

## **JUSTICE COMMITTEE**

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

#### **SUBMISSION FROM A FORCE FOR GOOD**

##### **WHO WE ARE**

A Force For Good is a pro-British Union campaigning organisation. It was established on 21 March 2012.

This submission has been written by A Force For Good Director, Alistair McConnachie, who has a degree in Scots Law from Strathclyde University.

Throughout this document, emboldened words represent are our own **emphases**.

##### **WHY WE CARE**

We comment and campaign regularly on a wide range of issues related to our primary concern – keeping the United Kingdom together. For example, this includes campaigning recently to defend the Henry Dundas statue in St Andrew Square, Edinburgh and to defend him against the accusations levelled by the Black Lives Matter (BLM) movement.

These activities are thematically consistent with our position on the Union, which includes careful attention to, and respect towards, our British history.

We believe there are people who disagree with our position on such matters, and who could try to use this law, which is under discussion, to make a spurious complaint about anything we say from our broad range of platforms, whether on the street, in our campaigning materials, in our hard copy literature, or online on social media or in our videos.

##### **SUMMARY OF OUR POSITION**

We disapprove of 'Hate' laws. They are intended to constrain the limits of debate on certain controversial issues. They represent a political concept for the purpose of social engineering, rather than a legal concept.

We disapprove of the notion of 'listed, or protected, characteristics' among people.

We believe that freedom of expression is a fundamental human right which involves speaking controversially, disagreeing with the mainstream, and includes the right to offend.

We also understand that speech should be tempered where necessary to avoid giving unnecessary offence, and we should always try to avoid causing hurt.

However, that should not prohibit the right to give expression to views which others will disagree with, or find challenging, or controversial, or indeed which they may find offensive, or which in a subjective manner they may find 'threatening' or 'abusive' or 'insulting'.

We believe the proposed legislation will threaten freedom of expression and will tend to prevent individuals and organisations from expressing or sharing or supporting such views.

However, in the knowledge that the Bill will likely go ahead in some form, we make the following recommendations.

## **OUR RECOMMENDATIONS**

- 1.** The concept of 'aggravated' offences – a 'Statutory Hierarchy of Wickedness' – should be abolished. Therefore, Part 1 should be removed from the Bill in its entirety.
- 2.** The concept of 'likely to stir up hatred' should be removed from the Bill since it contradicts the age-old Scots Law principle of *mens rea* – the guilty mind.
- 3.** Part 3, Sec 9 relating to the prosecution of all 'responsible individuals' in an organisation because of the behaviour of one of them, should be removed in its entirety. It smacks too much of a political attempt by the Holyrood administration to shut down organisations which it opposes politically.
- 4.** There should be a fail-safe Freedom of Expression Clause which should follow our 6-paragraph recommendation in this Submission.

**We examine each of these Recommendations in detail below.**

While reading our Submission, it is important to remember that the crime in the Bill is the 'stirring up of hatred' or the 'likely stirring up of hatred'. It is not the alleged threatening, abusive or insulting words, *per se*. This is perhaps something that many people don't grasp, including those who make the complaints.

**RECOMMENDATION NUMBER 1: THE IDEA of AGGRAVATED CRIMES which ESTABLISH 'a Statutory Hierarchy of Wickedness' is a POLITICAL CONCEPT and should have NO PLACE in the BILL**

The Scottish Parliament website which highlights this Bill states:

Crimes motivated by prejudice **will be treated more seriously** and will not be tolerated by society. The Bill has been created to make this clear to victims, those who commit hate crimes, and the wider society.

<https://beta.parliament.scot/bills/hate-crime-and-public-order-scotland-bill>

This concept of 'aggravation' – which enabled a harsher sentence for those convicted of crimes motivated by prejudice – was introduced for racial and religious incidents by the Crime and Disorder Act 1998 (Sec 28-32 for England and Wales, and Secs 33 and 96 for Scotland). At the time, there was considerable opposition to this approach.

It suggests that a perpetrator, where everything else is equal, is somehow less culpable – less deserving of blame – if he attacked someone because of sheer badness, rather than if he did so while harbouring a particular prejudice against the person who was a member of one of these 'protected characteristic' groups.

