



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

27th Meeting, 2020 (Session 5)

Tuesday 10 November 2020

The Committee will meet at 9.30 am in a virtual meeting.

1. **Hate Crime and Public Order (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

John McLellan, Director, Scottish Newspaper Society;

Lisa Clark, Project Manager, Scottish PEN;

Fraser Sutherland, Chief Executive, Humanist Society Scotland;

David Greig, Artistic Director, The Lyceum Theatre, Edinburgh;

and then from—

Anthony Horan, Director, Catholic Parliamentary Office of the Bishops' Conference of Scotland;

David Bradwell, Associate Secretary (Global Justice and Public Witness), Faith Impact Forum, Church of Scotland;

Kieran Turner, Public Policy Officer, Scotland, Evangelical Alliance;

Rev. Stephen Allison, Minister & Assistant Clerk to the General Assembly, Free Church of Scotland;

Ravi Ladwa, Hindu Forum of Britain (Scotland Chapter);

Isobel Ingham-Barrow, Head of Policy, Muslim Engagement and Development (MEND);

Neil Barber, spokesperson for Scotland, National Secular Society;

Hardeep Singh, Deputy Director, Network of Sikh Organisations;

Ephraim Borowski, Director, Scottish Council of Jewish Communities.

2. **Hate Crime and Public Order (Scotland) Bill (in private):** The Committee will review the evidence heard earlier in the meeting.

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Clerk to the Justice Committee
Room T2.60
The Scottish Parliament
Edinburgh
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The papers for this meeting are as follows—

Agenda Item 1

Note from the clerk

J/S5/20/27/1

SPICe briefing paper (PRIVATE)

J/S5/20/27/2(P)

Justice Committee

27th Meeting, 2020 (Session 5), Tuesday, 10 November 2020

Hate Crime and Public Order (Scotland) Bill

Paper from the Clerk

Introduction

1. The Hate Crime and Public Order (Scotland) Bill (“the Bill”) was introduced by the Cabinet Secretary for Justice on 23 April 2020 and referred to the Justice Committee. The Bill and accompanying documents can be accessed [here](#).
2. The purpose of the Bill is to modernise, consolidate and extend hate crime legislation in Scotland. The law in this area has evolved over time in a fragmented manner with the result that different elements of hate crime law are located in different statutes. There is therefore a lack of consistency and the relevant legislation is not considered as user-friendly as it could be. The Scottish Government believes that the Bill will consolidate existing hate crime legislation within one statute to provide greater clarity, transparency and consistency.
3. There is no single accepted definition of hate crime. In his independent [review](#), of hate crime legislation in Scotland commissioned by the Scottish Government for their consultation, Lord Bracadale used the following definition:

“Offences which adhere to the principle that crimes motivated by hatred or prejudice towards particular features of the victim’s identity should be treated differently from ordinary crimes”

Background

4. According to the Scottish Government’s [policy memorandum](#) which accompanies the Bill, it will “modernise and extend existing hate crime legislation” by:
 - Adding age as a new characteristic in connection with the aggravation of offences by prejudice under Part 1;
 - Creating new offences relating to stirring up hatred in Part 2 that will apply in relation to all listed characteristics to include age, disability, religion, sexual orientation, transgender identity and variations in sex characteristics (currently those offences relate only to race);
 - Updating the definition of transgender identity in Parts 1 and 2 of the Bill including removing the term “intersexuality” and creating a separate category for variations of sex characteristics
 - Including a power to enable the characteristic of sex to be added to the lists of characteristics referred in Parts 1 and 2 of the Bill by regulations at a later date.
5. The Bill will also abolish the common law offence of blasphemy. The offence has not been prosecuted in Scotland for more than 175 years and is no longer considered necessary or appropriate.

Approach to Stage 1 consideration

6. The Committee began taking Stage 1 oral evidence on the Bill on 27 October. It is expected Stage 1 evidence will continue throughout November.

Oral evidence

7. At its meeting on 10 November, the Committee will continue taking oral evidence on the Bill by hearing from two panels of witnesses. They are—

- John McLellan, Director, Scottish Newspaper Society; Lisa Clark, Project Manager, Scottish PEN; Fraser Sutherland, Chief Executive, Humanist Society Scotland and David Greig, Artistic Director, The Lyceum Theatre, Edinburgh;
- Anthony Horan, Director, Catholic Parliamentary Office of the Bishops' Conference of Scotland; David Bradwell, Associate Secretary (Global Justice and Public Witness), Faith Impact Forum, Church of Scotland; Kieran Turner, Public Policy Officer Scotland, Evangelical Alliance; Rev Stephen Allison, Minister & Assistant Clerk to the General Assembly, Free Church of Scotland; Isobel Ingham-Barrow, Head of Policy, Muslim Engagement and Development (MEND); Ephraim Borowski, Director, Scottish Council of Jewish Communities (SCoJeC); Neil Barber, spokesperson for Scotland, National Secular Society, and Hardeep Singh, Deputy Director, Network of Sikh Organisations.

8. This evidence session will be a virtual session with Members and witnesses participating via live video conferencing. Members of the public can watch the evidence session live on the Scottish Parliament TV website from 9:30 am on Tuesday 10 November:

<https://www.scottishparliament.tv/>

9. Following this evidence session, the Committee will consider the evidence received as part of the Stage 1 scrutiny of the Bill.

10. To date, the Committee has taken oral evidence on the Bill on [27 October](#) from the Cabinet Secretary for Justice, the Scottish Government Bill Team and Lord Bracadale and on [3 November](#) from The Faculty of Advocates, The Law Society of Scotland, Dr Andrew Tickell and Police Scotland, the Scottish Police Federation and Crown Office & Procurator Fiscal Service.

Written evidence

11. Background information on witnesses giving evidence on 10 November is provided at Annexe A. Written submissions from the witnesses are provided at Annexe B.

12. Other written submissions received by the Committee in response to its call for views on the Bill are available [on the Committee's webpage](#).

13. A SPICe briefing setting out the key issues in the Bill is also available [here](#).

Next steps

14. At its next meeting, the Committee will continue its Stage 1 scrutiny and will hear evidence from organisations supporting groups which fall within the protected hate crime characteristics as set out in the Bill including disability, sexual orientation, age, race, transgender identity and variations in sex characteristics. The Committee are due to report to the Parliament on the general principles at the beginning of December 2020.

**Justice Clerks
4 November 2020**

Hate Crimes and Public Order (Scotland) Bill

Background information on witnesses for 10 November 2020

Introduction

The Committee has requested each witness giving oral evidence on the Bill to provide some brief biographical information, in bullet point format, on their background, namely-

- Their name/organisation
- The main role of their organisation and its key functions/interests/objectives
- Their organisation's status
- How their organisation is funded and the key sources of funding

Tuesday 10 November

The following has been provided by those witnesses giving oral evidence on the Bill on Tuesday 10 November 2020-

Panel 1

Scottish Newspaper Society

- **Your name/organisation**
John McLellan, Director, Scottish Newspaper Society.
- **The main role of your organisation and its key functions/interests/objectives**
The Scottish Newspaper Society is the trade association for the Scottish news publishing sector, from the smallest independent companies to large UK organisations publishing Scottish editions. It exists to further the interests of independent news publishing and the protection of a free press and freedom of expression.
- **Your organisation's status (such as whether you are a charity, a membership organisation, a professional body etc).**
A trade association
- **How your organisation is funded and the key sources of funding**
Entirely funded by member subscriptions

Scottish PEN

- **Your name/organisation**
Lisa Clark, Scottish PEN
- **The main role of your organisation and its key functions/interests/objectives**

We are the Scottish centre of PEN International, a not-for-profit organisation that champions freedom of expression and literature across borders. We are a membership organisation and work with a range of writers, campaigners, activists and communities across Scotland and around the world. We coordinate the activity of four Scottish PEN committees: Writers at Risk, Women Writers, Writers in Exile and Writers for Peace. Our aims and objectives are further outlined in the PEN Charter: <https://scottishpen.org/the-pen-charter/>

- **Your organisation's status (such as whether you are a charity, a membership organisation, a professional body etc).**
Scottish PEN is a registered Scottish Charitable Incorporated Organisation (SCIO), and includes a membership function
- **How your organisation is funded and the key sources of funding**
Our ongoing funding is dependent on the collection of membership fees. We also currently receive project funding from the Joseph Rowntree Charitable Trust. This funding relates to our Defamation Reform campaign and is in place until December 2021

Fraser Sutherland

- **Your name/organisation**
Fraser Sutherland, Chief Executive, Humanist Society Scotland
- **The main role of your organisation and its key functions/interests/objectives**
We are a membership organisation with over 16,000 live members across the country and the charity is governed and controlled by these members.

We represent the views of Scotland's humanist and non-religious population. We are particularly interested in promoting human rights and have specific expertise in the field of freedom of religion and belief and freedom of expression. In addition we carry out charitable support work with rough sleepers and schools across the country. We provide services to non-religious people in Scotland such as weddings and funerals. Our celebrants solemnise more legal marriage ceremonies in Scotland than any other organisation religious or civil.

- **Your organisation's status (such as whether you are a charity, a membership organisation, a professional body etc).**
Humanist Society Scotland is a registered charity and company.
- **How your organisation is funded and the key sources of funding**
The vast majority of our funding is through voluntary donations, legacies and membership fees. A smaller proportion comes from fees relating to providing ceremonies, events and training that the charity runs. We do not receive any government funding. Our full accounts are published in the public domain: <https://find-and-update.company-information.service.gov.uk/company/SC413697>

David Greig

- **Your name/organisation**

David Greig, Artistic Director, The Lyceum Theatre, Edinburgh

- **The main role of your organisation and its key functions/interests/objectives**

We are one of Scotland's main producing theatres making between 6 and 10 new shows every year. We make and stage plays for our own 650 seat auditorium in Edinburgh, for tour in the Scotland, The UK and Internationally. We develop new work. We nurture new theatre talent. We curate and maintain the Scottish theatrical canon. We also run a youth theatre, and over 60's theatre group. We host discussions around plays, and we podcast, film and use social media to distribute our work and discussion about our work.

- **Your organisation's status (such as whether you are a charity, a membership organisation, a professional body etc).**

We are a charity and a Limited Company.

- **How your organisation is funded and the key sources of funding**

We are funded by box office, by donations, by Creative Scotland and by City of Edinburgh Council. In normal times we have a turnover of approx. £5 million per year and around £4 million of that is box office and donations. Just over 1 million is from public support. During Covid our box office has disappeared. We are currently also supported by the Scottish Government's Performing Arts Venue Relief Fund.

Panel 2

Catholic Parliamentary Office of the Bishops' Conference of Scotland

- **Your name/organisation**

Anthony Horan, Director, Catholic Parliamentary Office of the Bishops' Conference of Scotland

- **The main role of your organisation and its key functions/interests/objectives**

The Bishops' Conference of Scotland is a registered charity (No 16650). The Conference enables the Roman Catholic Bishops in Scotland to work together, undertaking nationwide initiatives through their Commissions and Agencies. The members of the Bishops' Conference are the Bishops of the eight Scottish Dioceses. The Bishops' Conference of Scotland is a permanently constituted assembly, which has a number of commissions and agencies assisting it in carrying out its work. The Catholic Parliamentary Office is an agency of the Bishops' Conference of Scotland and part of its remit is to engage with the work of Parliament and Government, including responding to consultations and calls for evidence on behalf of the Bishops' Conference.

- **Your organisation's status (such as whether you are a charity, a membership organisation, a professional body etc).**
The Bishops' Conference of Scotland is a registered charity (No 16650)
- **How your organisation is funded and the key sources of funding**
The Bishops' Conference of Scotland is funded by the Catholics of Scotland through their parishes and dioceses to represent their concerns at a national level.

Church of Scotland

- **Your name/organisation**
David Bradwell works at the Church of Scotland national office and has responsibility for parliamentary engagement and public policy. From November 2015 to September 2020 he co-ordinated a Scottish multi-faith refugee project, Scottish Faiths Action for Refugees.
- **The main role of your organisation and its key functions/interests/objectives**
Church of Scotland seeks to inspire the people of Scotland and beyond with the Good News of Jesus Christ through enthusiastic worshipping, witnessing, nurturing and serving communities. The Church of Scotland is one of the largest organisations in the country. We have over 330,000 members, with more regularly involved in local congregations and our work. We have around 800 ministers serving in parishes and chaplaincies, supported by more than 2,000 professional and administrative staff. Most of our parishes are in Scotland, but we also have churches in England, Europe and overseas. The Church of Scotland plays a pivotal role in Scottish society and works with communities worldwide.

The Church's main decision making-body is the General Assembly, which meets annually. It can agree public statements and take positions on public policy that we then describe as the 'view' or 'position' of the church. The General Assembly has expressed support for work to tackle hate crime, as well as affirming the importance of respect for human rights, including the right to freedom of religion or belief and the right to freedom of speech. We have also been explicit about our support for the repeal of laws of blasphemy in other jurisdictions.

