JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM THE CHRISTIAN INSTITUTE

The Christian Institute has serious concerns about Part 2 of the Bill. The Bill would be better without it. It is not clear what behaviour the Scottish Government is seeking to criminalise that both a) deserves it and b) is not already covered by other laws.

The existing stirring up hatred offence in Scotland only applies to race. The proposed new grounds include religion, sexual orientation and transgender identity. These involve debatable matters of belief, practice and morality in a way that race does not. There must be freedom to disagree on and debate such issues without the threat of censure through the criminal law. The stirring up hatred offence under section 3 and the inflammatory material offence under section 5 jeopardise free speech for the following reasons:

## 1. No requirement for intention to stir up hatred

As drafted, both offences can be committed where hatred is deemed "likely" to be stirred up against a group. The perpetrator would not have to intend to stir up hatred, *or even be aware that it could happen*. On controversial issues like religion, sexual orientation and transgender identity, which are hotly debated all the time, this is very dangerous. In the course of debate, people often falsely accuse political opponents of 'stirring up hatred' by expressing opinions they do not like. The accusation is frequently made simply because it is viewed as a means of marginalising, or silencing, the opinion.

There is also no definition of hatred in the offence. It is, of course, a very subjective concept. What one person considers to be mere disapproval may be characterised by another as hatred. This makes it very difficult to determine the kind of hatred which ought to be caught by a criminal offence. It is also very difficult to assess whether hatred exists, or is likely to exist, in the heart of another person. Yet the offence requires police, prosecutors and courts to pronounce on that very fact.

The wording of the Bill must be amended to reduce the risk of these offences becoming a tool for activists and vexatious complainants that would be at best a waste of time for police and Procurators Fiscal, and at worst a cause of numerous miscarriages of justice. Therefore, in our view, for religion, sexual orientation and transgender identity, only behaviour or material intended to stir up hatred should fall within the offence. This is the appropriate level of *mens rea* for such a serious offence. This would help to protect free speech in these areas while still allowing the deliberate stirring up of hatred to be caught by the offence. If someone is to be charged with stirring up hatred on contested grounds like religion, sexual orientation and transgender identity, it must be a requirement to prove that they were doing so deliberately. Simply assessing the likelihood of hatred being stirred up without considering the accused's awareness or intent means someone could be convicted of a serious crime for words communicated in an academic or artistic context, or in the context of a debate. The artist, academic or debater might be left having to rely on the 'reasonableness' defence in court, unsure whether they can convince a judge

that they fall within it. Rather than being blameworthy, some people may not realise their words could be construed as stirring up hatred because they lack imagination or social awareness. Or they may be seeking to provoke people to think by stating views in strong terms. The ability to do this is essential in a democracy. Parallel religion and sexual orientation offences in England and Wales require proof of intention.[i]

## 2. No requirement to understand the nature of the behaviour

Additionally, there is no requirement in the Bill for an individual even to be aware that their words or behaviour could be understood as "abusive" (we address the problems with using the vague term "abusive" in point 3 below). The result is that the offence can be committed completely unwittingly.

The existing stirring up hatred offence, covering race, includes the following provision:

> "A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting." (Public Order Act 1986, Section 18(5)).

This ensures that any perpetrator who did not intend to stir up hatred did at least realise that his words *might* be threatening, abusive or insulting. It means an offence cannot be committed without at least some level of *mens rea*. Every stirring up hatred offence in the UK requires either intention to stir up hatred or at least an awareness of how the behaviour could be understood.[ii] By omitting a similar clause, the Bill seems to be lowering the threshold for the existing racial offence, as well as creating a low threshold for the new grounds covered.

'Reasonableness' defences like those in sections 3(4) and 5(4) are not appropriate substitutes for a *mens rea* requirement. Sections 3(4) and 5(4) only protect objectively reasonable behaviour, not those who subjectively believe they are acting reasonably but actually are not.

This is a fundamental issue. Establishing the mental culpability of an alleged perpetrator for the offence they stand accused of is a crucial part of criminal justice. Absolute or strict liability offences are usually kept for matter-of-fact breaches where it is clear that a crime occurred, such as speeding. They are wholly inappropriate for criminal offences that a) include a high level of subjectivity and b) carry such a serious, life-altering potential sentence. Being convicted of a hate crime would also cause immense reputational damage.

We note that Lord Bracadale's report was silent on this particular point. Therefore it seems reasonable to assume that, when he referred to extending the offence to the other grounds, he expected that the section 18(5) defence would be extended too.

## 3. The term "abusive" is dangerously vague

Many dictionaries describe abusive using terms like "insulting", "rude" or "offensive". This level of subjectivity makes it a very dangerous word to use when defining an

offence of this kind, especially given the absence of a *mens rea* requirement (see above). In particular, religion, sexual orientation and transgender identity are matters that are frequently the subject of public debate. Robust discussion of religious and ethical issues is crucial to a free society. This will be damaged if language that is deemed merely insulting or offensive is outlawed. Therefore any offences covering these areas of discussion should capture threatening behaviour only.

We recognise that threatening and abusive behaviour is already covered by section 38 of the Criminal Justice and Licensing Act (Scotland) 2010 ("CJLSA"). This has been used to justify the use of "abusive" in the stirring up hatred offence, on the basis that the term is used and understood within the criminal justice system. However, there are fundamental differences in how the section 38 offence and the stirring up hatred offences are constructed. Under section 38 of the CJLSA, the threatening or abusive behaviour must "be likely to cause a reasonable person to suffer fear or alarm" [emphasis added]. This incorporates a degree of objectivity. The offender would also have to at least be reckless as to whether fear or alarm would be caused – a higher threshold that requires more mental culpability than a test of fear or alarm simply being likely. Furthermore, fear or alarm are quite different concepts to hatred. It is more straightforward to assess whether a victim has suffered, or might suffer, fear or alarm, than to determine whether a (perhaps unidentified) third party has had, or might have, hatred stirred up in his heart (see point 1 above). In any event, despite these safeguards, we are aware that section 38 has occasionally been used against Christian street preachers for mild conduct that should never have been considered for prosecution.[iii] There have been no convictions in such cases, but they create a chilling effect on free speech – something that the stirring up hatred offence would increase enormously.

