JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM DR ANDREW TICKELL

1. This is an important Bill, which risks becoming mired in hyperbole and confusion. This submission will principally focus on Part 2 of the Bill, and the proposed new offences of stirring up hatred it contains. As Lord Bracadale reflected in his independent review of this area of law, "the potential risk to freedom of expression from the introduction of stirring up hatred offences is well recognised."[1] This submission echoes those concerns. In summary, I argue that there is scope to improve this legislation, allaying anxieties about the reach of the new criminal provisions it proposes, striking a more secure balance between free expression and the restrictions this Bill creates.

2. Crimes motivated or animated by hatred and prejudice have profound social consequences, causing physical and psychological harm – "to the direct victim, harm to the group to which the victim belonged (or was thought to belong) and harm to the wider community."[2] It is right that these harms are recognised in legislation and that crimes animated by this kind of prejudice are appropriately identified and condemned by our criminal justice system. However, these proposals touch on a range of sensitive issues, including the right to criticise religions and religious ideas, the ability to preach or revolt against traditional conceptions of sexuality, and ongoing debates about transgender rights, gender and sex. The new offences created by this Bill will apply to a number of areas of social life often characterised by strong emotions, contested ideas, and difficult conversations. Parliament should proceed with care.

3. The law concerning hate crimes in Scotland is currently a mess, its provisions scattered over a range of different Acts, accumulating piecemeal over successive reforms. Different protected characteristics are treated differently, without obvious justification. In principle, consolidation of this area of law is to be welcomed, increasing the law's accessibility and public awareness of its restrictions.

4. If you accept the general principle that crimes motivated by prejudice should be punished more severely than those motivated by anger, jealousy, greed or indifference, Part 1 of the Bill should also be uncontroversial. Aggravators based on the motivations of the accused or the malice and ill-will they evince towards their victims create no new criminal offences. They prohibit no conduct which is currently lawful. They have no significant implications for free expression.

5. In terms of the characteristics listed in the Bill, I agree with Lord Bracadale that the concept of "insulting" behaviour should be eliminated from the statute book, and that prosecutions for stirring up racial hatred should be subject to the same legal tests as will apply in respect of religion, sexual orientation and the other

[1] Lord Bracadale (2018) *Independent review of hate crime legislation in Scotland: Final Report*, para 5.17.
[2] J Chalmers and F Leverick (2017) *A Comparative Analysis of Hate Crime Legislation*, para 3.1.

characteristics listed. This separate treatment adds needless complexity to the structure of the Bill. It is also questionable in principle – given the expansive legal definition of race in this context – whether the apparently lower threshold of "insulting" behaviour is an appropriate one to justify criminalisation.[3]

6. In terms of the proposed offences of stirring up hatred, I recommend that the Bill be amended in two key ways. Firstly, the new offences of (a) stirring up hatred and (b) possessing of inflammatory materials should be amended into crimes of intention only. This limited change to the Bill would considerably blunt the – sometimes extravagant – criticisms these proposals have already been subject to, and materially diminish the likelihood of inappropriate prosecutions under these proposals. Secondly, I argue the defence of "reasonableness" in the Bill should be fleshed out with relevant factors the court should take into account in determining whether the defence is available.

6. Some critiques of the language of the Bill ignore the fact that (a) similar offences already exist under the law as it stands and (b) several of the concepts used in the Bill are already used elsewhere in the criminal law of Scotland. Superficially, the new stirring up hatred offence resembles section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. Under the 2010 Act, "threatening or abusive" behaviour may be prosecuted if it is "likely to cause the reasonable person fear or alarm" and it can be established that the accused either intended to cause fear or alarm or was reckless about the impact of their behaviour. There is also a generic defence of reasonableness to charges under section 38. Like this Bill, the concepts of being "threatening," "abusive" or "reasonable" are not defined in the 2010 Act. In the absence of clearer statutory definitions, courts will apply the ordinary meaning of these words. Since being brought into force, section 38 has been applied to a diverse range of cases, from traditional breach of the peace type cases, threats of violence and cases involving racist and sectarian abuse,[4] to brandishing a placard bearing the legend "God hates Catholics" outside St Mirren's Cathedral as the congregation attended Sunday services.[5]

7. Under section 38, the question of whether the accused person's behaviour is "likely to cause the reasonable person fear or alarm" is an objective one. The complainer's reaction to the behaviour is not determinative of its criminality. It is not necessary for the crown to prove any person actually suffered fear or alarm as a consequence of the accused's behaviour. In Lord Carloway's memorable phrase, it may be that an "intrepid Glasgow police officer" may not be disturbed on encountering behaviour which, nevertheless, would be likely to cause the reasonable person fear or alarm.[6] Her sturdiness in the face of jeopardy does not give the accused a defence to a charge under s.38.