- **Your organisation's status (such as whether you are a charity, a membership organisation, a professional body etc).**
The Church of Scotland is a registered charity (SC011353).
- **How your organisation is funded and the key sources of funding**
Our most recent Annual Report (https://www.churchofscotland.org.uk/data/assets/pdf_file/0014/70007/3476-TRUSTEES-Annual-Report-2020-A4-mono-FINAL.pdf) lists how our activities were funded:
 - Congregational Contributions £47.2m
 - Social Service Income £43.4m
 - Other Trading Income £8.4m

Income from Investments £4.5m
Legacies £2.5m
Property Disposals £2.5m
Donations, Grants, Trusts £2.2m
Other Charitable activities £3.4m
TOTAL £114.1m

Evangelical Alliance

- **Your name/organisation**
Kieran Turner, Public Policy Officer, Scotland, Evangelical Alliance
- **The main role of your organisation and its key functions/interests/objectives**
The Evangelical Alliance is the largest alliance of evangelical churches, organisations and individuals in the UK bringing together approximately 4000 member churches and 600 organisations. The main aim of the Evangelical Alliance is to support and encourage member churches and organisations to demonstrate the Christian faith by loving God and loving our neighbour to lead to the positive social transformation of society. This is summed up in our strapline 'Together Making Jesus Known'.

Our church-based members in Scotland include the Baptist Union of Scotland, Free Church of Scotland, Salvation Army, Redeemed Christian Church of God (RCCG), Assemblies of God (AOG), United Free Church of Scotland, Elim Pentecostal Churches, the Church of the Nazarene and a number of independent churches. Our organisational members include Bethany Christian Trust, Blythswood Care, Christians Against Poverty, Glasgow City Mission, Scripture Union Scotland and
- **Your organisation's status (such as whether you are a charity, a membership organisation, a professional body etc).**
Charity and membership organisation.
- **How your organisation is funded and the key sources of funding**
Membership donations and other charitable giving.

Free Church of Scotland

Your name/organisation

Rev. Stephen Allison, Minister and Assistant Clerk to the General Assembly of the Free Church of Scotland

The main role of your organisation and its key functions/interests/objective.

The Free Church of Scotland aims to conform as closely as possible to the Biblical idea of a Christian Church. The principal activity of the Church is the conduct of public worship and associated matters in the context of local congregations. Other activities in support of the Church's overall mission include:

- Running a degree awarding seminary for theological students
- Addressing questions of morality, religion and doctrine
- Running a programme of residential holidays for young people
- Supporting a variety of social responsibility projects both within the Church and through external agencies
- Supporting mission work in a number of countries

Your organisation's status (such as whether you are a charity, a membership organisation, a professional body etc)

The Free Church of Scotland is a registered Scottish Charity and each of its congregations are also separately registered charities.

How your organisation is funded and the key sources of funding

The primary source of central funds for the Free Church of Scotland is contributions from local congregations. This supports the cost of ministerial stipends as well as the wider mission work of the Church at home and abroad. Congregations are primarily funded by charitable donations from members and other supporters of the work of the Church.

Hindu Forum of Britain

Your name/organisation

Ravi Ladwa, Scottish Chapter, Hindu Forum of Britain

The main role of your organisation and its key functions/interests/objective.

Hindu Forum Britain is the largest umbrella organisation for Hindus in UK, and most of Hindu organisations in Scotland (e.g. Edinburgh Hindu Mandir, Glasgow temple, ISKCON Scotland, Aberdeen Hindu Society to name a few). HFB get involved in below activities: Public policy and community consultation for the government. Capacity building and project development for the Hindu community. Developing good interfaith relations with other faith communities to build a cohesive and inclusive Britain

Your organisation's status (such as whether you are a charity, a membership organisation, a professional body etc)

Registered charity and Co Ltd by Guarantee

How your organisation is funded and the key sources of funding

Membership Fees & Donation

Muslim Engagement and Development (MEND)

• **Your name/organisation**

Isobel Ingham-Barrow, Head of Policy at Muslim Engagement and Development (MEND)

• **The main role of your organisation and its key functions/interests/objectives**

Muslim Engagement and Development seeks to encourage political, civic, and social engagement within British Muslim communities through empowering British Muslims to interact with political and media institutions effectively.

Our approach to achieving this involves a combination of community engagement (through education, community events, local campaigns to encourage voting etc.) and advocacy work (involving victim support, submissions to parliamentary inquiries, media analysis, elections resources, briefings etc.).

Our work has been recognised through the following accolades:

- The World Economic Forum commended our work as “best practice” in Human Rights “protection and promotion”.
- The Office for Democratic Institutions and Human Rights rated us as the “best example for civil society organisations”.
- The EU Parliament Magazine stated that “The EU could learn a lot from MEND’s work on counter-radicalisation through engagement”.

How MEND Assists Parliamentarians and Policymakers:

- Providing briefings, information, analysis, and expertise on the issues facing British Muslim communities.
 - Arranging opportunities for MPs to engage with their local Muslim communities.
 - Conducting research within Muslim communities.
 - Connecting MPs to local stakeholders.
- **Your organisation’s status (such as whether you are a charity, a membership organisation, a professional body etc).**
We are a community funded non-profit organisation
 - **How your organisation is funded and the key sources of funding**
Our main source of funding coming from community fundraisers and personal donations.

Scottish Council of Jewish Communities

- **Your name/organisation**
Ephraim Borowski, Director, Scottish Council of Jewish Communities (SCoJeC)
- **The main role of your organisation and its key functions/interests/objectives**
The Scottish Council of Jewish Communities (SCoJeC) is the representative body of all the Jewish communities in Scotland. The Council advances public understanding about the Jewish religion, culture and community, by providing information and assistance to educational, health, and welfare organisations,

representing the Jewish community in Scotland to Government and other statutory and official bodies, and liaising with Ministers, MSPs, Churches, Trades Unions, and others on matters affecting the Jewish community. The Council also provides a support network for the smaller communities and individuals and families who live outwith any Jewish community, holds events throughout Scotland, provides speakers and educational resources for schools, and assists organisations within the Scottish Jewish community to comply with various regulatory requirements. SCoJeC also promotes dialogue and understanding between the Jewish community and other communities in Scotland and works in partnership with other organisations and stakeholders to promote equality, good relations, and understanding among community groups.

- **Your organisation's status (such as whether you are a charity, a membership organisation, a professional body etc).**
Scottish Incorporated Charitable Organisation SC029438
- **How your organisation is funded and the key sources of funding**
Grants and donations (including from SG Promoting Equality and Cohesion Fund)

National Secular Society

- **Your name/organisation**
Neil Barber, spokesperson for Scotland, National Secular Society.
- **The main role of your organisation and its key functions/interests/objectives**
The National Secular Society champions the separation of religion and state and equal respect for everyone's human rights, so no one is disadvantaged, nor privileged, because of their beliefs. We campaign for a secular state in which all citizens are free to practise their faith, change it, or have no faith at all. We promote secularism as the surest guarantor of religious freedom and the best means to foster a fair and open society, in which people of all religions and none can live together as equal citizens.
- **Your organisation's status (such as whether you are a charity, a membership organisation, a professional body etc).**
The NSS is a democratic and independent non-profit membership organisation. We are incorporated as a UK Company Limited by Guarantee, no. 01418145.
- **How your organisation is funded and the key sources of funding**
Our work is wholly supported by our members' subscriptions and donations. We receive no funding from government or outside bodies.

Network of Sikh Organisations

- **Your name/organisation**
Hardeep Singh/Network of Sikh Organisations

- **The main role of your organisation and its key functions/interests/objectives –**
(i) To work with allied organisations in cooperation to enhance the image and understanding of Sikhism in the UK (ii) to provide view on issues in relation to public policy and government affairs (ii) We run the Sikh prison chaplaincy service and are the endorsing authority for the Sikh Chaplain to the Armed Services

- **Your organisation's status (such as whether you are a charity, a membership organisation, a professional body etc).**
A charity

- **How your organisation is funded and the key sources of funding –**
Government funding for supporting the prison chaplaincy service and occasional public funding for community related projects.

WRITTEN SUBMISSIONS FROM TODAY'S WITNESSES

Panel 1

Scottish Newspaper Society

As the trade association which represents the Scottish newspaper industry, we would like to take the opportunity to comment on the proposals contained in the Hate Crime and Public Order (Scotland) Bill introduced in the Scottish Parliament on April 23, 2020.

We fully appreciate the good intentions which lie at the heart of the legislation, and we certainly welcome the abolition of the offence of blasphemy, but that is overshadowed by what we feel are some highly dangerous measures in the rest of the legislation and we have grave reservations about the considerable risks to freedom of expression they represent.

Having noted the questions set in the consultation document I will try to limit my comments to those which have the potential to affect our members directly, although they may wish to raise other points on the wider issues in their own responses.

1. Do you think there is a need for this Bill and, if so, why?

Not as far as the Press is concerned, and as currently framed we believe it poses a serious threat to freedom of expression in its broadest sense. A full explanation follows.

2. The Bill brings together the majority of existing hate crime laws into one piece of legislation. Do you believe there is merit in the consolidation of existing hate crime laws and should all such laws be covered?

In theory, yes

6. Do you have views on the merits of Part 2 of the Bill and the plans to introduce a new offence of stirring up of hatred?

Without a requirement to prove intent or that hatred was actually stirred up, just that the communication had the potential to do so, the bill creates the equal potential for vexatious complaints, and commentators in news publications and broadcasts would be primary targets. Even if there was a remote possibility of a successful conviction it would present a greatly increased opportunity to instigate worrying, time-consuming and costly investigations against news publishers and broadcasters, individual staff members and contributors.

Very few civil law defamation and privacy cases reach the Scottish courts but that is not representative of the number of complaints publishers receive, and the new bill threatens to expose them to a similar number of complaints through criminal law, a very different proposition to dealing with civil complaints. Most civil actions never get

to court because they are settled beforehand, not necessarily because the complaint is either valid or frivolous, simply because they are costly to contest. With criminal law there would be no way of limiting exposure to expensive and highly stressful legal process, particularly for individuals.

We know from the number and nature of referrals to the Independent Press Standards Organisation many complaints are lodged on the basis of offence being taken and this legislation creates the conditions for such grievances to move through the criminal justice system. In his review of hate crime legislation, Lord Bracadale observed, *“At the end of the day the court will decide whether in a particular case an offence was being committed”*, but this does not recognise that a criminal prosecution would involve putting journalists and legitimate commentators through a police investigation and not a matter of legal departments dealing with technical matters. It should not be forgotten that of 67 journalists arrested in Operation Weeting, 57 were cleared but only after years in which their lives were on hold.

Going back ten years, a high-profile example would be the 21,000 complaints against the Daily Mail following the publication of a column by Jan Moir about the death of Boyzone singer Stephen Gately. It may be that under similar circumstances the columnist would not have been convicted, but it is hard to believe that under the proposed legislation it would not have resulted in a complaint for stirring up hatred, followed by a criminal investigation and all that would entail. The regulator, the Press Complaints Commission at the time, rejected the complaints on the basis of freedom of expression and there are many similar examples of complaints about opinions being handled by the regulator and we firmly believe that it where they should stay.

7. Do you have any views on the Scottish Government’s plans to retain the threshold of ‘threatening, abusive or insulting’ behaviour in relation to the stirring up of racial hatred, contrary to Lord Bracadale’s views that ‘insulting’ should be removed?

Insult is surely part of robust debate and “insulting” should be removed, but our concerns about loose and subjective terminology go much further than just one word:

3(1)(a)(ii): A person commits an offence if the person *“communicates threatening, abusive or insulting material to another person.”* Abusive or insulting is not clearly defined and is open to wide, subjective interpretation; abusive or insulting according to whom?

3(1)(b)(i): *“...the person intends to stir up hatred...”* Intention is a subjective judgement.

3(1)(b)(ii): *“it is likely that hatred will be stirred up”*. What is the definition of likely? Again this is open to wide, subjective interpretation.

3(4): *“It is a defence for a person charged with an offence under this section to show that the behaviour or the communication of the material was, in the particular circumstances, reasonable.”* and **3(5)(a):** *“evidence adduced is enough to raise an*

issue as to whether that is the case,” and **3(5)(b)** “the prosecution does not prove beyond reasonable doubt that it is not the case.”

The subjectivity here could frequently result in cases being tested in courts and not thrown out at an early stage, especially if the complaint has been the result of a high profile campaign.

3(6)(a): “...includes behaviour of any kind and, in particular, things that the person says, or otherwise communicates.” This clearly encompasses speech and written communication.

3(7)(a): “...displaying, publishing or distributing the material.” This has the potential to involve delivery agents and retailers in investigations and prosecutions.

That infringement of any of the above could result in seven years’ imprisonment is, in our opinion, entirely disproportionate.

8. Do you have any comments on what should be covered by the ‘protection of freedom of expression’ provision in the Bill?

It was disappointing to note that in his original evidence-gathering process, Lord Bracadale did not proactively contact any media organisation or any group, such as the Scottish PEN, with an interest in freedom of expression and we find this hard to understand. By contrast, when the Scottish Law Commission was drafting the Defamation and Malicious Publications Bill now going through the Scottish Parliament there was extensive consultation with media representatives.

