

## JUSTICE COMMITTEE

### HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

#### SUBMISSION FROM THE SCOTTISH COUNCIL OF JEWISH COMMUNITIES

The Scottish Council of Jewish Communities (SCoJeC) is the representative body of all the Jewish communities in Scotland. SCoJeC advances public understanding about the Jewish religion, culture and community, by providing information and assistance to educational, health, and welfare organisations, representing the Jewish community in Scotland to Government and other statutory and official bodies, and liaising with Ministers, MSPs, Churches, Trades Unions, and others on matters affecting the Jewish community. SCoJeC also provides a support network for the smaller communities and for individuals and families who live outwith any Jewish community or are not connected with any Jewish communities, and assists organisations within the Scottish Jewish community to comply with various regulatory requirements. SCoJeC also promotes dialogue and understanding between the Jewish community and other communities in Scotland, and works in partnership with other organisations and stakeholders to promote equality, good relations, and understanding among community groups.

In preparing this response we have consulted widely among members of the Scottish Jewish community, and this response reflects the views of all branches of Judaism that have communities in Scotland.

**1. Do you think there is a need for this Bill and, if so, why? Are there alternatives to this legislation that would be effective, such as non-legislative measures, wider reforms to police or criminal justice procedures?**

Hatred and discrimination are, sadly, everyday issues for many people in Scotland. It is known that hate crime of all kinds is under-reported, in some cases because people fear they will not be believed, in others because they do not think that the police will follow up reports (unfortunately often because of previous negative experience), because victims fear further persecution if it becomes known that they have reported the attacker to the police, because incidents have become so frequent that they feel reporting would take up too much of their time, or even because incidents are so 'routine' that some people have come to regard them as part of 'normal' life. As a result, published statistics do not accurately reflect the experience of people from minority communities in Scotland.

Hate incidents do not need to take place every day for them to be an everyday issue. Their impact on individuals and communities is long-lasting, and extends well beyond any individual incident affecting others who share the same protected characteristic.

As the then Association of Chief Police Officers stated in their *Hate Crime Guidance Manual 2010*, "Whilst all crime can increase the fear of being targeted in people other than the victim, fear of hate crime escalates dramatically in those who share with an immediate victim, the same group identity that has made a victim a target."

Enabling people to feel safe, and reducing their fear of becoming the next victim of a hate incident, is at least as important as Police Scotland's objective of "Keeping People Safe", and hate crime legislation is, therefore, important not only in terms of prosecution and punishment, but also serves the demonstrative purpose of enabling society to signal its abhorrence of prejudice and hatred against identifiable groups. We support the Bill for this reason as well as because it consolidates hate crime legislation thus making it more comprehensible, and also provides everyone with equal protection before the law.

Although important, legislation and improved security can, however, only provide a partial solution, and we also emphasise the importance of educational initiatives, including interfaith and inter-communal activities, to demystify 'the other', and promote the development of good relations between communities, thus enabling people to appreciate the lives and fears of Scotland's diverse communities.

**1a. Are there other provisions you would have liked to have seen in the Bill or other improvements that should have been made to the law on hate crime**

**(a)** We would appreciate clarification on what will be covered by "association" with a protected characteristic. Although several examples are provided in the Policy Memorandum, such as when "a white person is assaulted because they socialise with a person of a different race"<sup>1</sup> "a parent is targeted because they are with their disabled child"<sup>2</sup>, and "2, these do not go far enough. "Association" should not only include socialising but also cases in which an attacker perceives that his or her victim is in any way associated with the target group. That would, for example, include the victimisation of a relation, friend, or schoolmate of a disabled person on account of that association, regardless of whether the disabled person is present at that time, and of a person whose relation or friend has married someone with a protected characteristic, even if they have never met, as is in fact the case under the Equality Act 2010.

**(b)** We are disappointed that the opportunity has not been taken to provide equal protection for all protected characteristics. We regret that SS.3.1 and 5.1 refer to "insulting" conduct, but SS.3.2 and 5.2 do not. One consequence of that is that Sikhs and Jews will be protected under the *Mandla* ruling<sup>3</sup>, but other religions will not. There is a simple solution, to add "insulting" to 3.2 and 5.2.