The idea that a crime is made worse – and should 'be treated more seriously' – than another identical crime, because of the motivation of the perpetrator is a concept which can only be explained politically.

The idea that hate directed at some people, where everything else is equal, is worse than hate directed at other people, can only be explained politically.

The political aim is to drive out what is perceived to be a particular prejudice from society.

For example, an editorial prior to the 1998 Act in *The Times* called it "more politically correct than politically astute" and stated:

The figure of Justice is blindfold for a reason. Using the criminal justice system to make symbolic genuflection to political causes, however noble, only undermines the effective operation of the rule of law and fetters proper judicial discretion. Punishment should not depend on creating **a statutory hierarchy of wickedness** which elevates racial prejudice over any of the other ugly impulses towards criminality with which society must deal.

**Editorial**, "Blind Justice", *The Times*, Friday 3 October 1997, p.21.

The Criminal Justice Act of 2003 (Sec 146) extended the concept of aggravation to sexual orientation (in England and Wales).

Jenny McCartney, commenting several years later, summed it up:

Take for example the case of the late David Morley, a gay bar manager who had survived the Admiral Duncan Soho pub bombing in 1999, which killed three people. That bombing was carried out by David Copeland, a 23-year-old engineer and Nazi sympathiser who had deliberately sought to murder gay men.

Five years later, Mr Morley and a friend were walking home near Waterloo in the small hours, when they encountered a four-strong group of teenage thugs who were "out to beat up tramps, druggies or just people on the street" and film the attacks on their phones. Mr Morley was a person on the street, and they beat him to death for it. There was no suggestion at the trial that they attacked him because he was gay.

**What I find extraordinary, however, is any suggestion that Mr Morley's vicious killers are somehow less culpable because they didn't attack him for his sexual orientation. Yet that is the skewed logic of the "hate crime" legislation.**

Already there are hints that disabled and elderly people will soon be included under the "tougher sentencing for hate crimes" guidelines. Perhaps after that there will be a move to include ginger-haired folk, overweight people and small-boned white men with glasses.

And perhaps, one day far in the future, we will beckon in so many plainly worthy sub-categories that we will arrive at the only position that makes any sense: that we are all equally valuable citizens under the law, deserving of the full protection of the police and justice system. That was, I think, the principle we started out with.

**Jenny McCartney**, "The new anti-hatred laws threaten to be anti-justice laws", *The Sunday Telegraph*, 11 November 2007, p.25.

In Scotland, the Offences (Aggravation by Prejudice) (Scotland) Act 2009, extended the concept of aggravation to 'prejudice relating to disability or to sexual orientation or transgender identity'.

The idea of 'aggravated' crimes is political. It is because some politicians want certain categories of people, and/or their behaviours, to be specially protected for political and ideological reasons.

We recommend that this element of the Bill is removed in its entirety.

### **EXAMINING THE IDEA of 'STIRRING UP HATRED' as a LEGAL CONCEPT**

We acknowledge that words can 'stir up hatred'.

Some people might say that the BBC is involved in 'stirring up hatred' almost every day against white British people as a consequence of its obsession with the BLM movement and its questionable theories on race, and its apparently endless complaints about British society and history.

Recent comments by the Justice Secretary, himself, in Holyrood (10 June 2020), where he went to great lengths to bemoan the number of 'white' people in positions of authority in Scotland could be said to be 'stirring up hatred' against white people.

Even though that was surely not his intention, he could potentially be convicted under this law!

That nobody appears to have reported him yet does not change the fact that someone could feel 'threatened' by his words, or find his language 'abusive' and a court could decide that such words were 'likely to stir up hatred'.

The Justice Secretary also appears to have set himself up as a subjective arbiter of such matters already.

In a Tweet he posted on 4 May 2020, he drew attention to comments on a Twitter thread, which, he stated, indicated the need for this law.

We presume he must have already pronounced several of the correspondents 'guilty as charged'!

Yet, it is important to remember that the crime is not the 'threatening', 'abusive' or 'insulting' words, *per se*.



The crime is the 'stirring up of hatred' or the 'likely stirring up of hatred'.