8. Under the Bill's proposals, to commit the offence of stirring up hatred, the prosecution must demonstrate that the accused person either (a) intended to stir up hatred against a group of persons based on one or more of the listed characteristics,

[3] The definition extending to "race, colour, nationality (including citizenship), or ethnic or national origins."
[4] *Paterson and Others v Procurator Fiscal, Airdrie* [2014] HCJAC 87
[5] *Orr v Procurator Fiscal, Paisley* [2018] SAC (Crim) 11
[6] *Paterson and Others v Procurator Fiscal, Airdrie* [2014] HCJAC 87 at para 20.

or alternatively, (b) prove that the accused person's "threatening or abusive" behaviour is "likely" to stir up hatred against such a group, regardless of their intentions. In my submission, there are strong arguments for making the new offences created by section 3 and 5 of the Bill crimes of intention only.

9. The Scottish Government justify the wider approach taken in the Bill on the basis it would give prosecutors "more flexibility,"[7] arguing that:

> "to confine a stirring up offence to an intention to stir up hatred would be prohibitively restrictive in practice as in real-life cases it may often be very difficult to prove beyond reasonable doubt what the accused's intent was, even where it is very clear that their behaviour would be likely to result in hatred being stirred up."[8]

Although the general contention is probably true – that it would be harder to prosecute this offence if intention must be demonstrated – I do not regard this as a compelling reason for lowering the threshold or discarding with a requirement for *mens rea.* A number of common law crimes in Scotland – notably assault, theft and fraud – are also crimes of intention only. To secure a conviction, prosecutors must prove the accused person intended to commit the relevant offence. Such crimes are prosecuted day and daily in our courts. No evidence is provided to support the contention that such a requirement would be "*prohibitively* restrictive" or explaining why this should be "*very difficult* to prove."[9] In England and Wales, the offences of stirring up religious hatred or hatred on the grounds of sexual orientation are both crimes of intention only. Although the numbers of prosecutions there are modest, these provisions are seeing effective use in English courtrooms – notwithstanding the fact that English prosecutors must demonstrate "threatening" behaviour on the defendant's part to secure a conviction, rather than the lower threshold of threatening or abusive behaviour set out in the Scottish Bill.[10]

10. In scrutinising this argument, it is also important for the Committee to understand how Scottish courts approach the issue of *mens rea* – in this context, the accused's intention to stir up hatred. The Government's objection to a more restricted stirring up offence might be more persuasive if Scots law generally required the prosecutor to prove what was actually going through the mind of the accused person when the crime was committed. Lawyers often describe this as a "subjective" approach to *mens rea*. Subjective forms of *mens rea* have more commonly been adopted by English courts - but Scots law has taken a distinct approach, embracing what is generally described as an objective approach to establishing *mens rea* and intention. The procurator fiscal does not have to prove the accused person's subjective intention. Instead, the accused person's intentions are objectively inferred, based on analysis of their behaviour – or in the context of this Bill, what they said, wrote, published, possessed or otherwise circulated. As Lord Justice General Clyde set out in the case of *Cawthorne v HM Advocate*, in the context of an attempted murder prosecution:

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[7] Scottish Government (2019) *Policy Memorandum,* para 140.
[8] Scottish Government (2019) *Policy Memorandum,* paras 141.
[9] (My emphasis.)
[10] Crown Prosecution Service (2019) *Hate Crime Report 2018-19* confirms there were 13 prosecutions in England and Wales for all stirring up offences in 2018/19, and eleven convictions.

> "the existence of the intention is a matter of the inference to be drawn from the accused's words, or acts, or both. The inference is easy when the accused has threatened his victim, or has stated his intention to third parties. Again, even in the absence of such statements, the intention may be deduced from the conduct of the accused." [11]

Although people accused of committing this offence will doubtless offer justifications for their behaviour and alternative accounts of their motivations, the idea proving intention to stir up hatred is an insuperable barrier to prosecution is unpersuasive. Courts will reach conclusions based on an assessment of the credibility and reliability of the evidence they hear. In view of the fact that prosecutions in this field will classically consider what the accused person *wrote or said* about a racial or religious group, I can see no reason why making inferences about their intentions on the evidence is hopeless elusive in the way the Scottish Government analysis maintains.