**(c)** UK legislation on "Online Harms" is much delayed, following the publication of a White Paper. It was recently reported<sup>4</sup> that Lord Puttnam, chair of the Lords Democracy and Digital Committee, said that the Bill may not come into effect until 2023 or 2024. If that is correct, then the opportunity should be taken to introduce such legislation in Scotland far sooner. The importance of this has been underlined

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<sup>1</sup> Policy Memorandum paragraph 89

<https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/policy-memorandum-hate-crime-and-public-order-scotland-bill.pdf>

<sup>2</sup> *ibid.* paragraph 91

<sup>3</sup> *Mandla v Dowell Lee* [1983] 2 AC 548 HL

[http://www.hrcr.org/safrica/equality/Mandla\\_DowellLee.htm](http://www.hrcr.org/safrica/equality/Mandla_DowellLee.htm)

<sup>4</sup> <https://www.bbc.com/news/uk-politics-53261907>

by a series of reports from the Community Security Trust, which is funded by the UK Government to monitor and advise on antisemitism. The most recent of these, *Hate Fuel: the hidden online world fuelling far right terror*<sup>5</sup>, reports on matters so extreme that they “decided it would be irresponsible to publish it in full”.

**(d)** We are concerned that some victims may be further targeted if it becomes known that they have reported their attacker to the police. Indeed, in some cases, victims may not report incidents for precisely this reason. As stated in the Bracadale Report<sup>6</sup>, “*hate crimes are likely to cause harm which is additional to the harm caused by the underlying offence*”, and to minimise this risk, we urge that the Bill should also include a duty for police and prosecuting authorities always to consider whether it would be appropriate to implement an anonymity order, reporting restrictions, and/or special measures in order to protect the victim, and his or her family.

**(e)** Monitoring is of vital importance in order accurately to assess progress towards building “the inclusive and equal society that Scotland aspires to ... [making] it clear to victims, perpetrators, and communities and to wider society that offences motivated by prejudice will be treated more seriously and will not be tolerated by society.”<sup>7</sup> Reliable and accurate data is a prerequisite for effective monitoring, and we therefore urge that the Bill should include a duty to develop an effective and accurate system for recording hate crime and hate incidents that, amongst other things, disaggregates racist and religious hatred, and also further disaggregates ethnicity and religions so that, for example, hate crimes perpetrated by an individual from one minority community against a victim in another minority community are visible in the statistics.

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

There is a strong case for simplifying and consolidating all relevant legislation, including regarding sentencing, because there is too often a feeling that although there is a consensus in society that some conduct is wrong, it is not clear under what label to prosecute. We therefore strongly agree with the consolidation of the patchwork of existing hate crime laws into a single piece of legislation. Consolidated legislation and general definitions will also help ensure uniformity across the protected characteristics – for example with regard to harassment – and help avoid any one group feeling either ignored or targeted or the creation of a “hierarchy of inequality”. Unfortunately under the Bill as proposed, there would remain such a hierarchy for the reason explained in the previous answer.

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<sup>5</sup> *Hate Fuel: the hidden online world fuelling far right terror*, Community Security Trust (2020) – only a summary of the report has been made publicly available due to the extreme nature of the content <https://cst.org.uk/news/blog/2020/06/11/hate-fuel-the-hidden-online-world-fuelling-far-right-terror>

<sup>6</sup> *Independent Review of Hate Crime Legislation in Scotland* (May 2018) paragraph 2.16 <https://www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2018/05/independent-review-hate-crime-legislation-scotland-final-report/documents/00535892-pdf/00535892-pdf/govscot%3Adocument/00535892.pdf>

<sup>7</sup> Policy Memorandum paragraph 8

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

**(a)** The statutory aggravation is an effective means by which to indicate the increased gravity of an offence motivated by hatred. This sends a strong message that society at large will not tolerate certain kinds of behaviour, provides reassurance to victims and those who share relevant protected characteristics, and sends a strong message to perpetrators that hate crime will be severely dealt with.

