JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM THE SCOTTISH POLICE FEDERATION

I refer to the above and thank you for inviting the Scottish Police Federation (SPF) to submit evidence on the provisions of the Bill. We have taken the step of splitting our response into two distinct sections. The first half of our response is a general narrative of the issues and challenges we see the Bill as presenting, with the second half being more specific to particular technical provisions in support of our general observations.

The Bill seeks to simplify and consolidate existing laws whilst also expanding the protected characteristics. In theory the SPF supports clarification of the law in any area of criminal law which can only serve to promote justice. That being said, it is important that legislation is drafted with careful consideration for the consequences, intended or otherwise.

The SPF rejects conduct, behaviour, and speech which is threatening in any context, whether motivated by hateful beliefs or otherwise. However, we cannot support a Bill which appears to paralyse freedom of speech in Scotland, particularly when threatening conduct is already a well-recognised criminal offence which does not require duplication. This Bill will, if passed, paralyse freedom of expression for both individuals and organisations by threatening prosecution for the mere expression of opinion which may be unpopular. Individuals, organisations, or others with an interest in doing so could shut down debate on important matters by simply labelling it criminal hatred. Whether or not they are correct the impact is likely to be that free speech is stifled regardless.

We support the criticisms raised by various parties in respect of the risk this Bill poses to free speech. In particular we support the comments made by Roddy Dunlop QC, the Dean of the Faculty of Advocates, Free to Disagree, Fred Mackintosh QC, and the Scottish Catholic Church. We reject the comments made by Aamer Anwar which, in a contemporaneous demonstration of the spirit of this Bill, seek to belittle, dismiss and curtail the legitimate concerns and opinions voiced by numerous parties as "scaremongering."

We believe that regardless of whether the Bill's provisions are believed to lead to an increase in convictions or not, that the "stirring up hatred" elements will see a significant increase in police workload and demand, with a corresponding demand placed upon the COPFS and courts. It is our experience that hate offences place more pressure on our custody facilities in particular as an expectation is quickly established that those accused of such offences appear in court from police custody.

Hate crime is an increasingly fluid term with ever increasing sections of society demanding special status for their particular group. As this trend continues to grow it erodes the basic principal that everyone should be equal in the eyes of the law. It creates competition over which victim deserves the greatest sympathy or public outrage over their experience(s).

In policing in particular we are all too aware that there are individuals in society who believe that to feel insulted or offended is a police matter. There are those who believe that to be disagreed with is tantamount to being insulted or abused. When the subject of debate is a personal matter, or one which people may feel passionately about, emotions can be heightened and anger can inform decision-making.

Police officers are frequently called to attend neighbour disputes whereby two or more people who do not see eye to eye seek to escalate matters against each other through a tit for tat exchange of police reports and allegations of criminal conduct. We are not suggesting that people should not contact the police, and if the conduct involved is criminal in nature there are already offences available which provide for prosecution. However frivolous allegations which waste police time are not uncommon and are a drain on resources. We are concerned that if this Bill is introduced into law its provisions would be abused either intentionally or unintentionally.

The SPF is further concerned that the Bill would move even further from policing (and criminalising) of deeds and acts to the potential policing of what people think or feel, as well as the criminalisation of what is said in private.

The Bill's provisions suggest that guilty intent (mens rea) is no longer required to be established to prove an offence. Guilty intent is however known and understood, and crucially, is capable of being "worked towards." This Bill however suggests something altogether more nebulous, akin to some form of 'accidental effect' will be enough to lead to conviction. We cannot support such a proposition.

It cannot be accidental that the subject of gender identity is not covered by the sections of the Bill devoted to what are described as the freedom of expression provisions. People are already frightened to enter the trans debate or criticise any anti-racism activities (regardless of whether they agree with wider political ideologies or not) for fear of being accused of being transphobic or racist. Fear of insulting is stifling free speech and the proposals in this Bill risks compounding that.

As an example; the use of language to distinguish between sex and gender is often conflated, in what can appear as an attempt to infer outrage or discrimination simply because of irreconcilable fundamental beliefs.