We know that some store has been placed in the Bill’s limited freedom of expression exemptions, but even they would not prevent investigation to see whether the exemptions were applicable and it would not be difficult to envisage situations where a judgement would be taken to proceed with prosecution. For example, the 2015 *Tackling Sectarianism and its Consequences in Scotland* report from the Scottish Government’s advisory group led by Dr Duncan Morrow specifically blamed newspapers for stirring up religious hatred in the run-up to an Old Firm match.

While the report called for a commitment “*not to sensationalise and stoke flames of sectarianism through headlines*”, it claimed newspapers were responsible for “*intensifying feeling and anxiety as seen in the lead up to the recent Celtic v Rangers league cup semi-final*”. Without defining what was meant by sensationalism, the report clearly stated that “*the repercussions of such sensationalism will always be harmful to society as a whole*”. This would be covered under the characteristics defined in 3(3)(c) of the new bill “*religion or, in the case of a social or cultural group, perceived religious affiliation*”.

As referred to above, we know from defamation and privacy law, and to a lesser extent Contempt of Court legislation, that trying to pin down limits to the reach of law when it applies to the definition and use of words is extremely difficult. We recognise that effort has obviously been made to balance the legislation with freedom of expression, and indeed journalism practice features regularly in the explanatory notes which accompany the legislation, but we do not understand why religion and

sexual orientation have been specified for freedom of expression exemptions and not the other defined characteristics. In any case the phrase “*is not to be taken to be*” in Clauses 11 and 12 is another very loose phrase open to wide application and the explanatory notes make the extremely limited nature of this defence very clear.

In our view, only with absolute exemptions can legitimate journalism escape the scope of this legislation and even then there are no guarantees. Even if absolute exemptions created loopholes, we believe they would not outweigh blocking a legal route to close down controversial or unpopular opinions. We do not have to go back far to find examples of commonly-held opinions which are now very much out of favour.

Publishing robust opinion and comment is an essential part of open accountability, as is public testing of actions carried out by organisations of all shapes, sizes and ownerships, but by its very nature it can be subject to legal attack and this legislation creates another, potentially more potent, weapon. We strongly believe this bill represents such a considerable threat to freedom of the Press that if it does make it into statute it must only be with absolute exemptions to prevent expensive, damaging and dangerous investigations before they start.

Publishers and broadcasters with strong and clear commitment to the public interest at their cores, who follow industry-recognised standards through demonstrable complaints systems, have clear transparency of authorship and accessibility, and who day after day show their willingness to follow the rule of law should not be subjected to this wholly unnecessary threat.

Other issues

We are aware other organisations have considerable concerns about the legislation, in particular those of broadcasters about the provisions for public performances in Clause 4, with the imprecise definition of “presents or directs” and “neglect” having similarities to the Lord Chamberlain theatre censorship abolished in 1968.

We also have concerns about Clause 8(1)(b) which says that “*the court may order that any of the forfeited material be disposed of in such manner as the court may direct*”. This is another dangerous principle with echoes of darker times. Would this extend to books? It would presumably cover back copies of newspapers and magazines but could also relate to deletion of material from the internet which we know is impossible to guarantee.

Conclusion

The recent controversy surrounding JK Rowling shows just how widely applicable such legislation could be. It would be foolish to second-guess the outcome of a non-existent case brought under legislation which has not been passed, but judging by the reaction to the author’s comments it’s highly likely a complaint would have been made under the terms of this bill. A police investigation would almost certainly have followed because the freedom of expression exemptions do not apply to transgender identity.

While we accept the purpose of this legislation is not to subject someone like JK Rowling or legitimate media organisations to police investigations for expressing, publishing or broadcasting controversial opinions but we are in little doubt that would be the consequence.

Social media is awash with people bearing extreme grudges against those with whom they disagree, especially in these times of heightened political tension over so many issues, and this legislation has the potential to put the full force of the law behind them. The justice committee has the chance to stop that happening.

Scottish PEN

Scottish PEN is a centre of PEN International. We work to defend writers' freedom of expression and to promote literature in Scotland. Our response to the Hate Crime and Public Order (Scotland) Bill is therefore focused on the interests of writers, performers and publishers and the potential impact of this Bill on their right to free expression.

Scottish PEN recognises the serious harm which hate crime causes in our society, impacting on individuals' ability to walk their streets without fear, to live their lives according to their own beliefs and values free of harassment, and to express themselves fully, in their days or on the page. We also recognise the importance of protecting provocative forms of art and literature which communicates different social perspectives and challenges conventional outlooks on the world.

We believe a climate of uncertainty or fear about what writers can safely express should not be allowed to accumulate unnecessarily. An open culture of criticism, satire, parody and exploration of taboo subjects is important and progressive. We know from our report with colleagues at the University of Strathclyde, *Scottish Chilling*, that when writers feel their work and communication is being monitored by the state, they are more likely to refrain from writing about sensitive subjects or, in some cases, refrain from writing altogether. Writers may overly restrict the scope of their work due to fear that their intentions will either be misconstrued or, even where their intention is clear, fears they will be held accountable for how their work is interpreted or misinterpreted by others after it is published or performed.

We welcome the principle of reconciling Scotland's fragmented and inaccessible legislation on hate crimes into a single piece of legislation. This consolidation should increase the transparency of this area of law, allowing citizens to gain a better understanding of their rights, and the legal limits on free expression. In order for this transparency to be practical and effective, however, the Bill itself needs to be sufficiently clear and accessible. As the legislation stands, we believe there is scope for improvement, additional clarity, and an opportunity to allay the anxieties of people who are concerned this legislation may overreach and criminalise provocative or controversial forms of writing, performing and publishing.

Scottish PEN supports the model of aggravators set out in Part 1 of the Bill. This consolidation of the law will not introduce any new offences into the criminal law, but will instead allow existing common law and statutory crimes motivated by or expressing hatred to be properly identified in a clear and consistent way. Statutory aggravators allow us to properly describe and condemn behaviour directed towards individuals and groups based on their presumed characteristics and to monitor the prevalence of hate crime being prosecuted in Scotland – if not its real incidence in society. We also strongly support the abolition of the common law crime of blasphemy.

However, Part 2 of the Bill creates new criminal offences, and accordingly, has the potential to introduce new and serious restrictions on what people say in public, in print, on air, and on stage. As a consequence, the balance of this submission will focus on the new offences of (a) stirring up hatred, and (b) the possession of

inflammatory material. We believe the legal thresholds being proposed in these new offences should be scrutinised carefully. We believe it is important for the Scottish Government and the Committee to consider and respond to the ways in which they could be applied in unforeseen ways in practice.

We agree with Lord Bracadale that the concept of “insulting” behaviour should be removed from the Bill and that the protected characteristic of “race, colour, nationality (including citizenship), or ethnic or national origins” should be treated in the same way as the other characteristics listed. Doing so would eliminate the unnecessary complexity this adds to the reform of this area of law, which has been largely justified by the logic of consolidation and the idea protected characteristics should be treated in a systematic way. We would also note that the definition of race used in this and other legislation in the field expresses a wider legislative understanding of the concept of “race” than many may realise, raising questions about whether the lower threshold of “insulting” words or speech is an appropriate basis for criminalisation.

Behaving in a “threatening or abusive manner” which would “cause the reasonable person to suffer fear or alarm” is already a criminal offence in Scotland. To secure a conviction, however, the crown must demonstrate that the accused either intended to cause fear or alarm, or was reckless about the impact of their behaviour. The new stirring up offence proposed in the Bill – to some extent – echoes this structure. Like others, however, we are concerned about the mens rea requirements for the new offences of stirring up hatred and possession of inflammatory material. As the Bill stands, prosecutors will be required only to show that hatred is “likely to be stirred up” by the “threatening or abusive behaviour”, regardless of any intention to do so on the part of the accused. Possession of “threatening or abusive” materials, similarly, is criminalised where either intention to stir up hatred, or hatred is “likely” to be stirred up if the material were communicated.

We believe there is a strong argument for restricting the new offences to situations where actual intention to stir up hatred can be proven. We recognise that the Bill’s approach to mens rea is not original. This aspect of the Bill is lifted from the Public Order Act 1986’s provisions on stirring up of racial hatred – which can be proven where there is “threatening, abusive or insulting” behaviour which is either intended to stir up hatred or where racial hatred was “likely to be stirred up in all the circumstances.” However, the fact that comparative language has been used in legislation before does not mean these proposals can or should escape scrutiny from first principles. There are reasonable grounds to question whether extending this approach to all of the protected characteristics is proportionate. The Bill’s new stirring up offence is wider than English and Welsh law in two important and potentially problematic respects. Firstly, the parallel offences of stirring up hatred on the grounds of religion or sexual orientation under the 1986 Public Order Act can only be committed by “threatening” behaviour rather than “abusive” behaviour envisaged by this Bill. This wider definition will clearly bring additional forms of potentially “abusive” writing and performance into the ambit of the Scottish offence. Secondly, English prosecutors must prove the defendant intended to stir up hatred on religious or sexual orientation grounds to secure a conviction. If passed, Scottish prosecutors will not, if they can persuade the court hatred is “likely” to be stirred up the accused’s threatening or abusive behaviour or communications.

While the English and Welsh legislation does include a “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 the accused person intended. 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. On every point of comparison, the Scottish proposals embody lower legal thresholds for prosecution. This represents a substantial expansion in the criminal law. Restricting the offences to situations where intention to stir up hatred can be proven beyond a reasonable doubt would significantly allay anxieties about the reach of this legislation.

The Scottish Government has argued that restricting the new offences in this way 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.” We do not find this objection compelling. In Scots law, the accused person’s intentions are objectively inferred, based on analysis of their behaviour and what this suggests about their mindset. The criminal law does not make windows into the accused person’s soul. Suspects and people accused of committing criminal offences have a right to silence, and accordingly, often give the investigating authorities and the court little or no explanation of their behaviour. The court’s responsibility is to reach an informed judgement on the evidence about the accused person’s intentions based on what they did, said or published. In ordinary circumstances, our courts do this day and daily. Several of the best known criminal offences in Scots law are crimes of intention only, including the common law crimes of assault, theft and fraud. The idea limiting the new offences in this important way would render them functionally inoperable is unpersuasive.

Sections 3(4) and 5(4) of the Bill introduce a “reasonableness” defence to charges of stirring up hatred or possessing inflammatory materials. We recognise that a defence of reasonableness is already used in respect of other statutory offences in Scotland without further elaboration or definition, leaving it to the courts to assess what constitutes reasonable behaviour on a case-by-case basis. Given concerns about the scope of these new offences, however, Scottish PEN believe the Bill should give clearer guidance on factors which must be taken into account by the court – and earlier in the process, by police officers and procurators fiscal investigating complaints – in assessing whether the complained of conduct is reasonable.

We therefore recommend the Bill should be amended to give clearer but non exhaustive guidance on factors which must be taken into account in assessing whether or not the defence of reasonableness applies. We do not believe this can be achieved by the introduction of additional free expression clauses into the Bill. Section 11 and 12 of the Bill introduce specific savings clauses in respect of religion and sexual orientation. These savings provisions are essentially subject-specific, dealing with specific religious and social controversies.

While Scottish PEN welcomes the additional clarity these provisions introduce into the interpretation of the concept of “threatening or abusive” behaviour in the Bill, and

would support the introduction of additional safeguards in respect of other areas of legitimate controversy in our society, we believe it is important that the Bill takes explicit account of the artistic, academic, comic and journalistic context in which potentially complained of behaviours or communications may arise, making clear that these contexts weigh in favour of the defence of reasonableness applying to the behaviour, communication or possession of potentially inflammatory materials. Accordingly, we recommend that a clause should be introduced to the Bill along the following lines: “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.”

The introduction of this clause into the Bill would not mean that behaviour or communications falling within one of these categories would automatically be permissible, or that individuals accused of attempting to stir up hatred would be able to hide behind academic, artistic, comic or journalistic justifications for their actions. Like the existing free expression clauses written into sections 11 and 12 of the Bill by the Scottish Government, adopting a clause of this kind would communicate to the courts the vital importance Parliament places on free expression and free inquiry, and inform courts’ judgements about whether the behaviour challenged in a criminal case could be characterised as “reasonable.” The introduction of a new clause of this kind would not restrict the generality of the defence of reasonableness to charges under sections 3 and 5. As a result, the Scottish Government may argue its inclusion is unnecessary. However, the presence of such clear and explicit safeguards on the face of the Bill would significantly allay artistic, journalist and scholarly anxieties that these new offences could be applied to provocative but nonetheless legitimate forms of writing, expression or research.

The final part of our submission focuses on the additional provisions in the Bill in respect of theatre performances. Section 4 of the Bill introduces additional provisions on culpability where the offence of stirring up hatred under section 3 is “committed during public performance of play.” In essence, this provision provides that someone who “presents or directs” a theatrical production in which one or more of the performers stirs up hatred may be found guilty of the offence alongside the actors or performers whose words or behaviour form the basis of the charge. To establish the director’s culpability under section 4, however, it must be shown they either “consented” to or “connived” in the stirring up of hatred, or alternatively, that the stirring up of hatred during the show is “attributable to their neglect.”

