that socioeconomic status is a very difficult concept to define and not an inherent personal characteristic: an individual’s socioeconomic status is likely to change over time.

356. This last point was highlighted by the Cabinet Secretary as a reason why he had not added homelessness as a characteristic into this Bill. He said “Hate crime and the protected characteristics that we have are different to the societal or socioeconomic factors that can change over time. You and I have people who are homeless come to us regularly. We do our best to get them a house and a secure tenancy so that they can move on from that homelessness status. I cannot do that with my race or religion. It is difficult to do with a disability and so on. Socioeconomic factors will often change so they are different to the protected characteristics.”<sup>240</sup>

**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.**

## **Other issues**

### *Financial resources and the financial memorandum*

358. A focus for the Committee was whether or not the financial memorandum accounted adequately and realistically for the costs which would be required for the implementation of the Bill. Concerns were raised following a letter from the Scottish Courts and Tribunals Service (SCTS) to the Scottish Government expressing its disappointment that it had not seen the final draft of the Bill or its financial memorandum ahead of its publication and considered it had not been provided with sufficient opportunity to fully contribute. The letter stated that “If these costs are significant we are of the view that these could not be met from current budgets”.

359. The Cabinet Secretary indicated that consultation was ongoing with SCTS and that the Scottish Government were “working through its concerns about implementation”. He told us that financial memorandums often needed to be changed and it would be “kept under regular consideration”. On a broader point, he told us that budgets, such as that for the SCTS were a matter that is kept under regular consideration.

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<sup>240</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 36](#)



360. Another area which is likely to be significantly impacted by the implementation of the new legislation is policing. The Committee considered whether sufficient consultation had taken place with them as to what resources in terms of training and planning are required.

361. Calum Steele indicated that a large proportion of the concerns about the likely costs of policing and police training time had been allayed by the modifications to the Bill. He highlighted, however, that it was “inevitable” that with new legislation and the requirement to measure, record and report on it would create a “fairly hefty administrative burden on the police service”. In that regard he told us “Although the Bill is unlikely to change the approach to policing per se, in our considered view it will place very weighty costs on the police service. The financial memorandum comes nowhere close to describing that adequately”.<sup>241</sup>

362. ACC Gary Ritchie was more positive about resourcing challenges, indicating that Police Scotland would not be able to make that assessment until they knew what the final Bill looked like. “If we are talking about statutory aggravations the training could potentially be done online. If we are talking about using different terms perhaps the training would have to be more extensive” He went on “In respect of the technology and recording the costs are unknown but given that we are developing systems that will be far more flexible they might not necessarily be significant”.

363. The most important aspect ACC Ritchie told us was to increase the reporting of hate crime so a Bill “in which the offences are consolidated, which is easier to understand, such that there is public knowledge of what constitutes acceptable and unacceptable behaviour is all to be welcomed. Of course that will bring costs but the intention is to have a real impact on hate crime in this country”.<sup>242</sup>

364. Anthony McGeehan stated that the COPFS had identified their costs for training and guidance for prosecutors at £50,000 and described the approach taken in the financial memorandum as “reasonable”. He added that they would continue to monitor rates of offences that were reported to the COPFS and “Should those numbers rise significantly we will engage with the Government”.<sup>243</sup>

365. Kate Wallace of Victim Support Scotland said that the allocation of funding to provide greater training in relation to the provisions of the Bill and enhancing equalities training for police more generally could be made more explicit.

366. In response to questioning on the adequacy of the financial resources associated with the Bill, the Cabinet Secretary said that a revised Financial Memorandum is nothing unusual and that stage 2 amendments can change the nature of a Bill and increase the financial burden on both organisations and on the Government. In relation to concerns raised by the SCTS, he told us that matters were discussed regularly with the chief executive who gave a strong indication that they are being resolved well by the implementation team and the Government and he did not think there are significant issues. In respect of police training, the Cabinet Secretary

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<sup>241</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 51](#)

<sup>242</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 51](#)

<sup>243</sup> [Justice Committee Official Report 26<sup>th</sup> Meeting 2020, Tuesday 3 November 2020 col 52](#)



told us that “the vast majority of hate crime is investigated and prosecuted under statutory aggravation model so we do not see a need for particular additional training – although that did not mean no training”. He said that “As the Bill progresses and, potentially is amended, I will be keen to continue conversations with trade unions, the SPF, as well as with Police Scotland”<sup>244</sup>.