Individuals freely discussing for example lesbian sexual practices might believe they are covered by the free speech provisions only to find that their interpretations are considered hateful by those who take a diametrically opposing view on whether lesbian relationships are (or ought to be) sex or gender derived.

Clause 4 of the Bill sets out changes that relate to the public performance of a play also remove an existing protection. The existing offence criminalises people who present or direct a performance, and either intend to stir up racial hatred or where racial hatred is likely to be stirred up a performer is specifically excluded from the reach of the offence.

We can't imagine that actors are considered such promoters of hatred (as categorised by the Bill) that they need to be specifically catered for, but given the relative power imbalance between actors on one hand and producers etc. on the other, it would be

helpful to understand why it is deemed necessary to bring such performers into the reach of the legislation.

It is however important to note that other forms of “hate” are not unknown amongst performance artists. Lyrics in certain genres of music promote and glorify the injury and murder of police officers, or sexual objectification of women for example. Performers have a long history of protest, activism, or depending on your particular point of view, simply promoting bad taste or abhorrent ideals.

One of the most high-profile, controversial, and relatively recent examples was associated with the song Blurred Lines by Robin Thicke. Many believe this song glorifies rape. It is conceivable the performance (or indeed playing) of this song could constitute an offence under the stirring up hatred provisions whereas those that advocate or promote violence against police officers would not. Is this the intention of the Bill?

The SPF does not support the intended provision to grant powers of search and entry (by force if necessary) to members of police staff. The use of coercive powers places police officers in a unique position, sees us held to different standards, and subject to particular restrictions that are not in existence for police staff.

Police staff are not restricted from expressing political opinion or commentary. It is not beyond the realms of possibility that police staff could be involved in public campaigning for activities they are then seen to be “policing.” Whilst the inherent problems with that ought to be entirely self-evident it cannot be right that complaints over the use of coercive powers could see police officer and police staff member subject to different processes and treatment for what could be identical events. We also consider the public would find such an approach intolerable.

Part 1 of the Bill simply widens the scope of characteristics which are protected and reiterates the procedural manner in which the court should record aggravations. In practice the courts already record aggravations upon conviction, however, we support the strengthening of procedure in this respect. The new provision in the Bill makes clear that those who are convicted of offences with aggravations of prejudice shall have this reflected plainly and in detail in their criminal record. The SPF therefore supports Part 1 of the Bill.

Part 2 of the Bill seeks to replace existing hate crime legislation and to consolidate several pieces of legislation into one. Whilst the SPF supports consolidation and clarification of the law, we are concerned that the amalgamation of the existing offences in the manner proposed by the new Bill is overly simplistic. We draw a distinction between clarification and simplicity. Simplification by consolidation does not necessarily clarify.

The Bill proposes at section 3(1) to create the offence of behaving in a threatening, abusive or insulting manner which either intends to, or is likely to, stir up hatred against a group defined by **race, colour, nationality, citizenship, ethnicity or national origins**. Further, section 3(2) creates the offence of behaving in a threatening or abusive manner which either intends to, or is likely to, stir up hatred against a group based on protected characteristics including **age, disability, religion (both**

perceived and in actuality), sexual orientation, transgender identity or variations in sex characteristics.

We are concerned the Bill seeks to criminalise the mere likelihood of ‘stirring up hatred’ by creating an offence of threatening, abusive or insulting behaviour, such offence to include both speech and conduct. This complicates the law and is in our opinion, too vague to be implemented. It is noted that the second offence created under section 3(2) covers only conduct which is threatening or abusive, not that which is insulting, however, our comments apply equally to both proposed offences.

To criminalise threatening behaviour is not opposed, but it is unnecessary as this behaviour is already criminalised out with the new Bill.

By definition the term “abusive” could include any expression of opinion which may be perceived to be personally applicable or offensive. We refer to the example raised by the Scottish Catholic Church that expressing their opinion on marriage and sexuality could now be seen as stirring up hatred under the new Bill. We do not consider that healthy debate should be criminalised on the basis that it might be offensive or insulting to those who share a different view. Under the Bill a mere difference of opinion could at least theoretically merit prosecution.