There is, however, one drawback to the statutory aggravation model, namely that there has to be an established offence before the question of whether it is aggravated by hate can even come into play. That does not always work because so much that happens by way of open racism and other hatreds is done in ways that fall short of criminality. For example, when a pig's head was dumped on a woman's lawn in Aberdeen, pork pies left with a blue pencil note at Dundee Synagogue, and a passenger made the gesture of firing a gun at a pedestrian from a passing car, it is not certain that any offence was committed. These would all have been recorded by the police as "hate incidents", rather than "hate crimes". But the motivation and effect are the same, and indeed the cumulative effect of such "incidents" without action being taken can be devastating both for individuals and communities.

We recognise the possibility of prosecuting such generic aggression as Breach of the Peace, for want of anything better, but as one communal leader remarked, "that 'for want of anything better', is surely why it ought to be possible to prosecute hateful behaviour as a crime in its own right".

We have experience of a prosecution for "racially aggravated conduct", and we would urge that proposed legislation should make this option available for incidents such as those we have described above. Even relatively trivial actions have foreseeable serious effects, and, given the general legal principle about "taking your victim as you find him", legislation needs to protect, for example, the traumatised victim of a hate crime who, in revenge for the original perpetrator being convicted, is subsequently subjected to low level but regular harassment by the perpetrator's associates. (It should be noted that some such situations could be avoided by the introduction of a duty to consider the implementation of an anonymity order, reporting restrictions, and/or special measures, as we have suggested in 1a(d) above.)<sup>8</sup>

**(b)** It is important that all groups in society are able to feel safe as they go about their daily business, so, in order to prevent a hierarchy of (in)equality, all protected characteristics should be equally protected by the use of statutory aggravations rather than by creating a new patchwork of standalone offences for hate crimes against particular groups.

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<sup>8</sup> St Andrews Student Convicted for Racially Aggravated Attack on Jewish Student  
[https://www.scojec.org/news/2011/11viii\\_st\\_andrews/st\\_andrews.html](https://www.scojec.org/news/2011/11viii_st_andrews/st_andrews.html)

Since, however, changes in societal attitudes will affect those characteristics regarded as deserving of protection, we do not agree that they should be listed in the primary legislation, as it would be preferable for the legislation to define the aggravation in completely general terms as malice against any identifiable group. If for some reason that is not possible, then we strongly urge that they should be listed in a separate Schedule or Statutory Instrument so that the list can be amended by a much simpler and less cumbersome procedure by statutory instrument.

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

As we have already suggested, amending the Bill by the removal of lists that specify protected characteristics and identifying aggravation in completely general terms, would facilitate its use to outlaw and prosecute malice against any identifiable group including on grounds of age.

There may be merit in the introduction of a statutory aggravation relating to exploitation of a victim's vulnerability, but, as we have already stated, hate crime is targeted against an individual on account of their belonging, or perceived belonging to or association with, a particular group. The introduction of a statutory aggravation relating to personal vulnerability is a completely separate issue which does not relate to sharing a group identity, and should be considered separately from hate crime legislation, i.e. not as part of this Bill. It should also be noted that the definition of personal vulnerability has proved difficult in relation to previous legislation. For example, the Protection of Vulnerable Groups (Scotland) Act 2007 refers to "protected" rather than "vulnerable" individuals as a result of representations made by people who might otherwise have been regarded as being vulnerable to exploitation or abuse, and similarly defines relevant situations and contexts rather than personal attributes that might result in increased vulnerability.

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

All groups in society, including those from any faith who are targeted on sectarian grounds, should be equally protected under the law. As generally understood, "sectarianism" refers to friction between different Christian groups, and not, for example, between Shiites and Sunnis; we therefore have a concern that singling out "sectarianism", an intra-Christian problem, is itself discriminatory, and urge that legislation should speak of religious hatred in general terms.

As we have already stated, our preference would be to remove lists, which by definition limit protection to those groups specified, from the face of the Bill. The Bill should then be amended to describe all offences and aggravations in completely general terms. Alternatively, although this is not our preference, a list of protected

characteristics could be specified by Statutory Instrument, which can be more simply amended than the primary legislation.

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

We agree with Lord Bracadale that “stirring up hatred has the potential to contribute to a social atmosphere in which prejudice and discrimination are accepted as normal”<sup>9</sup>, and that its introduction has “an educative function” and “communicates to the groups with protected characteristics, and to society in general, that the law has taken steps to protect those with a protected characteristic from hatred.”<sup>10</sup> We therefore strongly support both the introduction of this new offence and its application across all protected characteristics.