The general principle of art and part guilt in Scots law holds that all persons who aid or abet the commission of a crime are as guilty as the principle offender. In simple terms, the getaway driver is as guilty in law as the bank-robber who brandishes the firearm. Section 293 of the Criminal Procedure (Scotland) Act 1995 provides that anyone: “who aids, abets, counsels, procures or incites any other person to commit an offence against the provisions of any enactment shall be guilty of an offence and shall be liable on conviction, unless the enactment otherwise requires, to the same punishment as might be imposed on conviction of the first-mentioned offence.” If this Bill is enacted, this art and part rule would apply to the new statutory offence of “stirring up hatred” under section 3. As a result, it is not clear why section 4 of the Bill is thought desirable or necessary, or the real-life scenarios in which the Scottish

Government envisage a “negligent” director could or should be prosecuted under this provision. Significantly, the Scottish Government does not appear to have set out its rationale for section 4 in the Policy Memorandum accompanying the Bill.

Fraser Sutherland, Humanist Society Scotland and other signatories

We represent a diverse group of individuals and organisations concerned about the impact on freedom of expression of the proposed Hate Crime and Public Order Bill as currently drafted.

We welcome the provisions to consolidate existing aggravated hate crimes and the repeal of the blasphemy law.

However, the Bill creates stirring up offences without any intent being examined; merely that the words, action, or artwork might do so. This offence could even be applied to being in possession of materials produced by someone else, where sharing the material could stir up hatred.

The unintended consequences of this well meaning Bill risk stifling freedom of expression, and the ability to articulate or criticise religious and other beliefs.

As currently worded, the Bill could frustrate rational debate and discussion which has a fundamental role in society including in artistic endeavour. The arts play a key part in shaping Scotland's identity in addition to being a significant economic contributor.

The right to critique ideas, philosophical, religious and other must be protected to allow an artistic and democratic society to flourish.

Signed,

Fraser Sutherland, Chief Executive, Humanist Society Scotland

Andrew Copson, Chief Executive, Humanists UK

Scottish PEN

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Chris Brookmyre, novelist

Val McDermid, writer

Elaine C Smith, actor and comedian

Dame Seona Reid, arts administrator

Alan Bissett, playwright and novelist

Ruth Wishart, journalist and broadcaster

Andrew Panton, artistic director Dundee Rep / joint CEO Dundee Rep & Scottish Dance Theatre Ltd

Professor Maggie Kinloch, theatre director and chair of Humanist Society Scotland

Ariane Sherine, comedian and journalist

Joan Smith, writer and human rights activist

Peter Tatchell, Director, Peter Tatchell Foundation

Rowan Atkinson, actor and comedian

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Nick Ross, television and radio presenter

Terry Anderson, Executive Director, Cartoonists Rights Network International

Gary McLelland, Chief Executive, Humanists International

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Dr Evan Harris, former MP and former Vice-Chair of Parliamentary Humanist Group

Quilliam Foundation

Panel 2

Catholic Parliamentary Office of the Bishops' Conference of Scotland

Introduction – The Bishops' Conference of Scotland

The Bishops' Conference of Scotland is a registered charity (No 16650). The Conference enables the Roman Catholic Bishops in Scotland to work together, undertaking nationwide initiatives through their Commissions and Agencies. The members of the Bishops' Conference are the Bishops of the eight Scottish Dioceses. The Bishops' Conference of Scotland is a permanently constituted assembly, which has a number of commissions and agencies assisting it in carrying out its work.

The Catholic Parliamentary Office is an agency of the Bishops' Conference of Scotland and part of its remit is to engage with the work of Parliament and Government, including responding to consultations and calls for evidence on behalf of the Bishops' Conference.

The Bishops' Conference of Scotland welcomes the Justice Committee's inquiry into the Hate Crime and Public Order (Scotland) Bill and is grateful of the opportunity to submit a contribution.

Comments on the Bill

Consolidation

The Bill brings together the majority of existing hate crime laws into one piece of legislation. Do you believe there is merit in the consolidation of existing hate crime laws and should all such laws be covered?

We agree that there is merit in consolidating existing hate crime laws.

Other forms of crime not included in the Bill

Do you think that sectarianism should have been specifically addressed in this Bill and defined in hate crime legislation? For example, should a statutory aggravation relating to sectarianism or a standalone offence have been created and added?

Existing legislation, including existing statutory aggravations, adequately covers offences relating to sectarianism.

We agree with Lord Bracadale that the absence of such an aggravation would not leave a gap in the law as both race and religion statutory aggravations can be attached to any base offence if proven.

Stirring up offences

Do you have views on the merits of Part 2 of the Bill and the plans to introduce a new offence of stirring up of hatred?

As expressed in Lord Bracadale's report into hate crime in Scotland, criminalising conduct is a serious step that should not be taken lightly. And any new law must be carefully weighed against fundamental freedoms, such as the right to free speech, freedom of expression, and freedom of thought, conscience and religion.

There is no argument with the proposition that stirring up of hatred is morally wrong. Furthermore, there is no argument with the reasonable belief that stirring up of hatred may lead to violence, public disorder, and may incite others to commit offences.

To create an offence whereby this kind of conduct is discouraged and condemned is a positive move. However, this must be balanced against existing legislation. It must also be balanced with fundamental freedoms, and the terminology used in any new law must accurately capture the offending behaviour being criminalised. The law must also be sufficiently clear for society to understand it and for the judiciary to be able to apply it. In terms of balancing fundamental freedoms, we have set out our response in our answer to question 8.

The provisions of the proposed new stirring up offence consist of a two-part test. Sections 3(1) and 3(2) set out that, for an offence to be established, the behaviour or communication must be threatening or abusive (or insulting in the case of race). This is the first part of the test. The second part of the test is that by this behaviour or communication, the person 'intends' to stir up hatred against a group of persons (with a protected characteristic), or there is a 'likelihood' that hatred will be stirred up against such a group. How hatred is defined is not clear which leaves it open to wide interpretation. This could lead to vexatious claims having to be dealt with by police.

The proposed threshold for an offence under the stirring up provisions might also be considered disproportionately low. For example, A might disagree with B's belief that a biological male cannot become a woman. A might even go so far as to say that B is 'talking nonsense' and that he is 'transphobic' and say so either in person or on a social media platform such as Twitter. The term abusive includes being offensive or mistreating, and should B feel offended, the first test is met. In terms of the second test, a group of people accompanying B deem the comments to be an intention to stir up hatred against them as a group, and thus the second test is met.

The behaviour of A should not be criminalised and criminal liability should not be determined solely on the subjective. The test must be stronger and allow the law to be consistent and not forever stretched in multiple ways to meet the capricious sensibilities and mores of the current culture and public opinion.

Further, the introduction of an offence of 'likelihood' (sections 1(b)(ii) and 2(b)(ii)) removes the mens rea (mental) element; a critical aspect of the common law test of criminal liability in Scots law.

An approach which may strike a better balance between the type of behaviour which ought to be criminalised and the public interest and fundamental freedoms is the 'hypothetical reasonable person', as prescribed in section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, and remarked on in *Paterson v Harvie*.

Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 provides that a person commits an offence if he behaves in a threatening and abusive manner and the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and he intends by the behaviour to cause fear and alarm or is reckless as to whether the behaviour would cause fear or alarm.

In *Paterson v Harvie* [2014] HCJAC 87 it was held on appeal that the 'essence of the offence under section 38 was that the accused's conduct was to be judged by an objective test in which the actual effect of the threatening or abusive behaviour on those who experienced it was irrelevant and if the objective test was met the crime was complete if the accused's behaviour would be likely to cause fear and alarm to the hypothetical [reasonable] person.' The reasonable person, it is remarked, is 'someone who is not of abnormal sensitivity.'

This test is both proportionate and clear and thus less susceptible to wide interpretation and a deluge of vexatious claims.

We are also concerned that section 5 of the Bill creates an offence of possessing inflammatory material which, if taken with the low threshold contained therein, could render material such as the Bible, the Catechism of the Catholic Church and other texts such as Bishops' Conference of Scotland submissions to government consultations, as being inflammatory under the new provision. For example, in a recent submission to the Scottish Government on proposed reform of the Gender Recognition Act 2004, the Bishops' Conference of Scotland stated the Catholic Church's understanding of the human person, including the belief that sex and gender are not fluid and changeable, and that male and female are complementary and ordered towards the creation of new life. Such pronouncements, which are widely held, might be perceived by others as an abuse of their own, personal worldview and likely to stir up hatred.

We cannot turn to censorship but must instead accept the divergent views and multitude of arguments inhabiting our society on a wide range of issues and allow for respectful debate.

Do you have any views on the Scottish Government's plans to retain the threshold of 'threatening, abusive or insulting' behaviour in relation to the stirring up of racial hatred, contrary to Lord Bracadale's views that 'insulting' should be removed?

Racial hatred is a grave offence that is to be condemned. The equal dignity of all human beings demands that we strive for fairer and more humane conditions for all people and that every form of social or cultural discrimination in fundamental personal rights on the grounds of race, sex, social conditions, or religion among others, must be curbed and eradicated.

We agree with Lord Bracadale's conclusion that the stirring up of racial hatred offences be limited to threatening or abusive conduct or material. As outlined in Lord Bracadale's report, the term 'insulting' was removed from an English harassment offence (s5 of the Public Order Act 1986) on the basis that 'threatening or abusive' sufficiently covered the type of conduct being targeted. Additionally, it was argued that its removal would not undermine the ability of the prosecution service to bring prosecutions. Removal of the term 'insulting' in the Scottish context would also ensure consistency across all protected characteristics.

There is also a danger that the inclusion of nationality (including citizenship) and national origins (section 3(1)) might censor some of the discussions which take place around important constitutional issues such as Scottish independence and exiting the European Union. By definition, insulting behaviour might include conduct which is insolent or causes affront. Constitutional debates are often robust and include a blunt exchange of views, which might be considered an affront by some. Consideration ought to be given to how the freedom to engage in robust and frank debate on political issues such as constitutional arguments can be protected and not fall foul of the provisions of the bill.

Other issues

Do you have any comments on what should be covered by the 'protection of freedom of expression' provision in the Bill?

Any new law must be carefully weighed against fundamental freedoms, such as the right to free speech, freedom of expression, and freedom of thought, conscience and religion. The right to exercise freedom, especially in moral and religious matters, is an inalienable requirement of the dignity of the human person. It is a right that must be recognised and protected by civil authority, always within the limits of the common good and public order.

Importantly the courts have expressly noted that the right to freedom of expression protects facts and opinion; and it protects expression which shocks, offends and disturbs other people. It also protects the contentious and the unwelcome. Freedom of expression provisions must be robust enough to protect the freedom to disagree.

Society must protect the right to freedom of expression across all protected characteristics and avoid singling out specific characteristics and creating a hierarchy of rights and freedoms. The right to freedom of expression is always balanced, and correctly so, against the duties and responsibilities set out in Article 10 of the European Convention of Human Rights.

As per our answer to question 6, a recent Bishops' Conference of Scotland submission to the Scottish Government on proposed reform of the Gender Recognition Act 2004 set out the Catholic Church's understanding of the human person, including the belief that sex and gender are not fluid and changeable, and that male and female are complementary and ordered towards the creation of new life. Without an appropriate freedom of expression provision such pronouncements, which are widely held, would not be protected.

Prominent public figures have been accused of hate and of transphobia for making the argument that a man cannot become a woman and vice versa. Many have also been accused of hate for using pronouns corresponding with an individual's biological or birth sex. The freedom to express these arguments and beliefs must be protected.

The growth of what some describe as the 'cancel culture' - hunting down those who disagree with prominent orthodoxies with the intention to expunge the non-compliant from public discourse and with callous disregard for their livelihoods - is deeply concerning.

No single section of society has dominion over acceptable and unacceptable speech or expression. Whilst the legislature and judiciary must create and interpret laws to maintain public order it must do so carefully, weighing in fundamental freedoms and allowing for reasonably held views, the expression of which is not intended to cause harm.

As stated in response to question 6, we cannot turn to censorship but must instead accept the divergent views and multitude of arguments inhabiting our society on a wide range of issues and allow for respectful debate and expect respectful tolerance. This does not mean anything goes. The law must provide red lines, but it must be proportionate and fair. Otherwise we risk becoming an intolerant, illiberal society.

What is your view on the plans for the abolition of the offence of blasphemy?

We have no objection to the plans to abolish the common law of blasphemy in Scotland.

Church of Scotland

General Comments

The Church of Scotland has a presence in each community in Scotland with a network of 1300 congregations spanning Shetland to the Scottish Borders.

The Church of Scotland is one of Scotland's largest voluntary sector organisations with over 300,000 members creating regular engagement with up to a quarter of Scotland's population. It has members, buildings and staff present in every part of Scotland. On a weekly basis, the Church provides a wide range of activities which contribute to the wellbeing of those in the communities it serves - from chaplaincy services, Parents and Toddlers Groups to Elderly Care (both residential and community-based), in addition to counselling, pastoral care and emergency food provision. In many parts of Scotland, churches and church halls remain vital community hubs.

