

JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM DR STUART WAITON, ABERTAY UNIVERSITY

THE PROBLEM WITH POLICING HATE

Freedom of speech is not only minorities' best friend...it's our only reliable friend.
Jonathan Roach, Senior Fellow, Brookings Institute and LGBT rights advocate.ⁱ

Without freedom of speech and the right to dissent, the Civil Rights movement would have been a bird without wings.
Congressman John Lewis.ⁱⁱ

This submission raises questions about two aspects of the bill:

- a. **The problem with 'protected characteristics'.**
- b. **The problem of criminalising 'hate speech'.**

a. PROTECTED CHARACTERISTICS

1. The term 'hate crime' is political and polemical, rather than legal, and has no place in law.
2. This bill defines the 'protected characteristics' of 'groups' or 'communities' affected by 'hate crime'. This brings together existing 'aggravated' legislation, making it a hate crime if the below 'groups' are e.g. assaulted due to their specific characteristics. To these existing categories has been added the new hate crime related to 'age hostility'. These categories (as well as race) include:
 - Age
 - Disability
 - Religion
 - Sexual orientation
 - Transgender identity
 - Variations in sex characteristic
3. The idea of 'protected characteristics' is a modern political and legal construction, and one that risks caricaturing people as all belonging to specific 'communities' or 'identities' that need special treatment.

4. It does this in part by constructing and representing entire groups of people as being particularly vulnerable, regardless of their individual and specific characteristics.ⁱⁱⁱ
5. This additionally can lead to divisive attempts by activists or advocates to develop an approach to society through a prism of what can be called 'competitive victimhood'.
6. As a result, this approach undermines the universal nature of law, by treating certain crimes against certain 'groups' as more serious than others.
7. It also risks undermining, rather than reinforcing, community cohesion, by further defining people, and treating them in law, as separate categories of people from separate 'communities'.
8. This undermining of the universality of law is further assisted, specifically, through the lack of corroboration needed to prove the aggravated nature of 'hate' offences.

b. HATE SPEECH

1. The offence of 'stirring up' hatred has now been applied to all of the above 'protected characteristics'. Therefore, the scope for criminalising ideas, issues and speech and materials is increased substantially, around areas of life where there is much contestation and disagreement.
2. When looking at the 'stirring up' of 'hate' offences, we should be clear that what we are talking about is the criminalisation of speech – this is both a form of speech and thought crime.
3. Somebody being 'abusive' is enough for a speech crime to have occurred. This is a subjective category and open to serious abuse.
4. In relation to race speech the bar is lowered yet further and includes the idea of being 'insulting', as a hate crime.
5. The areas of 'speech' that will be prosecuted are all encompassing and include everything from the spoken word to an email or placard.
6. Speech is to be protected by a claim to 'reasonableness'. This means it is for law lords and judges to decide what is free to be spoken thus undermining the very idea of freedom of speech.

7. This bill is an attack on the very idea of privacy. Unlike past acts that protect what is spoken in private, here we find no such protection of speech in a private dwelling.
8. The bill is a threat to the arts, specifically targeting plays, directors of plays and also, additionally to any prior act, names actors as targets for prosecution.
9. It targets organisations making them culpable for 'hate', thus raising the possibility of ideas and issues raised by newspapers or in universities being policed.

a. Protected characteristics explored

A cohesive society is one with a common vision and a sense of belonging for all communities.

Hate Crime and Public Order (Scotland) Bill.^{iv}

Hate is a polemical political term not a legal category. Its incorporation into law reflects a degeneration of both politics and law.

Politics and with it, law, has changed significantly over the last few decades. Commentators have noted a shift from a rule of law to a 'rule by law', as law itself increasingly becomes a mechanism used by politicians for enforcing 'correct' ideas onto society.^v Elsewhere a discussion has emerged about the 'politics of recognition', a more emotional and psychological form of politics that engages with 'identity' and moves away from the socio-economic framework for understanding social and personal problems.^{vi} This psychological turn in politics has developed with the emergence of what is called a 'therapeutic state' where the role of authorities and institutions, including law, comes to be dominated by concerns with the governing of emotions.^{vii} Within this context, even issues like unemployment, Furedi notes, become framed less through discussions about practical matters but about low self-esteem and what governments can do to resolve the perceived emotional harm. Finally, of note, harm itself has become a fast-expanding category, with the American legal writer, Bernard E. Harcourt, noting that J.S. Mill's harm principle has 'collapsed'. Now Harcourt observed, almost anything can and is being described as a 'harm' and addressed by law and the police.^{viii}

The importance of these developments for understanding this bill relate to the construction of the idea of 'protected characteristics', not least of all because these now legally labelled 'groups' are defined through an understanding of their 'vulnerability', and in particular, their emotional vulnerability: Hate crime legislation, for example, is often justified through an understanding that this form of crime is more 'traumatic' for the victims, while the automatic recording of hate incidents (without need for evidence) is

justified by arguing that one does not want to ‘doubly traumatise’ a potential victim of ‘hate’.