**We wonder the extent to which the Justice Secretary, and maybe even some courtrooms, are confused about this distinction?**

**RECOMMENDATION NUMBER 2: 'LIKELY TO STIR UP HATRED' should NOT be a LEGAL CONCEPT**

Committing a crime without having the intention to commit a crime runs contrary to the Scots Law principle of *mens rea* – having 'the guilty mind'.

The guilty mind must normally be proven in Scots and English law. Without the intention to commit the crime, the person is not normally held guilty!

Yet in this Bill, it is not necessary to show that the defendant intended to 'stir up hatred'. It is only necessary to show that it is 'likely to stir up hatred'; and even if no hatred has actually been stirred up.

This removes the element of intention and deliberately widens the scope of the offence. It makes it easier to secure a conviction.

It has no place in this Bill and we recommend its removal.

### **RECOMMENDATION NUMBER 3: REMOVE LIABILITY of 'RESPONSIBLE INDIVIDUALS'**

According to the Explanatory Notes:

Section 9 – Individual culpability where organisation commits offence

61. Section 9 makes provision for certain persons associated with different types of organisations to be held criminally liable for committing an offence under section 3 or 5, in addition to the organisation.

62. For that to happen, those persons (referred to in section 9 as "responsible individuals") must have consented to, or connived in, the organisation's commission of the offence, **or have been guilty of neglect** resulting in the organisation's committing the offence. Section 9(4) sets out a table explaining which type of person is a "responsible individual" in relation to different types of organisation listed in the table. For example, the director or secretary of a company, and a partner in a firm, are responsible individuals, so potentially have criminal liability for offences under section 3 or 5 committed by an organisation. <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime- and-public-order-scotland-bill/introduced/explanatory-notes-hate-crime-and-public-order-scotland-bill.pdf>

This is a blatant **political** attempt to extend the liability to everyone else in the company or organisation in order, deliberately, to close down the organisation. This political clause should be removed entirely from the Bill.

## **FREEDOM OF EXPRESSION: THE PROBLEM OF 'PERCEPTION' and SUBJECTIVE OPINION**

For a crime to be committed, the words used must 'stir up hatred' or be 'likely to stir up hatred'. What this means is that even if the words appear **to some people** to be 'threatening' or 'abusive' or 'insulting', it does not necessarily follow that they will lead to 'stirring up hatred' or be 'likely to stir up hatred'.

The result of the case will depend upon how these words are perceived by the complainant and the court.

This immediately sets up a conflict where a complainant 'perceives' the words to be 'threatening' or 'abusive' or 'insulting', but a court may not.

The Justice Secretary has stated:

Let me be clear – the Bill will not prevent people expressing controversial, challenging or even offensive views, as long as this is not done in a threatening or abusive way that is intended to stir up hatred or likely to stir up hatred.

**Humza Yousaf**, "Hate Crime Bill strikes right balance between respecting freedom of expression and tackling hate speech", *The Courier*, online article 19-7-20 at <https://www.thecourier.co.uk/fp/news/politics/scottish-politics/1454498/humza-yousaf-hate-crime-bill-strikes-right-balance-between-respecting-freedom-of-expression-and-tackling-hate-speech/>

Clearly, this is a hugely subjective field of opinion which comes down to a matter of opinion, which will differ from courtroom to courtroom.

For example, if someone were to say that, "There should be no more immigration from France", then a French person living in the UK may feel 'threatened' by such language and may even believe that such language is 'likely to stir up hatred'. Who is to deny his feelings? If he feels them, then they are real.

Yet, his feelings could be used to silence, or convict, people who are politically campaigning on the basis to stop immigration from France.

A woman may claim that, "I don't want men in women's toilets". Perhaps a transsexual may feel that this is 'abusive' language which may 'stir up hatred'



against transsexuals. That is a point of view which is debateable but it could go to court.

Why should that person's feelings be any more important than the woman who stated them in the first place? And why should the transsexual get the opportunity to try to silence that woman in law?

We are **not** reassured by the Justice Secretary's claim that "the Bill will not prevent people expressing controversial, challenging or even offensive views".