The Church has a particular commitment to tackling poverty and social injustice, and it has consistently contributed to the discussion around hate crime legislation and how it should be implemented.

We welcome the opportunity to comment on the Hate Crime and Public Order (Scotland) Bill and strongly support the intention of the Justice Committee to create a more transparent and consistent approach to tackling hate crime in Scotland.

Age as a new characteristic

We would like to reiterate the Church of Scotland response to the Scottish Government consultation on Hate Crime legislation submitted in February 2019 which supported the addition of a new statutory aggravation on age hostility to Scottish hate crime legislation. This would also be consistent with the provision of age as a protected characteristic under the Equality Act 2010.

The Church believes that the statutory aggravations in Scottish hate crime legislation should apply where people are presumed to have one of more protected characteristic. Protection of those presumed to have a particular characteristic or who have an association with it would also reflect the protections afforded to such individuals under the Equality Act 2010.

Other forms of crime not included in the Bill

In the Church of Scotland's consultation response in 2019 on Hate Crime legislation, the Church stated that there was a need for sectarianism to be specifically addressed and defined within hate crime legislation, as there may be a limited number of cases in which a separate provision for sectarianism in criminal law may be necessary.

The Church of Scotland has defined sectarianism as a complex set of attitudes, actions, beliefs and structures at personal, communal and institutional levels that involves religion, and typically involves a negative mixing of religion and politics. It

arises as a distorted expression of human needs, especially for belonging, identity and the freedom of expression of difference, and is expressed in destructive patterns of relating (cited from Joseph Leichy of the Irish School of Ecumenics)

We believe that all religions should be included when defining sectarianism. The Church of Scotland is involved in building community alongside people of other faiths including, but not exclusively, the Roman Catholic Church. Sectarianism creates barriers between religions that the Church of Scotland is working with others to tackle.

The Church recognises that sectarianism arises from cultural differences that may manifest alongside religious or political characteristics, and that it presents as a broader societal issue, rather than merely a matter for criminal law.

We therefore believe that a broad range of measures are required to tackle the problem and that creating a specific criminal offence in the context of hate crime legislation is one such measure. However we do not believe that a standalone offence relating to sectarianism should have been added to the hate crime legislation as it is important to ensure a consistency of approach across all characteristics. The Church believes it is important to note the prevalence of online abuse and its effect on individuals. This must also be considered in the formulation of this Bill as it is the medium in which people may use to perpetrate hate crime.

Stirring up offences

The Church of Scotland agrees with the recommendation of Lord Bracadale that stirring up of hatred offences should be introduced in respect of each of the protected characteristics, including any new protected characteristics.

However we do not agree with Lord Bracadale's recommendation that any new stirring up hatred offences should require that the conduct is "threatening or abusive".

Conduct can have the effect of stirring up hatred towards those with particular characteristics, without necessarily reaching the threshold of being threatening or abusive.

We accept that conduct which is merely "insulting" should be protected by the Article 10 right to Freedom of Expression and should not have criminal consequences, but we suggest that conduct which is "grossly insulting" is likely to have the intention or effect of stirring up hatred and that this should be included.

Other issues - Blasphemy

A report was published by the Church of Scotland in May 2013 entitled, 'Human Rights: What Does God Require Of Us? Justice Informed By Love,' which concluded that human rights are relational and that our duty and responsibilities to one another are based on love-informed justice. The 2013 General Assembly of the Church of Scotland also affirmed the Universal Declaration of Human Rights, and the European

Convention on Human Rights, reiterating the Church's commitment to love our neighbours, defined as "every person, in every place and in all times."

Therefore, the Church's commitment to human rights and to the protection of specific characteristics, including religion and belief under the Equality Act of 2010, now supersedes legislation relating to the common law offence of blasphemy, which has not been prosecuted in Scotland for more than 175 years.

Over the past number of years, the Church of Scotland has regularly expressed concern at the blasphemy laws which exist in other parts of the world that persecute Christians and other religious groups.

In 2018, the Church welcomed a landmark decision to overturn the death sentence of a Pakistani Christian woman convicted of blasphemy,

Over the past decade, the former World Mission Council of the Church has called for the repeal of the Blasphemy Law in Pakistan. In 2012, the General Assembly of the Church of Scotland urged the Government of Pakistan to repeal the Blasphemy Law, particularly section 295C, which makes the death penalty mandatory upon conviction, and to release and pardon all charged under the misuse of the Blasphemy Law.

It therefore makes sense that the Church of Scotland would also support the abolition of the offence of blasphemy in Scotland as it does across other parts of the world.

Evangelical Alliance

1. Do you think there is a need for this Bill and, if so, why? Are there alternatives to this legislation that would be effective, such as non-legislative measures, wider reforms to police or criminal justice procedures? Are there other provisions you would have liked to have seen in the Bill or other improvements that should have been made to the law on hate crime?

Any new criminal offences are a significant legal development and there must always be a clear need for new criminal legislation. This Bill is no exception particularly as the Bill is so wide ranging in scope, considering areas of intent, communications and speech as well as physical conduct, and also covering a wide range of locations including public places, private homes and even the performance of plays. There needs to be clarity as to why this Bill is needed, what gap in legislation is filled by the Bill and who is currently not protected by existing legislation. It is not apparent that there are clear answers to any of these questions with much of the language surrounding the bill based on terms such as ‘sending a strong message’ that hate crime offences ‘will not be tolerated by society’.¹ Whilst these are laudable intentions that in itself is not the basis for good law.

2. The Bill brings together the majority of existing hate crime laws into one piece of legislation. Do you believe there is merit in the consolidation of existing hate crime laws and should all such laws be covered?

If the Bill is considered necessary, it is understandable to use the opportunity to provide a consolidation exercise. We do, however, have concern that in drawing together different pieces of legislation together the threshold for defending free speech will be weakened.

All the existing legislation includes a defence that the accused did not ‘intend to stir up hatred’ whereas the current proposals replace this with a ‘reasonableness test’. This would appear to reject Lord Bracadale’s proposals and weaken the defence. The problem with a reasonableness test is that it lacks certainty and risks someone being guilty of a crime they did not intend to commit or know they have committed. It is also not a fixed test so what is reasonable behaviour in one context, or at one time, could later be deemed to be unreasonable based on a fresh assessment of whether it is reasonable. This legal subjectivity allows criminality to be determined by social, political and cultural trends rather than intention.

3. Do you think that the statutory aggravation model should be the main means for prosecuting hate crimes in Scotland? Should it be used in all circumstances or are there protected characteristics that should be approached differently and why? For example, the merits of a statutory aggravation for sex hostility rather than a standalone offence for misogynistic harassment?

4. Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation? Would any alternative means be measured effective? For example, would there have been merit in introducing a statutory aggravation (outwith hate crime legislation) for the exploitation of the vulnerability of the victim?

5. Do you think that sectarianism should have been specifically addressed in this Bill and defined in hate crime legislation? For example, should a statutory aggravation relating to sectarianism or a standalone offence have been created and added?

While we strongly oppose sectarianism in all its forms, we believe that any protections needed are adequately covered in existing law under the categories of race and religion.

6. Do you have views on the merits of Part 2 of the Bill and the plans to introduce a new offence of stirring up of hatred?

Although we have sympathy for the intentions behind the desire to criminalise stirring up hatred, we have significant concerns about this part of the Bill. We are not seeking to defend hateful speech that incites violence and we agree that stirring up hatred towards people is morally wrong. However, in creating new offences in this area great care is required to ensure that someone's speech is not ruled as criminal because it is objectionable to the person who hears it. Protecting disagreement is a vital part of democratic society, even when it touches on issues that people find insulting.

Our concerns about the present proposals include the level of the criminal threshold, the lack of need to prove intent to meet the threshold for part of the two part criminal test and the point at which the criminal law can be engaged with material and communications which can be deemed illegal before ever being distributed. Taken together we believe there is a real danger that what might be deemed objectionable and offensive behaviour could now be criminalised without any intent or even knowledge of the individual exhibiting that behaviour. The introduction of this new offence would have profound implications for liberal democracy.

We hold that the law should provide certainty and clarity, and concur with the comments of Lord Hope in *Purdy v DPP*:

“The word “law” ... implies qualitative requirements, including those of accessibility and foreseeability. Accessibility means that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it what acts and omissions will make him criminally liable...The requirement of foreseeability will be satisfied where the person concerned is able to foresee, if need be with appropriate legal advice, the consequences which a given action may entail.” [emphasis added]

In the context of the proposed Bill the current wording fails this test, the burden of reasonableness is with the accused, as it is not clear what a prosecutor would need to do to prove beyond reasonable doubt that the comments were not reasonable.

Specifically, we have four concerns in this area:

1. Threatening or abusive threshold (clause 3(2), 5(2))

The concept of threatening behaviour is a well understood concept both legally and by the general public. However, the term abusive however is not defined in the Bill and can mean a range of different behaviours interpreted widely by society. This does not meet the intention of the Bill to have clearly understandable legislation for the general public. Furthermore, there is a danger without definition that a wide interpretation given by a court could meet the first part of the two-part test for stirring up hatred.

We are aware of the operation of the similar threshold in Section 38 of Criminal Justice and Licensing (Scotland) Act 2010.³ However in this act there are greater requirements for the threshold to be met with the additional requirement to cause a reasonable person fear or alarm and also the need to demonstrate intent or reckless behaviour. These requirements are missing from the current Bill. Given the consequences of being convicted of an aggravated offence of stirring up hatred immense care should be taken, and this lower standard should be rejected. To adopt an approach such as this would potentially criminalise people for expressing disagreement or holding a divergent viewpoint that someone else considers to be abusive. As a society we should promote peaceable diversity, and acknowledge that there will always be fundamental disagreements, especially relating to religious beliefs, where some express views they passionately believe to be true and others consider such expressed views to be wrong or abusive.

For example, at the core of the Christian faith is the notion of salvation. The idea that some people will go to hell could be considered offensive, and even abusive. Likewise, while the proposed bill includes protection for comments relating to sexual orientation it does not include commensurate protection regarding discussion of gender identity.

It is therefore entirely foreseeable that this could be used to deem comments relating to biological sex as abusive.

2. Definitions of stirring up and hatred

There are no definitions given of either stirring up or hatred within the Bill. These are broad and subjective terms and consequently pose a significant challenge with the second part of the two-part test. With current stirring up offences in relation to racial hatred there are a number of clearly defined offences within sections 18-23 of the Public Order Act 1986 Act.⁴ By simply making a generalised offence without definition of key terms this will potentially lead to significant confusion for both the general public and the courts.

3. Place of intent

The second part of the test allows for the threshold to be met without any reference to intent of the alleged perpetrator, simply that hatred is 'likely to be stirred up' by the actions taken. This must mean that it is possible to meet this part of the test unintentionally. In the Bill this applies to both sections 3 and 5 in relation to conduct and communications covering an extremely broad range of behaviours. If part one of the test is met the lack of mens rea ensures a very low bar to meet the full test – particularly with the lack of definitions of 'stirring up and hatred' as noted above.

Ordinarily where mens rea is not required (for example with strict liability in driving offences) there are clear statutory defences. Whilst there are statutory defences in the Bill, when viewed against the existing law they are significantly weakened. The undefined reasonableness test does not provide the same level of protection, nor the clarity required for the law.

4. Possession of inflammatory material (clause 5)

Similar to the wider challenges related to intent outlined above, clause 5 of the Bill relating to inflammatory material also raises concerns as to its breadth. In particular, the fact that communications do not need to have been sent but merely possessed means that it is possible to be convicted without any actual sending of communications in a threatening or abusive way.

Furthermore, we are concerned that texts such as the Bible are perceived by some groups as being 'threatening, abusive or insulting material' in a number of ways. With the breadth of the current offence as drafted and a free speech clause that leaves a number of gaps in its current form, it is not clear where the protections lie for those, from a variety of faith traditions, for whom scriptural teaching and the sharing of this teaching is significant part of their life and faith practice.

7. Do you have any views on the Scottish Government's plans to retain the threshold of 'threatening, abusive or insulting' behaviour in relation to the stirring up of racial hatred, contrary to Lord Bracadale's views that 'insulting' should be removed?

Racial hatred is abhorrent and recent events have reminded everyone of the scourge of racism locally and globally. As a Christian organisation we hold that all human beings are created equally in dignity and worth, as outlined in the opening pages of the Bible, and racism is the antithesis of this. We are therefore sympathetic to the government not wishing to send a signal that somehow protections against racism are being weakened at this time. That said, the threshold of insulting is a low one which if applied without sufficient and clear defences available does criminalise significant areas of free speech.

The possible challenges of this have been raised recently by Roddy Dunlop QC, Dean of the Faculty of Advocates, who has highlighted that in the context of comedy traditional jokes made against nationality may become subject to this offence as well as classic racism:

"People could complain that the joke discriminates against Scottish people's national identity. We worry it will be too wide and too much of a curb on freedom of expression"

In the existing Public Order Act 1986 stirring up offences such clear defences do exist as outlined by the recent commentary from Fred Mackintosh QC. Once again these primarily relate to the issue of intent:

"The problem with consolidating the four offences into one is that some of the specific detail and defences which are an important part of the existing separate offences have been lost. All five of the existing defences have a

defence which enables the argument to be made by an accused, who did not intend to stir up racial hatred, to prove he did not intend, and had no reason to suspect, that his conduct was threatening, abusive or insulting.