The term ‘protected characteristics’ is relatively modern. It emerged in the early 1970s but was used infrequently until 2007 when its use increased exponentially. With a slightly longer history but a similar trajectory, the idea of ‘vulnerable groups’ and particularly the use of the term ‘victimhood’ has also increased exponentially in the last few decades.^{ix} Arguably, the category of vulnerability is becoming a new universal framework for thinking about humanity in general.^x However, certain people are now being defined in law as particularly vulnerable and in need of ‘protection’ due to certain ‘characteristics’. This raises a number of problems.

Firstly, the definition of all gay people, for example, as vulnerable (as part of a ‘vulnerable group’), is a caricature that ignored individual characteristics. It is a caricature that many gay people (black people, elderly people...) themselves would see as patronising and reject.^{xi} It is a pre-judgement about millions of individuals.

Secondly, this pre-judgement, or prejudice, about these labelled ‘groups’ is now being set in stone, in law. As a result, it risks concretising certain identities and potentially undermines the individual sense of self, a self that is now being defined by society through its ‘protected characteristic’. Helped by activists and often state funded interest groups this will help to further construct separate and competitive ‘victim groups’.^{xii}

Thirdly, the separation of people into those who have extra protection and those who do not undermines the universality of law.

Fourth, in what is in reality a highly, and increasingly, tolerant society, undeserving of such an explosive category, the idea of people ‘hating’ one another risks exaggerating individual cases that relate more to disagreements, tensions or acts of drunken stupidity than any serious expression of hate.^{xiii} This elevation of the fear based concept ‘hate’ is likely to further encourage the search for ‘hate’ by activists.^{xiv} As a result, the perceived and projected levels of hatred in society are likely to be further exaggerated.

Finally, with reference to all of the above points it could be argued that rather than this new law helping to create a ‘cohesive society’, which is one of the objectives of the bill, it does the exact opposite. It does this by elevating the fear in society about levels of hate and by institutionalising the idea that there are separate ‘communities’ in Scotland, separate communities who are defined by their vulnerability and by the fact that they need to be protected from other members of the community.

b. Hate speech explored

How do you make it an offence to offend people? Being offended is subjective. It has everything to do with you as an individual or a collective or a group or a society or a community, your moral conditioning, your religious beliefs. What offends me may not offend you, and you want to make laws about this? I'm offended by boy bands for God's sake!

Australian Comedian Steve Hughes

It should be noted that the idea of criminalising hate speech first emerged in Joseph Stalin's Soviet Union, where in 1936 their constitution allowed, 'Any advocacy of racial or national...hatred... [to be] punishable by law'.^{xv} For decades this approach was opposed by almost all liberal democracies as a threat to freedom. However, as Nadine Strossen notes, despite this, many 'Western' governments in the first half of the twentieth century used the power of the state to limit public expression but by 1964, a more liberal climate led to the American Supreme Court ruling that, 'speech concerning public affairs is more than self-expression it is the essence of self-government'.^{xvi} Freedom of expression was understood to be the basis of democracy.

Strossen notes that the term hate crime and hate speech are used to demonise, stigmatise and call for the punishment of an array of opinions. The criminalising process in the Scottish bill adopts vague and elastic terms like 'insult' (for race) and 'abusive' for all other categories of people, helping to develop a profoundly subjective quality to Scots law, assisted by the very term 'hate' that has no clear definition. This is likely to result in the politicisation and potential discrediting of law, as pressure to prosecute develops with high profile cases and pressure from activists and politicians, with moral panics resulting in new and harsh punishments for a growing number of viewpoints. With organisations incorporated into this bill and punished for 'hate speech' this becomes a potential threat to freedom of the press, artistic expression and academic freedom. As Congresswoman Eleanor Holmes Norton notes,

It is technically impossible to write an anti-speech code that cannot be twisted against speech nobody means to bar. It has been tried and tried and tried.^{xvii}