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

We agree with the retention of “insulting” behaviour as an offence in relation to both stirring up of hatred and the possession of inflammatory material, but are unclear why it should only apply in relation to “race, colour, nationality (including citizenship), or ethnic or national origins” (SS. 3.1 and 5.1) and not to the other characteristics (SS. 3.2 and 5.2). There should not be any hierarchy of equality, and all people in society should have the right to be and to feel safe as they go about their daily lives. We therefore urge that the relevant sections of Part 2 should be amended to extend this provision to all protected characteristics.

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

As recognised by the European Convention of Human Rights, freedom of expression is not an absolute right but must be qualified “as necessary in a democratic society” for, amongst other things, “the protection of the reputation or rights of others”. Proportionality is the key, and legislation should give guidance on how to achieve a proportionate balance. There is a clear distinction between rational and robust argument and criticism, and rabble-rousing. Context, demeanour, vocabulary, and previous conduct all contribute to making that judgement. We are strongly of the opinion that the offence of stirring up hatred need not criminalise or even stifle rational discussion or humour.

We are, however, concerned that it has been thought necessary to include specific exceptions to the offence for just two protected characteristics, religion and sexual orientation, and do not consider it sufficient justification that “Lord Bracadale did not make any recommendation in his report on this matter, and that consultation

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<sup>9</sup> *Independent Review of Hate Crime Legislation in Scotland* (May 2018) paragraph 5.11

<sup>10</sup> *ibid.* paragraph 5.13

respondents' concerns about the impact of the offence on freedom of expression related specifically to religion and sexual orientation."<sup>11</sup>

The excepted activities may be carried out in a way that does or does not become threatening or abusive. For example proselytising may lie anywhere on a continuum from simply active promotion of the favoured religion to abusive denigration of a person's current religion, faith, or belief, couched in terms that could stir up hatred against its adherents. Similarly, the "urging of persons to refrain from or modify sexual conduct or practices" could be conducted in ways that range from rational debate to threatening and abusive diatribe. In addition, it appears particularly irrational for some behaviours relating to sexual orientation to be excepted while the same type of activities relating to transgender are not. And once again Sikhism and Judaism would remain protected as "racial groups" despite this exception, while other religions would not. We therefore recommend that sections 11 and 12 of Part 2 should be replaced by a general provision excepting robust but non-abusive, non-threatening, and non-insulting discussion, criticism, and opinion of the protected characteristics.

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

The Policy Memorandum recognises<sup>12</sup> that repeal would "contribute towards the overarching aim of new hate crime legislation, which is to consolidate and simplify hate crime legislation and avoid having different thresholds and tests for offences or aggravations relating to different characteristics" and "create consistency in the law by removing the standalone offence that exists only for racially motivated crimes.[Because] there is no equivalent to the section 50A offence in relation to any other characteristic within hate crime law and, as noted above, if left in force it could be perceived as creating a hierarchy of characteristics." We are, therefore, at a loss to understand the justification that "as the Bill is not introducing equivalent offences in relation to the other characteristics the Scottish Government has taken the decision not to consolidate [Section 50A]."<sup>13</sup>

As we have already stated, all groups in society should be equally protected against hate crime. The retention of Section 50A perpetuates a hierarchy of equalities including that Sikhs and Jews would continue to be protected but other faiths would remain outwith the scope of this protection.<sup>14</sup> We therefore urge that Section 50A should be repealed but that an equivalent offence covering all protected characteristics should be incorporated into the Bill.

(Note that there is internal precedent for this since the "new offences relating to stirring up hatred ... will apply in relation to all listed characteristics ... [whereas]

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<sup>11</sup> Policy Memorandum paragraph 192

<sup>12</sup> *ibid.* paragraphs 266-267

<sup>13</sup> *ibid.* paragraph 281

<sup>14</sup> see *Mandla v Dowell Lee* [1983] 2 AC 548 HL (footnote 3 above)

existing offences, which these new offences largely replace, apply only in relation to race".<sup>15)</sup>

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

We are content with the abolition of the offence of blasphemy.

The Scottish Council of Jewish Communities  
22 July 2020

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<sup>15</sup> Policy Memorandum paragraphs 5 and 287