11. Assessing of whether or not threatening or abusive behaviour is "likely to cause the reasonable person fear or alarm" is arguably a more straightforward and appropriate test for courts to apply than assessing whether it is "likely to stir up hatred" – "likely" "stirring up" and "hatred" being three more concepts which are also not further defined in the Bill. As the prosecutor will not have to prove that hatred was *actually* stirred up against a group as a consequence of the accused person's behaviour – this raises open questions about the kind of evidence the Government envisage prosecutors might lead, to establish this limb of the legal test. Determining whether conduct is likely to stir up hatred, in my judgement, risks becoming highly speculative and artificial in the court room – and extremely difficult for police officers to assess at an earlier stage of criminal inquiries.

12. The same arguments apply in respect of the possession of inflammatory materials offence proposed in section 5 of the Bill. The Bill treats the characteristic of race differently again here. To prosecute, the crown will have to show (a) the accused possesses threatening or abusive material (or in the case of race, national origins and citizenship, insulting material) (b) "with a view to communicating it to another person."[12] The definition of communications in the Bill is very wide, capturing all forms of dissemination in any medium.[13] Secondly, they will also have to prove that these materials were possessed either with the (a) intention to stir up hatred against a group of persons, or alternatively, (b) that it would be "likely" hatred would be stirred up if the inflammatory materials were communicated. There is also "reasonableness" defence to charges under this section. While this seems likely to address situations where, for example, a democratically-minded historian is critically examining racist and fascist ideologies and publications for the purposes of perspective and critique – significant legal weight is being put on the courts applying an open-minded understanding of what constitutes reasonable grounds for possession of such materials.

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[11] *Cawthorne v HM Advocate* 1968 SLT 330.
[12] Section 5(1)(a).
[13] Section 5(6).

13. To draw the contrast again with the Public Order Act 1986, while the English and Welsh legislation includes its own "possession of inflammatory material" offence, in its application to sexual orientation and religion, the crime is limited to possession of "threatening" rather than "abusive" material, and requires prosecutors to show the intention to stir up hatred, rather than being prosecutable if the material is "likely to stir up hatred", whatever was intended.[14] In terms of possession of racially inflammatory material, this extends to "threatening, abusive or insulting material", but also requires proof of intention to stir up racial hatred, rather than the test the Scottish Government has proposed. On every point of comparison, the Scottish proposals embrace lower thresholds for prosecution. Making section 5 a crime of intention only, requiring prosecutors to demonstrate the intention to stir up hatred alongside the possession of such inflammatory materials, would put beyond doubt that legitimate forms of possession and research fall outwith the criminal law.

14. Although a number of submissions to this consultation are likely to criticise the vagueness and subjectivity of the defence of "reasonableness," this Bill is far from the first piece of Scottish legislation which has included this general defence.[15] Given the broad brush strokes in which the offences in section 3 and 5 of the Bill have been framed, however, it is arguable that the Scottish Government are placing excessive weight on this uncertain defence, and the Bill would benefit from – and public confidence would be encouraged by – giving courts enforcing this legislation clearer direction on relevant factors which should be taken into account in determining whether the complained of behaviour should be regarded as reasonable.

15. Scottish PEN have recommended that additional guidance should be introduced to the Bill,[16] giving a list of factors which the judicial authorities should have regard to in determining whether or not the defence of reasonableness applies to the complained of behaviour. To quote their specimen amendment:

> *"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."*

While the inclusion of these (and indeed other additional) factors may not be strictly necessary, putting them on the face of the Bill would not restrict the generality of the defence, but instead identify relevant contextual factors which should be taken into account in deciding whether or not the defence applies to a given case. Indeed, this approach is similar to sections 11 and 12 of the Bill and the subject-specific protections which are extended, for example, to urging people "to cease practising their religions" or "to refrain from or modify sexual conduct." The Bill makes it clear that behaviour should not be taken to be threatening or abusive "solely" on the basis that it involves or includes expressing sentiments of these kinds. "Solely" is the critical word here. This provision makes clear that communications of this kind could

[14] Public Order Act 1986, section 29G.

[15] Including, for example, the offence of stalking under s.39 of the Criminal Justice and Licensing (Scotland) Act 2010, and more recently, to charges under section 1 of the Domestic Abuse (Scotland) Act 2018.

[16] In the interests of transparency, I should declare am a ScottishPEN trustee and contributed to the organisation's submission on this Bill.

still be prosecuted under section 3, if the wider nature and context of the preaching against homosexuality or preaching against preaching rendered the underlying behaviour threatening or abusive. Refining the defence of reasonableness in this way would go some way to further enshrine the importance of free expression considerations in the application of this legislation, dampening both well-founded and misplaced anxieties about the reach of this element of the Bill.

16. Lastly, I strongly support the proposed abolition of the common law crime of blasphemy. Striking this crime from the statute book is the least restitution this country can give to the ghost of poor Thomas Aikenhead (1676 – 1697).

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