Having provided no plausible definition of specifically what exactly it seeks to criminalise as abusive or insulting and where the line will be drawn, the Bill undermines freedom of expression and the vagueness which the wording leaves behind is, in the view of the SPF extremely problematic.

The SPF shares the view communicated by many others in response to the Bill that the creation of a new offence of threatening or abusive behaviour is entirely unnecessary; it already exists.

The Criminal Justice and Licensing (Scotland) Act 2010 (hereinafter ‘the 2010 Act’) made it an offence to behave in a manner which is threatening or abusive. This offence is wide-ranging and applies to everyone, including all of the protected groups which the proposed new offence seeks to protect. The offence is one of the most frequently libelled charges throughout summary Sheriff courts in Scotland and the case law which has developed the offence since its inception has been clear, concise and perhaps most informative of all – sparse.

The law is clear: threatening or abusive behaviour is a recognisable criminal offence. The pre-existing offence works well in practice and affords those accused of the offence an adequate opportunity to defend themselves. The aggravating factors already in place and available to the Crown Office and Procurator Fiscal Service work well in practice and whilst they could be expanded, there is no need to overhaul a system which is already working well. There is therefore in the view of the SPF no requirement for the creation of a new offence and to do so would simply be repetitive, unnecessary, and unhelpful.

Furthermore, the test which must be applied by the judicial system during the prosecution of any offence under section 38 of the 2010 Act is an objective test of reasonableness; the behaviour must be threatening or abusive *to such a degree that*

it would be likely to cause a reasonable person to suffer fear or alarm. That this test is objective is a protective factor – the courts must consider the alleged conduct against the context of each case in a manner which ignores whether the complainer in each case actually suffered fear or alarm. Instead the courts consider objectively whether it is in fact reasonable that any person would be likely to suffer fear or alarm on account of the alleged conduct.

The Bill appears to create a very loosely-worded replica of this test for offences of stirring up hatred but whilst this test is effective currently for an offence under section 38 of the 2010 Act, it would not in the view of the SPF be equally effective when applied to hate crime. It's easy to define what is threatening by reference to an objective test but to define objectively what is abusive to specific groups, in other words offensive or insulting, is implausible. It requires a subjective examination of each scenario and each victim or group and cannot be considered against an objective framework. What may be insulting to one individual or group may be considered humorous to another. What could be deemed to be offensive by one could be considered a perfectly acceptable expression of opinion by another. To determine whether or not speech or conduct is abusive is subjective and the Bill as currently drafted fails to identify an adequate test, nor does it recognise the importance distinction to be made between subjectivity and objectivity in how the offence would be tried in practice.

Against a backdrop of an extremely low threshold for culpability - mere insult - that the Bill does not require a person to have actually caused anyone offence is concerning. It does not require that their intention was to cause offence. The Bill requires only that the speech, conduct or behaviour in question is or was likely to stir up hatred, with the extremely subjective question of likelihood left entirely open to interpretation.

We referred to the vagueness of the proposed offences of abusive speech or conduct. Again, we find the test of likelihood attached to the offence to also be so vague in its context as to render the Bill too esoteric. It creates a troubling scenario where a person could express opinion without actually offending anyone, within the privacy of their own home and with no intention whatsoever of offending anyone, and still be criminalised.

Whilst threatening to paralyse the right to freedom of expression, the Bill, in our view, also sits uncomfortably with Articles 6 and 7 of the Convention concerning the right to a fair trial. Whilst Article 6 affords us all the right to be informed promptly of the nature of any offence forming the basis of a prosecution, Article 7 protects us from being held responsible for an act which does not constitute a recognisable criminal offence.

The SPF takes the view that the vagueness of the proposed new offence and equally the vagueness of the test which will apply to it does not define a recognisable criminal offence. It seeks to criminalise freedom of speech generally whilst providing no curtailment of how and when this might apply in practice in a realistic manner such that citizens can draw a line between what might fall within the ambit of hate crime and what is fair comment during debate.

The Bill seeks to criminalise the expression of opinion without providing adequate means by which this will be controlled and we refer again to the fact that freedom of expression should only ever be restricted to the minimal extent permitted by the

Convention under Article 10. We do not consider that the Bill in its current form could coexist with the basic human rights enjoyed under the Convention. To the contrary we consider that the Bill threatens to paralyse the human rights referred to under the Convention.