If 'insulting' is to be retained within the Bill, the same available defences should likewise be retained, rather than weakened as is currently the case.

8. Do you have any comments on what should be covered by the 'protection of freedom of expression' provision in the Bill?

There are two free speech clauses in the Bill relating to religion and sexual orientation which are welcome and provide a level of protection for discussion of both. As a faith based organisation, we strongly support freedom of religion and belief to debate and discuss ideas and this freedom is most especially needed in areas of passionate disagreement.

However, the protections are narrow, and they do not cover any other aspect of the Bill, not least the current gender identity conversation that is taking place in society. So, these must be strengthened both in breadth to cover all aspects covered by the Bill and in detail about what is protected in each area. Given the protection afforded to comments relating to sexual orientation for consistency this should also relate to other characteristics such as gender identity. Again, this is not about seeking to promote hatred of anyone but rather to allow for honest conversation and democratic disagreement about some very contested areas of views.

In the European Court of Human Right judgment in the case of Handyside the court noted:

"Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

A further concern is that the proposed definition of "hate speech" does not necessarily require the speech to be false. It is our view that traditional defences of 'fair' and 'honest comment' should be considered within any proposed expansion. Moreover, we would contend that recognition of the broad freedoms afforded to individuals, particularly pursuant to Articles 9 (freedom of religion) and 10 (freedom of expression) of the European Convention of Human Rights should feature prominently in any definition, so to prevent the inappropriate use of the term 'hate speech' to silence peaceful opinion on controversial topics.

We consider a broad protection for the freedom of speech similar to that included in the Westminster 2006 Racial and Religious Hatred Act to be preferable. This states:

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism 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.

This Act also had the added protection that it applied only to threatening, and not threatening or abusive speech.

9. Do you agree with the Scottish Government that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should not be repealed?

10. What is your view on the plans for the abolition of the offence of blasphemy?

Evangelical Alliance
24 July 2020

Free Church of Scotland (1)

The Free Church of Scotland is committed to following the teaching of Jesus which includes condemning genuine hatred and promoting the good of all people. In Matthew 5:43-44 Jesus tells his disciples, “You have heard that it was said, ‘You shall love your neighbour and hate your enemy.’ But I say to you, love your enemies and pray for those who persecute you.” However, we do not consider that the new offences of stirring up hatred within the proposed Hate Crime and Public Order (Scotland) Bill is the way to secure this end and we are very concerned about the Bill’s significant detrimental effect on free speech within our society. We have sought to outline our views in answer to the 10 suggested questions below.

General

1. Do you think there is a need for this Bill and, if so, why? Are there alternatives to this legislation that would be effective, such as non-legislative measures, wider reforms to police or criminal justice procedures? Are there other provisions you would have liked to have seen in the Bill or other improvements that should have been made to the law on hate crime?

We recognise that there are issues in our society of genuine hatred which are wrong and should be addressed. However, we are also concerned by the tendency of some to see any criticism of their beliefs and opinions as amounting to hatred. We believe it is possible to disagree with someone while loving and respecting them as a person. Indeed, we believe that an understanding that people hold a wide range of opinions and beliefs on a wide range of issues, and acceptance (even encouragement) of free debate about such opinions and beliefs is an essential feature of a mature democratic society.

The issue we have with this particular Bill is that it encourages a recourse to law where there is a legitimate disagreement. This silences debate and prevents reconciliation between people. It undermines any efforts to understand those you disagree with.

We also believe there are already sufficient protections in law under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 which provides that threatening or abusive behaviour is an offence if it would be likely to cause a reasonable person to suffer fear or alarm and a person either intends or is reckless as to whether their behaviour would have this effect.

In essence, the Bill is trying to make people be “nice” to one another. We are not convinced it is possible for the law to do that. Law cannot change people’s morality – it merely restrains the worse abuses. As Christians we believe that Jesus Christ came into the world so that we could be genuinely transformed and given a new heart.

Consolidation

2. The Bill brings together the majority of existing hate crime laws into one piece of legislation. Do you believe there is merit in the consolidation of existing hate crime laws and should all such laws be covered?

We can see that there may be merit in consolidation of existing hate crime laws into one statute for ease of reference. However, it is clear that the scope of the Bill goes well beyond consolidation. Our real concerns with this bill are related to the desire to extend hate crime legislation.

How to prosecute hate crime?

3. Do you think that the statutory aggravation model should be the main means for prosecuting hate crimes in Scotland? Should it be used in all circumstances or are there protected characteristics that should be approached differently and why?

For example, the merits of a statutory aggravation for sex hostility rather than a standalone offence for misogynistic harassment?

We believe the aggravation model, which currently operates in Scotland, goes far enough in protecting against hate crime. It has the advantage of combining the more subjective element of hatred with another recognised offence, such as assault, which requires corroboration to establish. We accept that hatred involved in an offence should be taken into account at the point of sentencing and the aggravation model achieves this.

4. Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation? Would any alternative means be measured effective? For example, would there have been merit in introducing a statutory aggravation (outwith hate crime legislation) for the exploitation of the vulnerability of the victim?

We do not believe it is necessary to add a new statutory aggravation on age hostility as it is our understanding that Scottish sheriffs and judges already take age into account when sentencing, where it is relevant to an offence, and we note that the Procurator Fiscal will state the age in the complaint or libel where they deem it appropriate to do so.

Other forms of crime not included in the Bill

5. Do you think that sectarianism should have been specifically addressed in this Bill and defined in hate crime legislation? For example, should a statutory aggravation relating to sectarianism or a standalone offence have been created and added?

We are not clear as to what the distinction is between aggravation relating to sectarianism and aggravation relating to a “religion or, in the case of a social or cultural group, perceived religious affiliation” which is already covered in the Bill.

Accordingly, we do not think it is necessary to add another form of aggravation.

Stirring up offences

6. Do you have views on the merits of Part 2 of the Bill and the plans to introduce a new offence of stirring up of hatred?

This is the area of the Bill which most concerns us as a church. We are not at all persuaded there is a need to introduce a new offence of “stirring up of hatred.” We are in agreement with Part 1 of the Bill in relation to aggravations because they do not create new offences – they merely enhance the sentencing provisions.

However, it is in adding new offences that the Bill goes too far and there is no evidence offered of a significant gap in the law to justify the new offences.

Our first concern is what exactly is meant by “stirring up” and “hatred”. The wording in the Bill is incredibly vague and subjective. Good law should show itself to be both necessary and clear. We are not convinced there is sufficient clarity in the terms in this bill to allow the law to operate effectively.

We are concerned that the offence does not require people to intend to commit the offence – all that is needed is that it was likely that hatred would be stirred up.

This strict liability offence is potentially far reaching and means that someone could unwittingly commit the offence even where they had no intention at all to stir up hatred.

We also noted that it is not clear what is meant by “likely” to stir up “hatred”. This is incredibly subjective and potentially far reaching. Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 specifically refers to behaviour likely to cause a reasonable person to suffer fear or alarm. The absence of reference to a “reasonable” person in the Bill concerns us as it makes the test entirely subjective.

In our society often people take any disagreement in relation to religion, sexual orientation and transgender as “hatred” of the individual and so would likely feel “hatred” simply because someone disagreed with them. Any person can state that they felt hatred was stirred up against them and this would have to be taken seriously by the police and the courts.

Given the offence can be committed unwittingly or unintentionally we are deeply concerned for Freedom of Speech in our society. The obvious example in the context of a church is the potential undermining of the right of ministers to preach the whole range of Biblical views on ethics which are part of mainstream Christianity. Are they going to need to have their lawyer on speed dial to check that their sermon each week does not fall foul of the offence of stirring up hatred?

And would their lawyer be able to advise them, given the vague and subjective nature of the offence?

We accept that our beliefs are not shared, nor necessarily understood by everyone. We welcome challenge, debate and open discussion of our beliefs both from within our Christian community and the wider community. The effect of the Bill is that, notwithstanding the fact that we do not undertake preaching and discussion of our

beliefs with an intent to stir up hatred (whatever that means), normal activity becomes criminalised and debate of any sort is closed down by individuals who simply disagree with our views. Their mere disagreement is construed as a “feeling” that we are “stirring up hatred”. We believe that this encourages the culture that is normally promoted in totalitarian rather than democratic states.

We also worry that in general such an offence will have a chilling effect on free speech making all of our members concerned about speaking up in relation to their faith for fear of committing the offence of “stirring up hatred.” We would question whether this offence is compatible with the European Convention of Human Rights, in particular in relation to our rights of freedom of thought, conscience and religion and freedom of speech.

While we note that there are protections built into the Bill for freedom of expression we think this is an implicit recognition that the Bill limits freedom of speech and this concerns us. We also note that having a freedom of speech defence will not stop individuals being charged with the offence of “stirring up hatred” and then having to go to the expense of defending themselves in court and pleading the defence, which surely cannot be the intention of the Bill. We note in particular that pressure is put on prosecutors at the moment to prosecute all hate crime where they can and that Freedom of Information requests mean that, where they do not prosecute, questions are often asked as to why they took that decision. This will mean prosecutors feel they have no discretion but to prosecute this offence, even though there might be a stateable defence. This could lead to harassment or abuse within the system where people are able to have others, who do not share their views, prosecuted even where there is little chance of conviction.

Moreover, we are concerned by the expansive nature of the offence which means it can also extend to publishers and distributors of offensive material. This will have a chilling effect on free speech as publishers concerned about potential prosecution will simply choose not to publish material which is debateable.

We also note the additional offences of possessing inflammatory material combined with the right for a warrant to be issued to enter a premise and remove inflammatory material and ultimately destroy it. This is deeply worrying to us as it could lead to certain books and publications essentially being banned. As books are confiscated and destroyed, precedents would develop that would amount to a list of banned books. Often people possess material they disagree with for critiquing purposes so prescribing the banning of books will have a major impact on debate and academic freedom. It is an unwarranted prohibition on freedom of speech. And as Christians we are deeply concerned that the Bible could fall foul of this offence. Given people have been reported to the police for potential hate crimes for displaying verses from the Bible, we are deeply concerned that the proposed protections in sections 11 and 12 will not cover the whole of Scripture.

The result would be to require secular courts to try and identify what, for example, is “religion” and what are “religious beliefs or practices” potentially exposing the Bible, or parts of the Bible to being viewed as inflammatory material, confiscated and destroyed.

As Christians we fundamentally believe that people should be free to disagree and debate with us. We might sometimes feel offended by the way people speak about our beliefs, but we invite such debate and discussion as we want people to genuinely engage with our beliefs. We value our own freedom of speech and the freedom of speech of others made in the image of God. We recognise that freedom of speech must include the right to express the unpopular opinion, otherwise it is not truly freedom of speech. In a free society we should be able to challenge, criticise and robustly disagree with the beliefs and opinions of others, even in ways that might offend them.

7. Do you have any views on the Scottish Government's plans to retain the threshold of 'threatening, abusive or insulting' behaviour in relation to the stirring up of racial hatred, contrary to Lord Bracadale's views that 'insulting' should be removed?

While we don't want people to be insulted because of their race we are concerned by the lack of clarity in relation to what is meant by 'insulting' in law which introduces a more subjective element to the offence and so we are inclined to agree with Lord Bracadale that "insulting" should be removed.

Other issues

8. Do you have any comments on what should be covered by the 'protection of freedom of expression' provision in the Bill?

As noted already, we do not believe the offence of "stirring up hatred" should be introduced for the reasons stated in answer to question 6 and we are not comforted by the "protection of freedom of expression" as this would need to be pleaded in court and would result in individuals having to incur the costs of defending themselves in court. However, if the offence is introduced, it is our view that the protections given in the Bill do not go far enough and appear to seek to limit our protections under the European Convention of Human Rights.

We note that in relation to religion, the protection of freedom of expression can be interpreted in a narrow sense of only offering a defence where confined to the areas listed. We are concerned that certain positions adopted by mainstream Christianity in relation to ethical issues might not be protected by this provision.

We believe the protection offered by the equivalent English legislation is stronger and more helpful. Section 29J of the Public Order Act 1986 gives the following protection:

"Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism 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."

As already stated, we believe that those who disagree with our religion should be free to mock us, ridicule us and insult us. That is part of free debate and we welcome

the chance to seek to persuade people in the marketplace of ideas that our beliefs are true and can withstand criticism. We note that the apostle Paul made clear in 2 Corinthians 5:11 that he sought to “persuade others” – he never wanted to force conversion – people must genuinely come to faith themselves.