The Scottish bill defends certain 'polite' forms of expression but leaves little scope for a more 'explosive' expression of opinion – 'abusive' comments will be prosecuted as hate – and the 'reasonableness' of this abuse will be determined by a judge. (This goes way beyond even the now repealed Offensive Behaviour at Football Act that allowed, 'expressions of antipathy, dislike, ridicule, insult or *abuse* towards those matters'). Where this leaves comedy or religious and political polemic is unclear and likely to be influenced by which issue (or statue) is being 'cancelled' at any particular time. What is called 'cancel culture' is important in this regard as this bill has emerged within this particular political/cultural climate. Ultimately, this bill will mean that the state becomes the arbiter of truth, often against the will of individuals across Scotland.

This is even more chilling given the lack of protection of material and spoken words in private dwellings (previously protected in the 1986 Public Order Act) and more so again given that abusive speech/materials could be so defined even where it is not intended.

The presumed 'harm' from even abusive speech needs far more consideration and discussion than it has received. Indeed, the expanding terrain of harm, with statues, for example, now being talked about as inflicting a form of 'violence', is new and appears to reflect a certain political and cultural climate. Even at the level of psychology, it has been noted that the potential for 'hate speech' to cause psychic or emotional harms has, 'not received much empirical investigation', and that 'there are wide individual differences regarding what constitutes a hurtful message'.^{xviii} Some psychologists have argued that limiting speech may actually be creating a problem, especially among younger people. Pamela Paresky, for example, is convinced of the importance of educating young people that such speech is not necessarily harmful and that stressful situations can lead to personal growth. Jonathan Haidt and Greg Lukianoff argue that, a dangerous campus culture is being created that encourages a sense of harm that threatens both freedom in society but also the mental toughness of students.^{xix} Following this line of argument, this new Scottish bill should be understood as something that will fortify the vulnerable subject in society and in law and to undermine the traditional robust legal subject that was the basic for liberal law.^{xx} In other words, the 'message' that the government will send out with this bill is one that is likely to encouraging a sense of vulnerability and harm.

Evidence of a lack of psychological harm nor the possibility that policing speech may actually undermine 'protected groups' sense of individual self is unlikely to impact upon those who are promoting this bill because evidence appears to follow the political and cultural demands of many politicians, rather than being used objectively to inform debate. Indeed, for this bill, the nature of individuals and their capacity for dealing with various forms of speech also appears to be secondary to the wider concern about harm to 'groups', or of trauma caused to entire 'communities'. Here we find meaningful justice at the level of individuals is subsumed within talk of 'social' justice, rather than actual justice. In other words, the politico-cultural dynamic of this bill needs to be understood as an attempt not to find justice for individuals but to find 'social' justice for constructed 'groups' by, 'changing the culture', and by 'sending out a message'.

These collective and political aims, and the one-sided nature of them, can be seen in the Scottish Parliament itself where we find social justice rhetoric, beliefs and ideologies frequently being expressed. Highly contested ideas of 'white privilege', of 'Islamophobia', of our 'patriarchal society', or of the problem of 'toxic masculinity', for example, go largely uncontested when expressed by either politicians or the myriad social justice/equalities charities and organisations that frequent the various parliamentary committees.^{xxi} Some people think these concepts are meaningful and right. Others however, and I would suggest the vast majority of the electorate, would

question them. They are sweeping generalisations that stigmatise huge sections of the population (as innately racist, for example), and are seen by many as an opinion or a prejudice, and even, potentially, as expressions of hate. And yet, these ideas are at the heart of a bill that is meant to be challenging prejudice and hate.

These politically endorsed ideas (of white privilege or patriarchy etc.) are abstract and ideological, and help us to understand that this bill is more about changing collectives and 'cultures' than it is about justice and punishment for individuals. Not only are potential victims understood to be part of a variety of 'groups' and 'communities', all of which are presumed to embody the attribute of vulnerability. But also, potential perpetrators, indeed much of the rest of society, is judged less in terms of individual actions and thoughts but also with reference to the various and abusive cultures that they are perceived to be part of. Through these ideologies we are understood to live in a world of toxicity, of phobias, of power and abuse that go way beyond any individuals' consciousness and rather, can be found in their 'unconscious' (bias) and collective cultural practices. In this respect, this bill should be understood as a form of cultural engineering concerned not with justice for living breathing individuals but with changing the culture of society through ideologies that many disagree with.

Finally, it is worth noting that concerns about the Scottish governments' approach to 'hate' and the activities and initiatives of Police Scotland, have themselves been challenged as being both prejudiced and hateful.