We support and adopt the comments of Fred Mackintosh QC and others in relation to the removal of available defences which exist for the current hate crime offences. If the Bill as presented is passed, those accused of the new offences of stirring up hatred will not have the opportunity to prove that they did not intend to stir up hatred or that they had no reason to suspect their conduct would do so.

The new Bill proposes instead to impose a test of reasonableness which conversely allows an accused person the defence of arguing that a reasonable person would not consider the conduct in question to meet the threshold of culpability. But this defence is not a one size fits all solution and it is not, in our view, cross-transferable to the new Bill and its proposed new offences.

This is primarily because of the difficulty in objectively examining conduct which is allegedly prejudicial to specific groups. To do so is to attempt to objectively consider a subjective matter; the two are mutually exclusive. Those accused of crimes must be afforded an adequate opportunity to defend themselves. The SPF believes that further thought must be given to potential defences to the proposed new offences, and takes the view that it is not possible to fairly apply the reasonableness defence to a subjective question. When combined with an extremely low prosecution threshold, a lack of available adequate defences poses a serious risk of injustice.

We highlight these complexities to reinforce our view that it is inevitable the provisions of this Bill will lead to considerable pressure being placed upon the police service. The sheer level of subjectivity at the heart of the stirring up hatred provisions will leave the police with little room to apply discretion. This will see more people brought into custody and into adversarial contact with the police. It will see more people reported for consideration of prosecution, and will see more pressure placed on the courts. It is impossible to see how this could not lead to more convictions for those who had no reason to believe their conduct could be deemed to be stirring up hatred.

We note that clauses 11 and 12 of the Bill create exceptions and thereby potential defences whereby freedom of speech is protected; but these only go as far as applying to religion and sexual orientation. We do not see why these groups or characteristics are specifically excepted insofar as discussion and criticism will be permitted, whereas those voicing opinion relative to other groups and characteristics do not enjoy the same purported protection?

Is discussion and criticism of matters relative to the other protected groups and characteristics prohibited under this Bill? Is the proposed legislation designed to specifically exclude current hotly-contested issues such as the housing of refugees, or trans rights and how they affect biological women? The same exceptions should apply for all characteristics and groups, if they are to be enacted at all. In any event we consider that these exceptions are flimsy and unfit for purpose. They allow only discussion and criticism but this is a far cry from the healthy, heated debate we are accustomed to as part of participation in free and open democratic processes.

We do not for one second suggest that prejudice, racism or discrimination are desirable qualities in our society but the need to address those matters when they reach a criminal level is met by laws already in place and the cost to free speech of going further with this Bill is too high a price to pay for very little gain.

The European Court of Human Rights has variously found that freedom of speech cannot simply apply to opinions or ideals with which people agree. It is not lost on the SPF that a great deal of concern in respect of the reach of the Bill is derived from the ambiguous language it is built on. The question raised by many other organisations which oppose the Bill has been: what is included within this offence? We believe that we can answer that question: there is nothing which is definitively excluded from this proposed new offence.

To cause others to feel insulted or offended by expressing opinion, whether intentionally or inadvertently, should not be criminalised; it is a fundamental human right enshrined within Articles 9 and 10 of the European Convention on Human Rights that the expression of opinion, however unpopular, should be protected. Whilst Article 9 affords freedom of thought, Article 10 embeds freedom of expression. The Convention, being enshrined within domestic law in Scotland, should not be departed from lightly.

Whilst Article 10 of the ECHR permits Governments to restrict freedom of expression for the purpose of the prevention of crime, the SPF implores the Government that such restriction should not be undertaken without the most considered and detailed of road maps to ensure that any departure from freedom of speech is the absolute minimum required to achieve legitimate aims.

We should never forget that the police in Scotland police with the consent of the people. We are firmly of the view that legislation that would see the police policing speech would devastate the legitimacy of the police in the eyes of the public. That can never be an acceptable outcome.

Scottish Police Federation
24 July 2020