After all, we have already pointed out that the Justice Secretary himself could fall foul of this Bill as a consequence of his words in the Scottish Parliament on 10 June 2020, when he went to considerable length to bemoan the fact that 'white' people occupied some of the top jobs in Scotland.

The question is whether this kind of debate can, or should, be criminalised, and what will be the effects on freedom of expression.

Therefore, we need clear protections for Freedom of Expression in this Bill.

#### **RECOMMENDATION NUMBER 4: A STRONG FREEDOM of EXPRESSION CLAUSE**

We are told in the Explanatory Notes for the Bill that:

Section 3(4) provides that it is a defence to an offence under section 3(1) or (2) for the accused to show that the behaviour or the communication **was, in the particular circumstances, reasonable**. This may apply where, for example, a person communicates a threat of serious violence made by someone else for the purpose of alerting a journalist or a journalist reporting a threat of serious violence made by another person.  
<https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/explanatory-notes-hate-crime-and-public-order-scotland-bill.pdf>

That it should be 'reasonable' is a good start, but 'reasonable' on its own is far too weak.

Indeed, the example given in order to explain a 'reasonable' defence has little to do with the matter at hand. It should go without saying that such a situation should not come to court!

There are also some rather weak defences of Freedom of Expression regarding religion and sexual orientation in Part 2, Secs 11 and 12.

**Here is our Recommendation for a proper Defence Section, based upon precedents which already exist in law.**

When reading these Defences it is important to remember that 'threatening', 'abusive' or 'insulting' behaviour is not the crime in the Bill, *per se*. The crime is the 'stirring up of hatred' or the 'likely stirring up of hatred' which may follow from that behaviour.

Threatening, abusive or insulting words which do not 'stir up hatred' nor are 'likely to stir up hatred' will mean there is no crime.

The first 4 paragraphs of our recommended clause are based on Public Order Act 1986, Section 29J and Section 29JA.

1. For the avoidance of doubt, the discussion, or criticism, or portrayal, of age, or disability, or race, or colour, or nationality (including citizenship) or ethnic or national origins, or religion, or gender, shall not be taken of itself to be threatening or abusive or insulting, or intended to, or likely to, stir up hatred; and nothing in this Act shall be read or given effect in a way which prohibits expressions of antipathy, dislike, ridicule, insult or abuse of said groups.
2. For the avoidance of doubt, the discussion, or criticism, or portrayal, of sexual identity including transgender identity, or sexual orientation, or sexual conduct, or variations in sex characteristics, or sexual practices, or the urging of persons to refrain from, or modify, such conduct or practices, shall not be taken of itself to be threatening or abusive or insulting or intended to, or likely to, stir up hatred; and nothing in this Act shall be read or given effect in a way which prohibits expressions of antipathy, dislike, ridicule, insult or abuse of said groups.
3. Furthermore, for the avoidance of doubt, 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 abusive or insulting or intended to, or likely to, stir up hatred.

4. For the avoidance of doubt, nothing in this Act shall be read or given effect in a way which prohibits or restricts discussion, or criticism, or portrayal, or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

5. Furthermore, for the avoidance of doubt, it shall be a defence to appeal to the truthfulness of a view expressed, and to the good faith in which a view is held, and to the sincerely held nature of the view, and to the reasonableness of the view, and to the fair comment of the view on a matter of public interest, and to the fair comment of the view for the public benefit; in regard to the discussion, or criticism, or portrayal of any of the protected characteristics listed in this Act.

6. The separate element of truthfulness, or good faith, or sincerely held view, or reasonableness, or fair comment on a matter of public interest, or fair comment for public benefit, will each be a complete defence in itself, or these elements of defence may be taken together in any number of combinations.

**Precedents for Paragraphs 5 and 6:**

'Truthfulness' and 'Fair Comment' are recognised defences under defamation and libel and slander laws. 'Reasonableness' is a common law defence. A 'Sincerely Held' view relating to religion is recognised in US law. 'Truthfulness', and 'Good Faith', 'Public Interest', and 'Public Benefit' are also recognised as defences in the Criminal Code of Canada, Sec 319(3).

A Force For Good  
24 July 2020