**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.**

### *Blasphemy*

368. Blasphemy is currently an offence under common law in Scotland. However, the last known reported prosecutions for blasphemy were in 1843. The law relates only to Christianity. The Bill removes the offence of blasphemy.

369. All the witnesses we took oral evidence from, including those representing faith groups, welcomed the reforms proposed in the Bill to repeal the offence of 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.**

### *Other non-legislative measures that need to be enhanced*

371. The Committee was interested to hear of a number of suggestions for additional, non-legislative measures that witnesses would like to see promoted to help address hate crime. Most witnesses spoke of the need for better education and were supportive of focussed training for police officers in relation to protected groups. Others called for the need to better support victims, outreach work to build trust within communities, the importance of hearing from those with “lived experience”, public awareness campaigns and adequate data collection as well as increased resourcing and promotion of services already in place such as third-party reporting.

372. In relation to training, Danny Boyle thought that it was important that individual police officers were given adequate training and financial support to enable them to have a comprehensive understanding of the definitions of the different statutory aggravators. Tim Hopkins believed more training for police officers around equalities would be helpful and referenced a project he had been involved in funded by the Equality and Human Rights Commission which had provided training for 70 police officers who then became experts in lesbian, gay, bisexual, transgender and intersex equality in their local area.

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<sup>244</sup> [Justice Committee Official Report 29<sup>th</sup> Meeting 2020, Tuesday 24 November 2020 col 44](#)

373. Colin Macfarlane commended the work of the LGBTI inclusive education working group and said he hoped that Government and Parliament would continue to support this kind of work. He told us “learning about identity and yourself in an education setting goes some way towards how people react to and treat those with different characteristics”<sup>245</sup>. Kevin Kane told us that understanding lived experience of hate crime is beneficial as it provides an in depth understanding of the issues that can enable policy makers to demand the right changes.

374. Many witnesses felt that support for them in relation to hate crime is inadequate. Kevin Kane told us “The majority of victims do not seek support. We need renewed discussion on identifying and addressing the barriers to reporting access and support”<sup>246</sup>. He stressed the important role that youth work could have, describing the youth work industry as a “massive contributor to the crime prevention agenda”. He told us “We work with perpetrators and victims and are well positioned to provide targeted and holistic support to all young people”.

375. Oonagh Brown said we must look at how we ensure that we do not remove human rights from people with learning disabilities when they are harmed through unnecessary adult support, protection and guardianship. She emphasised the importance of asking people with learning disabilities who have experienced hate crime about the support that they need and that their evidence is taken seriously and valued. She added “We want the consistent use of the appropriate adult system where appropriate to be looked at, we also want advocacy to be examined. We need adequate data collection so that people with learning disabilities do not remain invisible in those discussions and funding for police awareness and training on learning and intellectual disabilities”.<sup>247</sup>

376. Dr Galbraith called for the formation of advocacy groups who could provide support for victims through the reporting process to prosecution. She said “We advocate the inclusion in the bill of a duty on ministers to promote the reporting of hate crimes. Such promotion could include the formulation of strategies to address specific areas of the hate crime reporting system such as the provision of support, where improvement is needed”.<sup>248</sup>

377. The issue of trust between the BAME community and the criminal justice system was raised by Amy Allard-Dunbar. She said “A way to better support victims would be to set up a community support and engagement network to act as a consultation space. People could go there to seek guidance and support. The network could run primarily on the basis of a restorative justice approach and function as an educator for perpetrators on the harm their crime has caused”.<sup>249</sup>

378. Paul Dutton supported resourcing for psychological support for victims. He told us that “People who experience high levels of distress can reduce psychosocial

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<sup>245</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 12](#)

<sup>246</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 13](#)

<sup>247</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 26](#)

<sup>248</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 44](#)

<sup>249</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 45](#)

functioning. Rather than thinking of these as medical or disability issues we need to take the social and psychological sides into account”.<sup>250</sup>

379. Witnesses also spoke of existing services, such as third party reporting run by the police which enable people who have experienced hate crime to come to the service, receive support and have the option of that organisation reporting the crime to the police. Kevin Kane described the provision as “patchy” and indicated that there were issues around people understanding that the service is available. His view was shared by Colin Macfarlane, who told us that third party reporting services were under-resourced but “crucial” for the LGBT community. He stated that “There are LGBT people will not report their experience of hate crime because they fear doing so might out them. Third party reporting provides a way by which LGBT victims of hate crime can report without potentially outing themselves to the wider community. It is crucial that it is properly resourced”<sup>251</sup>.