In relation to sexual orientation the protection of freedom of expression is particularly narrow, confining itself to discussion of sexual conduct or practices and urging people to refrain from those practices. Nothing is said about criticism or discussion of the wider issues of identity that are associated with sexual orientation. We appreciate that people’s behaviour is often so closely connected to their perceived identity that it is not always possible to draw a distinction between identity and practice and yet this Bill appears to attempt to draw a distinction. We also note that no protection is given to allow someone to disagree with same sex marriage. Again, we believe the equivalent protection offered by the Public Order Act 1986 is stronger and more wide ranging. Section 29JA states:

“(1) In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or 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 intended to stir up hatred.

(2) In this Part, 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 intended to stir up hatred.”

We also note that there is no clause protecting freedom of expression relating to transgender issues. This is particularly concerning as there is already wide ranging debate in society about issues connected to self-declaration, the impact of transgender rights on safe spaces for women and the impact transgender ideology is having on children. Our society needs to be free to continue to debate these areas, especially as new research emerges and the lack of provision to protect freedom of speech in this area has the potential to curtail debate and discussion.

In each of these areas of freedom of expression – religion, sexual orientation and transgender – we are concerned that the mere expression of views which may be contrary to the views of others will become a criminal offence and the individuals who express “the wrong views” will face prosecution. Given the pervasive nature of this risk ministers would have to take extensive legal advice and potentially have every sermon vetted prior to preaching to make sure it does not unintentionally breach this bill.

9. Do you agree with the Scottish Government that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should not be repealed?

We agree that the offence of racially aggravated harassment should be maintained.

10. What is your view on the plans for the abolition of the offence of blasphemy?

The Free Church of Scotland declared in Act 12 of our General Assembly of 1846 that “she disclaims intolerant or persecuting principles, and does not regard her

Confession of Faith, or any portion thereof, when fairly interpreted, as favouring intolerance or persecution, or consider that her office-bearers, by subscribing it, profess any principles inconsistent with liberty of conscience and the right of private judgment.”

We therefore believe that people should be completely free to disagree with our faith in any way, including mocking and ridiculing us. We are convinced that our faith is true and has a sufficient evidential basis to withstand and we invite people to engage us in debate.

We believe the offence of blasphemy curtails freedom of speech and debate and so are fully in support of its abolition. Given there have been no prosecutions for blasphemy for over 175 years we did believe it had already been abolished by desuetude but welcome the formal abolition if deemed necessary. However, we have concerns that it is being replaced with a new blasphemy in the form of “stirring up hatred.”

Board of Trustees of the Free Church of Scotland

Free Church of Scotland (2 – supplementary submission)

On the 23rd July 2020, the Free Church of Scotland submitted our response to the Call for Views from the Justice Committee of the Scottish Parliament in relation to the Hate Crime and Public Order (Scotland) Bill. We note that in opposing certain key aspects of the Bill we are joined by a diverse range of bodies including The National Secular Society, The Peter Tatchell Foundation, The Catholic Church, The Faculty of Advocates, The Law Society of Scotland and the Scottish Police Federation.

One of the issues we raised in our response to the Bill was the fact that the proposed new offence of “stirring up hatred” did not require that the perpetrator intended to commit the offence and accordingly the offence could be committed unwittingly by someone who had no intention at all of stirring up hatred. Accordingly, we welcome the announcement by the Justice Secretary, Humza Yousaf on the 23rd September 2020 that a requirement that the perpetrator intended to stir up hatred would be introduced into the Bill. We recognise that removing the strict liability nature of the offence as drafted significantly improves the legislation. However, we are still deeply concerned that a number of issues we raised with the Bill have not been addressed.

Ultimately, although we recognise that requiring an intention to stir up hatred is an improvement, we note that intention is a legal test and that the courts can take into account the full facts and circumstances to infer intention. This means that although the person may never have “intended” in the everyday sense of the word, to stir up hatred, the Court might infer from the circumstances that he or she did so intend.

This will, therefore, continue to have a chilling effect on Free Speech. The nature of the offence is still too vague, and it is too easy for someone to fall foul of the legislation simply by disagreeing with someone else’s opinion. Too many in our society today perceive legitimate disagreement as hatred and would seek to accuse people of stirring up hatred just because they disagree. We still worry that ministers will have to take care as to what they say each week, perhaps consulting their lawyers before speaking on controversial ethical issues in society. The proposed offence will drive debate and discussion underground and be dangerous for our civil society in the long run.

We believe it is likely that there will be a presumption in favour of prosecution stemming from the political interest in hate crime. Even where someone might successfully defend themselves against the accusation, the stress, anxiety and cost associated with defending themselves is completely unwarranted. It will alienate law abiding citizens and represent an unproductive, or even counter-productive use of police and court resources.

We agree with the comments by the Scottish Police Federation that asking them to police speech would seriously damage the relationship between the police and the public. We note that encouraging a culture where citizens report one another for perceived hate crime will lead to more division in society. We also note that the police would record reported hate crime for intelligence purposes even where they do not believe an individual is guilty of the offence of stirring up hatred. However, if they received 2 or 3 complaints about an individual, that might be sufficient for them

to apply to the Court for a warrant to search the person's private home for inflammatory material which can then be confiscated and destroyed. People possess material for a variety of reasons including material they do not personally agree with. Many historical works express views that are not acceptable in society today but that is not a reason to confiscate them. Surely in a liberal society we do not want to be in a situation where Freedom of Speech is being radically undermined by the banning of books.

We continue to believe that Part 2 of the Bill is unnecessary and will have a serious detrimental effect on Freedom of Speech. There are already several avenues available in law to address genuine hate crime. We believe the aggravation model of increased sentencing where another crime was motivated by hatred is adequate (as set out in Part 1 of the Bill). We also note that there are sufficient protections in law under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 which provides that threatening or abusive behaviour is an offence if it would be likely to cause a reasonable person to suffer fear or alarm and a person either intends or is reckless as to whether their behaviour would have this effect. This has the benefit of an objective "reasonable person test" and requires corroboration. We note that a section 38 offence can also be aggravated by prejudice.

As the Free Church of Scotland, we have an interest in promoting debate and discussion. We believe that this is not only in the interests of Christians but is in the interests of society as a whole.

In conclusion, despite the Justice Secretary's concession, we still believe Part 2 of the Hate Crime and Public Order (Scotland) Bill is at best unnecessary and ultimately has the potential to seriously undermine our democratic and liberal society by dampening Free Speech. We do not consider the protections to free speech offered in the draft in anyway strong enough to prevent a major erosion of this fundamental tenet of a democratic society. Too many people automatically view disagreement as hatred rather than engaging in civilised debate over differing opinions. We want to encourage genuine debate and discussion in our society and that will not be achieved by criminalising perceived hatred. Instead this Bill will drive legitimate debate underground and alienate ordinary citizens, including many members of the Christian community.

Muslim Engagement and Development (MEND)

This submission from Muslim Engagement and Development (MEND) to the Justice Committee call for views regarding the Hate Crime and Public Order (Scotland) Bill seeks to explore the impact of the bill for BAME communities, and Muslims in particular.

MEND is a community-funded organisation that seeks to encourage political, civic, and social engagement within British Muslim communities through empowering British Muslims to interact with political and media institutions effectively. Our approach to achieving this involves a combination of community engagement (through education, community events, local campaigns to encourage voting etc.) and advocacy work (involving victim support, submissions to parliamentary inquiries, media analysis, election resources, briefings etc.).

The Islamophobia Response Unit (IRU) was founded by MEND in response to rising anti-Muslim attacks across Europe and a growing tide of anti-Muslim sentiment. The IRU offers a platform for victims of Islamophobic hate crime and discrimination to report and share their experiences and serves as a source of free casework and advice, legal and emotional support, and referral services.

Considering MEND's expertise in hate crime and abuse directed at Muslim communities, we feel that we can provide valuable insights into the potential benefits, impacts, and oversights of the bill. As such, MEND hopes that our recommendations may provide guidance to the Justice Committee in reviewing important factors that must be taken into account during the consideration of the bill.

Do you think there is a need for this bill and, if so, why? Are there alternatives to this legislation that would be effective, such as non-legislative measures, wider reforms to police or criminal justice procedures? Are there other provisions you would have liked to have seen in the bill or other improvements that should have been made to the law on hate crime?

The bill is indeed essential as the consolidation of varying powers can only streamline the process and elevate confusion for all those involved, including providing clarity to victims regarding the protections to which they are entitled. However, while the bill itself presents a significant legislative improvement, there should also be a simultaneous focus on encouraging the reporting of hate crimes, nurturing relationships between local police forces and communities, ensuring a robust approach to Islamophobia specifically, and improving police training and recording practices.

Nurturing relationships between police forces and local communities

In the daily lives of most people, the police are perhaps the most visible representation of the state. As such, the relationship between minority communities and their local police is reflective of the relationship between communities and the state. Therefore, trust and understanding are critical in building healthy communities. Consequently, the adequate representation of minorities within the police force becomes a fundamental asset in nurturing understanding, trust, and a feeling of

representation. Indeed, increasing the diversity within local forces has the benefit of allowing communities to feel represented, whilst also providing police forces with nuanced understandings of the issues and experiences of such communities, as well as helping them to respond to their needs and concerns meaningfully and with greater sensitivity.

However, it has recently been revealed that Police Scotland still suffers from a severe lack of diversity, especially amongst its senior ranks. It [appears](#) that only 253 out of 17,693 officers in Scotland (1.4%) are from BAME backgrounds, and there are no BAME officers amongst Police Scotland's executive team of senior officers. The lack of BAME representation at senior levels is particularly problematic. Indeed, such a lack affects the police service's leadership, culture, and understanding of the community it serves. Meanwhile, people of a BAME background wishing to develop their careers within the police service may lack role models, encounter barriers when trying to access necessary training, and face selection panels which are frequently lacking in diversity.

As a result, MEND would encourage Police Scotland to fully examine its current policies and procedures at all levels of recruitment, retention, and progression, in order to develop a clear strategy for improving diversity across every level of seniority within the force.

MEND would also encourage local forces to build relationships with representative grassroots organisations, such as MEND, who may assist them in a variety of ways, including:

- **Facilitating engagement and platforms for discussion with local Muslim communities,**
- **Providing training and expertise in the issues experienced by Muslim communities,**
- **Serving as a third-party reporting centre (in the form of our IRU), which is able to both encourage reporting and also act as a liaison between police and local victims.**

Encouraging the reporting of hate crimes

A critical problem facing Muslim communities in tackling the widespread prevalence of Islamophobic hate crime is the significant level of underreporting, which results in an incomplete and inaccurate picture of the rate of hate crime targeting Muslim communities. As with all types of hate crime and other forms of violent crime, a significant number of cases are not reported due to factors such as victims facing intimidation from the suspect; anxiety from the incident; a lack of confidence in the police; and a lack of knowledge regarding how to report an incident. There are also concerns that there are issues of misreporting religiously aggravated hate crimes as racially aggravated hate crimes. This is particularly relevant for cases of Islamophobia due to the way it is frequently conflated with other forms of racism, and as such, it may be difficult to determine the true motivation of a perpetrator. It is, therefore, imperative that further initiatives are promoted to encourage greater levels

of reporting in order to glean an accurate understanding of the scale of these incidents.

Consequently, MEND urges the Scottish Parliament to undertake a holistic examination of the barriers that minority communities face in reporting crimes, and commit to developing enhanced strategies to combat these challenges through engagement with representative grassroots organisations.

Ensuring a robust approach to Islamophobia specifically

The Cross-Party Group (CPG) on tackling Islamophobia has observed that Islamophobia in Scotland poses as significant problem. In particular, they discovered that 83% of Muslims had experienced Islamophobia in Scotland, and 79% of Muslims in Scotland feel that Islamophobia is getting worse.¹ Additionally, a ComRes poll commissioned by MEND in 2018 found that nearly half of all Scottish people felt that there was more negative discrimination against Muslims than people of other faiths.²

However, one of the greatest challenges in tackling Islamophobic hate crime is the intersection between race and religion within the motivation of the offense. In many cases, it becomes essentially impossible to distinguish between the two motives. In Todd Green's seminal work, *The Fear of Islam*, he states that "Islamophobia is not racially blind, nor is it simply a manifestation of older forms of racism rooted in biological inferiority. It is an example of what some scholars have labelled "cultural racism". This form of racism incites hatred and hostility based on religious beliefs, cultural traditions, and ethnic backgrounds."³ This is an important understanding to have, for while animosity towards religion is frequently used as a justification for prejudicial sentiments, this hostility is also a product of animosity towards race, ethnicity, and culture, with Muslims becoming treated as a racialised group. A case in point is the conflation between ethnic and religious insults (such as the application of "p*ki" in reference to a Muslim as well as an ethnic identity), or the reality that British Sikhs have frequently been the unfortunate targets of Islamophobic abuse on the basis of their ethnicity and assumed connection to a Muslim identity. Therefore, rather than viewing Islamophobia in a vacuum, it is important to approach it through the lens of racism as it often manifests itself and functions through these logics.