The existence of section 38 also demonstrates that there is no need for the new stirring up offences. There is already significant criminal law in this area. If the Scottish Government is going to press ahead with this legislation, it must identify precisely the kinds of behaviour it intends to be captured by the new offences that are not caught by existing offences. If it deliberately intends there to be an overlap between these offences and existing offences, it must precisely delineate what that overlap is and why it is justified.

At its lowest threshold, section 38 captures someone who, being reckless as to whether their behaviour will cause fear or alarm, behaves in an abusive manner likely to cause a reasonable person to be fearful or alarmed. No fear or alarm need actually be caused. The reach of this offence is extensive, and yet the Scottish Government wants to go further without making the case for doing so.

### 4. Free speech protections are inadequate

It is very surprising that no free speech clause has been included covering transgender identity. In recent years this has been a high-profile and hotly debated issue. Accusations of transphobia are readily made against anodyne statements that would have been accepted just a short time ago, such as that a biological man is not a woman.[iv] Thames Valley Police even announced that stickers containing the dictionary definition of the word 'female' could lead to prosecution for a public order offence.[v] Significant public figures have been called transphobic for calmly stating their belief in the reality and importance of biological sex.[vi] This being the case, it is

not hard to imagine any new stirring up hatred offence covering transgender identity being used by activists to try to shut down debate and silence those who disagree. It is therefore essential that the Bill includes robust free speech protection on transgender identity to prevent this. Such a clause would be entirely consistent with Lord Bracadale's report. He rightly commented that the "potential risk to freedom of expression from the introduction of stirring up hatred offences is well recognised" and said that the right to free speech "protects expression which shocks, offends and disturbs other people".[vii]

The freedom of expression clause on religion (section 11) must be strengthened. It draws on the previous section 7 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 ("OBFA"), but has been significantly watered down. Lord Bracadale's recommendation was that the free speech protections should be "similar" to the OBFA clause, but section 11 is merely a shadow. OBFA's safeguard included a crucial additional limb protecting "expressions of antipathy, dislike, ridicule, insult or abuse" towards "religions or the beliefs or practices of adherents of religions". This mirrored the equivalent clause in section 29J of the Public Order Act 1986. This level of protection gives confidence that people can engage in robust debate around religious matters. The current draft of section 11, protecting merely criticism and discussion, is too academic for practical purposes and it is not clear it protects speech that "shocks, offends and disturbs other people". "Religion" was also defined in section 7 of OBFA to include "other belief systems", meaning that criticism of atheism, for example, was protected. This is missing from section 11, despite section 14 making it clear that, in terms of the protection offered by the offence, a person's lack of religious belief is covered. So on the face of it, there is a disparity in the Bill – atheists are protected by the offences just like religious people, but critics of atheism do not have the benefit of the free speech clause that critics of religion do.

Section 12 is the equivalent free speech clause on sexual orientation. As Lord Bracadale recommended, it appears to be based on section 29JA of the Public Order Act 1986. However, the major omission is a specific reference to views about marriage, which section 29JA includes: "any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred". Section 12 should be strengthened with the inclusion of this point.

### 5. No protection for behaviour in the privacy of a home

This is another major omission from the current racial hatred law. It should be included across the grounds.

Section 18 of the Public Order Act 1986 states:

> "(2) 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.
> …
> (4) 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."

These provisions prevent the offence being committed completely in the privacy of a home, or where someone justifiably believes that they are in the privacy of a home. Not including them in the Bill means this offence extends into the private realm to a disturbing degree. 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.

Lord Bracadale's report was silent on the dwelling defence, suggesting that he anticipated it would remain as part of the extended offence. Every UK stirring up hatred offence includes a provision creating a dwelling defence.[viii]

The Christian Institute
24 July 2020

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[i] See Section 29B(1) of the Public Order Act 1986

[ii] In addition to Section 18(5) of the Public Order Act 1986, see Section 29B(1) of the 1986 Act and Article 9(4) of The Public Order (Northern Ireland) Order 1987

[iii] *Telegraph online*, 5 February 2017, see https://www.telegraph.co.uk/news/2017/02/05/preacher-locked-hate-crime-quoting-bible-gay-teenager/ as at 23 July 2020

[iv] *Telegraph online*, 22 December 2019, see https://www.telegraph.co.uk/news/2019/12/22/transgender-woman-accused-hate-speech-wearing-t-shirt-stating/ as at 23 July 2020

[v] *Telegraph online,* 14 October 2019, see https://www.telegraph.co.uk/news/2019/10/14/police-response-transphobic-stickers-branded-extraordinary/ as at 23 July 2020

[vi] *BBC News online*, 11 June 2020, see https://www.bbc.co.uk/news/uk-53002557 as at 23 July 2020

[vii] Independent Review of Hate Crime Legislation in Scotland: Final Report, *Scottish Government*, May 2018, paras 5.17 and 5.22

[viii] In addition to section 18(4) of the Public Order Act 1986, see Section 29B(2) and (4) of the 1986 Act and Article 9(2) to (3) of The Public Order (Northern Ireland) Order 1987