Scottish police posters that could be found across Scotland, for example, read, 'Dear homophobes we have a phobia of your behaviour', and 'Dear Bigots, you can't spread your religious hate here. End of sermon'. This led to a challenge from Christian Concern who produced their own poster, that read, 'Dear 'One Scotland', all people should be free to express their views, even if they offend other people. That is what freedom of speech means. How about promising to protect those whose views others might find offensive? This is how democracy works'. A challenge was also made to the police about their 'phobia' of Christians, something that was described as a hate crime itself.

This highly political and divisive bill is arguably the most illiberal and censorious bill in any liberal democracy in the world. It, and the very use of the non-legal concept of hate crime, should be scrapped.

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ⁱ Strossen, N. (2018) *Hate: Why we should resist it with free speech, not censorship*. New York: Oxford University Press. pp. 12.

ⁱⁱ *Ibid.* pp. 41.

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- ^{iv} Available online at: <https://www.gov.scot/publications/hate-crime-public-order-scotland-bill-equality-impact-assessment/>
- ^v John Holbrook (2019) 'The Rise and Fall of the Rule of Law', in A. Kennedy and J. Panton's, *From Self to Selfie: A Critique of Contemporary Forms of Alienation*. Cham: Palgrave Macmillan.
- ^{vi} See Frank Furedi's discussion, 'Attention Seeking: multiculturalism and the politics of recognition', Institut français, London 16 November, 2002 at <http://academyofideas.org.uk/documents/transcriptsandreports/attentionseeking/RecogniseMyIdentity.pdf>
- ^{vii} Nolan, J. (1998) *The Therapeutic State*. New York: New York University Press.
- ^{viii} Harcourt, B. E. (1999) 'The collapse of the harm principle' in *Journal of Criminal Law and Criminology*. Vol.90, No.1, 109-194. pp. 187.
- ^{ix} Use Google Ngrams, that gives a sense of the increasing use of terms in the millions of books in the Google Books search engine.
- ^x See Waiton, S. (2019) 'The Vulnerable Subject' in *Societies*, 9/3. Online at <https://www.mdpi.com/2075-4698/9/3/66/htm>
- ^{xi} See BBC News <https://www.bbc.co.uk/news/uk-scotland-41335762>
- ^{xii} Best, J. (1999) *Random Violence: How we talk about new crimes and new victims*. Berkeley: University of California.
- ^{xiii} See article, 'A close inspection of the British Social Attitudes Survey shows that racial prejudice is in long-term decline' at <https://www.democraticaudit.com/2014/08/27/a-close-inspection-of-the-british-social-attitudes-survey-shows-that-racial-prejudice-is-in-long-term-decline/>
- ^{xiv} In one of the local discussions about this bill, for example, a disabled activist was anxious to explain that people were not merely ignorant or prejudiced about disabled people, they 'hate the disabled'. Books like 'Disability Hate Crime: Does Anyone Really Hate Disabled People?' are now being written in an attempt to prove that, 'Disability hate crimes are a global problem'.
- ^{xv} Strossen, N. (2018) *Hate: Why we should resist it with free speech, not censorship*. New York: Oxford University Press. pp. 26.
- ^{xvi} Ibid. pp. xxiv.
- ^{xvii} Ibid. pp. 43.
- ^{xviii} Ibid. pp. 124.
- ^{xix} Lukianoff, G. & Haidt, J. (2018) *The Coddling of the American Mind*. Penguin: London.
- ^{xx} See Waiton, S. (2019) 'The Vulnerable Subject' in *Societies*, 9/3. Online at <https://www.mdpi.com/2075-4698/9/3/66/htm>
- ^{xxi} See for example, the Equalities and Human Rights Committee discussion where it was noted that there was, 'an acknowledgement from the Executive Team about the importance of talking more openly and frequently about white privilege and racism'. https://www.parliament.scot/S5_Equal_Opps/Race%20Equality%20in%20Scotland/19_Scottish_Government.pdf Also see, the Meeting of Parliament 27 November 2018, where Humza Yousaf explained that, 'Men and their behaviour, which toxic masculinity is part of, are the problem but, equally, we can be part of the solution.' <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11807&i=106819&c=0&s=!!Committee%2520Announcement!!>
- And see Meeting of Parliament 8 March 2018, discussing International Women's Day, where politicians discussed the problem and need to challenge the 'patriarchal society'. <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11402&mode=pdf>