380. Tim Hopkins told us that public awareness campaigns such as an advert at a bus stop or targeted adverts showing that there is no place for hate crime in Scotland encourage people to feel that they can report hate crime. He also stressed how important it is to the police. He told us that people find the prosecution stage less satisfactory, highlighting a lack of communication and information. Ensuring the fiscal’s office and the courts communicated better about the process than they currently do would be welcomed.<sup>252</sup>

381. The Equality Network, Victim Support Scotland and BEMIS called for “a legal requirement to be integrated into the Bill that places a duty on the Scottish Government, Police Scotland and any other relevant duty bearers to develop a bespoke system of hate crime data collection and disaggregation across all characteristics covered by the Bill”. Adam Stachura echoed this, stating “As with everything there is an absolute need to have far better data collection.”

382. Oonagh Brown agreed with this, saying “We called for a duty on public bodies to record disaggregated disability data on hate crime. We believe that such information can be self-declared by individuals. We believe it is important because people with learning disabilities experience hate crime. Without separate identification people with learning disabilities might not recognise the bill as helpful to them and would not report crimes. Without that duty the invisibility in published statistics will impede the evidencing and appropriate implementation of policy measures to ensure justice for that group”.<sup>253</sup>

383. Isobel Ingham-Barrow offered a wide range of suggestions, including anonymity clauses which she believed would help victims come forward to report their experiences; recording islamophobia as a separate category of hate crime by the police; police engagement with local communities, increasing diversity in the force; encouraging political maturity by political representatives, not using divisive language in statements; school curriculums developing a sense of shared history and

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<sup>250</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 70](#)

<sup>251</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 28](#)

<sup>252</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 28](#)

<sup>253</sup> [Justice Committee Official Report 28<sup>th</sup> Meeting 2020, Tuesday 17 November 2020 col 17](#)

highlighting the contributions of different minority groups; recognising the challenges that Muslim and other minority communities face as well as their contribution to society and developing policies with bullying in schools and how to deal with bullying that is motivated by issues around race and religion.

384. In supplementary evidence, the Church of Scotland provided examples of work that it has undertaken to tackle hate speech, to deliver anti-sectarianism initiatives, to overcome violence against women, and to promote intercultural dialogue and refugee integration. These included focussed workshops and youth work training sessions (Outside In) which trained 120 youth workers in transformative methods in responding to hate speech, engaging with and studying recommendations of the Scottish Government's working group on sectarianism to inform policy, building coalition with Side by Side Scotland, a faith based gender justice initiative to promote gender equality, engaging in the 16 days of activism against violence against women campaign and interfaith and refugee integration initiatives.<sup>254</sup>

**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.**

**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.**

**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.**

## **General principles**

388. The Committee notes the strongly held views that have been expressed in relation to this Bill, particularly as regards the stirring up offences. We welcome the changes that the Cabinet Secretary has signalled he will make to this part of the Bill.

389. However, as our report makes clear, the Committee believes that further changes and greater clarity are still necessary, for example, to the understanding of what is meant by "abusive" in the Bill, to the provisions on freedom of expression, and to the reasonableness defence.

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<sup>254</sup> [Church of Scotland, supplementary written submission](#)

**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.**

## **Annex**

The Committee received a significant amount of written evidence from organisations and individuals during the course of its Stage 1 inquiry. Submissions which have been accepted as written evidence by the Committee have been published [online](#):

Minutes and the Official Reports from the relevant Committee meetings where oral evidence was taken can also be found [online](#) for:

- 6 October 2020
- 27 October 2020
- 3 November 2020
- 10 November 2020
- 17 November 2020
- 24 November 2020