However, at the same time, Muslims are incredibly diverse in terms of ethnicity, language, culture, and an array of other variables. Therefore, Muslims cannot be considered a race in the same way as Jewish or Sikh communities. The result is frequently confusion in how to record such hate crimes, which impacts not only the protections to which victims are entitled (indeed the difference in protections afforded on the grounds of race and religion will be discussed further below), but also the ways in which data is recorded; data which forms the foundation for exploring patterns of crime and highlighting areas in need of improved strategies and particular focus. Consequently, without recording Islamophobia as a specific category of hate

¹ Beaton, Ailean. 2020. "Third Of Scottish Muslims Say Islamophobia Is An 'Everyday Issue'". *Holyrood*.

https://www.holyrood.com/news/view/third-of-scottish-muslims-say-islamophobia-is-an-everyday-issue_15169.htm.

² "MEND - Islamophobia Poll October 2018". 2018. *Comresglobal.Com*. <https://comresglobal.com/wp-content/uploads/2018/10/MEND-Islamophobia-Poll-October-2018-1.pdf>.

³ Todd H. Green, *The Fear of Islam: an Introduction to Islamophobia in the West* (Minneapolis: Fortress Press, 2015), 27.

crime within police procedures, the actual levels of Islamophobic abuse will remain hidden.

As such, MEND recommends that the bill in question specifically includes a requirement for the police to record Islamophobic hate crime as a separate category of hate crime, in order to assist in effective policy development and application.

Do you have any views on the Scottish Government’s plans to retain the threshold of ‘threatening, abusive or insulting’ behaviour in relation to the stirring up of racial hatred, contrary to Lord Bracadale’s views that ‘insulting’ should be removed?

MEND firmly believes that protections against insulting behaviours should be maintained within the legislation. Indeed, permitting insulting words against people on the grounds of race directly contributes to discrimination and institutional racism that negatively impact the lives of minority communities by creating barriers to their participation within social, civic, economic and political life. As such, the long-term impacts of the perpetuation of such statements can be equally detrimental to the lives of victims as physical violence.

Moreover, protections against abusive and insulting behaviour should also be included on the grounds of religion. As previously mentioned, Islamophobia frequently manifests itself as a form of racism, but Muslims are not defined as a race, and therefore are not entitled to the protections against racially motivated hate crimes in the same way as Jewish and Sikh communities. However, just as insulting behaviours on the grounds of race can contribute to discrimination and institutional racism that create barriers to minority participation within social, civic, economic and political life, such propagating of insulting Islamophobic hatred can have these consequences for Muslims.

Therefore, especially considering the intersection between race and religion within Islamophobia, MEND urges legislators to:

- **Maintain the protections against “insulting” behaviour in relation to the stirring up of racial hatred,**
- **Mirror this protection in relation to the stirring up of religious hatred.**

Do you have any comments on what should be covered by the ‘protection of freedom of expression’ provision in the Bill?

Part III Schedule 11b (protection of freedom of expression: religion) would devalue the bill of a great deal of protective power when applied to Islamophobic abuse, unless it is accompanied by a robust and policy applicable definition of Islamophobia. In 2018, the All Party Parliamentary Group (APPG) for British Muslims launched an inquiry into a definition of Islamophobia. The APPG concluded this inquiry by proposing the following definition: “Islamophobia is rooted in racism and is a type of racism that targets expressions of Muslimness or perceived Muslimness.” It is essential that this definition is grounded within legislation. Moreover, considering the

importance of clarity when attempting to balance the protection of vulnerable people with the protection of freedom of speech, MEND advocates for combining the above definition with clear guidelines. MEND has proposed the following guidelines to secure a holistic and robust understanding of Islamophobia:

Islamophobia is rooted in racism and is a type of racism that targets expressions of Muslimness or perceived Muslimness. It is demonstrated in, and articulated through, speech, writing, behaviours, structures, policies, legislation or activities that work to control, regulate or exclude Muslim participation within social, civic, economic and political life, or which embody hatred, vilification, stereotyping, abuse, discrimination, or violence directed at Muslims.

Taking into account the overall context, examples of Islamophobia in public life, the media, schools, the workplace, and in the religious sphere may include (but are in no way limited to):

- *Any distinction, exclusion, restriction, or preference against Muslims that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*
- *Causing, calling for, aiding, or justifying the killing or harming of Muslims or those perceived to be Muslim due to their religious identity.*
- *Causing, calling for, aiding, or justifying the killing or harming of individuals due to their perceived or actual connection to or support of Muslims.*
- *Charging Muslims with conspiring to harm humanity and/or the Western way of life or blaming Muslims for the economic and social ills of society.*
- *Making mendacious, dehumanising, vilifying, demonising, or stereotypical allegations about Muslims.*
- *Objectifying and generalising Muslims as different, exotic or underdeveloped, or implying that they are outside of, distinct from, or incompatible with British society and identity.*
- *Espousing the belief that Muslims are inferior to other social or religious groups.*
- *Accusing Muslims as a collective of being responsible for real or imagined wrongdoing committed by a single Muslim person, group or nation, or even for acts committed by non-Muslims.*
- *Applying double standards by requiring of Muslims a behaviour not expected or demanded of any other social, religious or ethnic group.*
- *Applying ethnocentric approaches to the treatment of Muslims (judging another culture solely by the values and standards of one's own culture), for example, evaluating Muslim women's choice of dress exclusively through the speaker's expectations and without reference to the personal cultural norms and values of the women in question.*

- *Acts of aggression within which the targets, whether they are people or property – such as buildings, schools, places of worship and cemeteries – are selected because they are, or are perceived to be, Muslim(s) or linked to Muslims.*

While criticism of Islam within legitimate realms of debate and free speech is not in itself Islamophobic, it may become Islamophobic if the arguments presented are used to justify or encourage vilification, stereotyping, dehumanisation, demonisation or exclusion of Muslims. For example, by using criticism of religion to argue that Muslims are collectively evil or violent.

Consequently, MEND urges the Scottish Government to:

- **Adopt the definition of Islamophobia produced by the APPG for British Muslims: “Islamophobia is rooted in racism and is a type of racism that targets expressions of Muslimness or perceived Muslimness.”**
- **Apply the above definition in conjunction with the aforementioned guidelines.**

It is through the adoption of these guidelines that a holistic understanding may be approached that is robust enough to foresee any potential confusion when applied in conjunction with the principles of freedom of speech.

Do you agree with the Scottish Government that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should not be repealed?

Protections against racial harassment outlined in Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 should not be repealed. Moreover, as discussed above, while Muslims are not a race, Islamophobia frequently manifests itself as a form of racism, especially considering the frequent impossibility to distinguish between racial and religious motivations of the perpetrator. Therefore, these protections should be expanded to include harassment on the grounds of religion. **MEND thus calls on policy makers to create a parity between the level of protections that are afforded on the grounds of race and religion.**

Conclusions and recommendations

As explored throughout this submission, Islamophobia poses a particular challenge in relation to legislating against hate crime. Consequently, MEND humbly suggests the following recommendations:

- **Police Scotland fully examine its current policies and procedures at all levels of recruitment, retention, and progression, in order to develop a clear strategy for improving diversity across every level of seniority within the force.**
- **Local police forces build relationships with representative grassroots organisations, such as MEND, who may assist them in representing the interests and needs of local communities.**

- **The Scottish Parliament undertake a holistic examination of the barriers that minority communities face in reporting crimes, and commit to developing enhanced strategies to combat these challenges through engagement with representative grassroots organisations.**
- **The bill in question be amended to specifically include a requirement for the police to record Islamophobic hate crime as a separate category of hate crime.**
- **The bill retains the protections against “insulting” behaviour in relation to the stirring up of racial hatred, while also mirroring this protection in relation to the stirring up of religious hatred.**
- **The Scottish Parliament adopt the definition of Islamophobia produced by the APPG for British Muslims: “Islamophobia is rooted in racism and is a type of racism that targets expressions of Muslimness or perceived Muslimness” and apply this definition in conjunction with the guidelines outlined within this submission.**
- **Legislators ensure that there is a parity within hate crime legislation between the level of protections that are afforded on the grounds of race and religion.**

How MEND can assist parliamentarians, policymakers, and community stakeholders

- Providing briefings, information, analysis, and expertise on issues impacting Muslim communities.
- Arranging opportunities for parliamentarians, policymakers, and community stakeholders to engage with their local Muslim communities.
- Conducting research within Muslim communities.
- Connecting parliamentarians, policymakers, and community stakeholders to other local stakeholders.

Scottish Council of Jewish Communities

The Scottish Council of Jewish Communities (SCoJeC) is the representative body of all the Jewish communities in Scotland. SCoJeC advances public understanding about the Jewish religion, culture and community, by providing information and assistance to educational, health, and welfare organisations, representing the Jewish community in Scotland to Government and other statutory and official bodies, and liaising with Ministers, MSPs, Churches, Trades Unions, and others on matters affecting the Jewish community. SCoJeC also provides a support network for the smaller communities and for individuals and families who live outwith any Jewish community or are not connected with any Jewish communities, and assists organisations within the Scottish Jewish community to comply with various regulatory requirements. SCoJeC also promotes dialogue and understanding between the Jewish community and other communities in Scotland, and works in partnership with other organisations and stakeholders to promote equality, good relations, and understanding among community groups.

In preparing this response we have consulted widely among members of the Scottish Jewish community, and this response reflects the views of all branches of Judaism that have communities in Scotland.

1. Do you think there is a need for this Bill and, if so, why? Are there alternatives to this legislation that would be effective, such as non-legislative measures, wider reforms to police or criminal justice procedures?

Hatred and discrimination are, sadly, everyday issues for many people in Scotland. It is known that hate crime of all kinds is under-reported, in some cases because people fear they will not be believed, in others because they do not think that the police will follow up reports (unfortunately often because of previous negative experience), because victims fear further persecution if it becomes known that they have reported the attacker to the police, because incidents have become so frequent that they feel reporting would take up too much of their time, or even because incidents are so 'routine' that some people have come to regard them as part of 'normal' life. As a result, published statistics do not accurately reflect the experience of people from minority communities in Scotland.

Hate incidents do not need to take place every day for them to be an everyday issue. Their impact on individuals and communities is long-lasting, and extends well beyond any individual incident affecting others who share the same protected characteristic.

As the then Association of Chief Police Officers stated in their Hate Crime Guidance Manual 2010, "Whilst all crime can increase the fear of being targeted in people other than the victim, fear of hate crime escalates dramatically in those who share with an immediate victim, the same group identity that has made a victim a target."

Enabling people to feel safe, and reducing their fear of becoming the next victim of a hate incident, is at least as important as Police Scotland's objective of "Keeping People Safe", and hate crime legislation is, therefore, important not only in terms of

prosecution and punishment, but also serves the demonstrative purpose of enabling society to signal its abhorrence of prejudice and hatred against identifiable groups.

We support the Bill for this reason as well as because it consolidates hate crime legislation thus making it more comprehensible, and also provides everyone with equal protection before the law.

Although important, legislation and improved security can, however, only provide a partial solution, and we also emphasise the importance of educational initiatives, including interfaith and inter-communal activities, to demystify ‘the other’, and promote the development of good relations between communities, thus enabling people to appreciate the lives and fears of Scotland’s diverse communities.

1a. Are there other provisions you would have liked to have seen in the Bill or other improvements that should have been made to the law on hate crime?

(a) We would appreciate clarification on what will be covered by “association” with a protected characteristic. Although several examples are provided in the Policy Memorandum, such as when “a white person is assaulted because they socialise with a person of a different race” a parent is targeted because they are with their disabled child”, and “2, these do not go far enough. “Association” should not only include socialising but also cases in which an attacker perceives that his or her victim is in any way associated with the target group. That would, for example, include the victimisation of a relation, friend, or schoolmate of a disabled person on account of that association, regardless of whether the disabled person is present at that time, and of a person whose relation or friend has married someone with a protected characteristic, even if they have never met, as is in fact the case under the Equality Act 2010.

(b) We are disappointed that the opportunity has not been taken to provide equal protection for all protected characteristics. We regret that SS.3.1 and 5.1 refer to “insulting” conduct, but SS.3.2 and 5.2 do not. One consequence of that is that Sikhs and Jews will be protected under the Mandla ruling , but other religions will not.

There is a simple solution, to add “insulting” to 3.2 and 5.2.

(c) UK legislation on “Online Harms” is much delayed, following the publication of a White Paper. It was recently reported that Lord Puttnam, chair of the Lords Democracy and Digital Committee, said that the Bill may not come into effect until 2023 or 2024. If that is correct, then the opportunity should be taken to introduce such legislation in Scotland far sooner. The importance of this has been underlined by a series of reports from the Community Security Trust, which is funded by the UK Government to monitor and advise on antisemitism. The most recent of these, Hate Fuel: the hidden online world fuelling far right terror, reports on matters so extreme that they “decided it would be irresponsible to publish it in full”.

(d) We are concerned that some victims may be further targeted if it becomes known that they have reported their attacker to the police. Indeed, in some cases, victims may not report incidents for precisely this reason. As stated in the Bracadale Report, “hate crimes are likely to cause harm which is additional to the harm caused by the

underlying offence”, and to minimise this risk, we urge that the Bill should also include a duty for police and prosecuting authorities always to consider whether it would be appropriate to implement an anonymity order, reporting restrictions, and/or special measures in order to protect the victim, and his or her family.

(e) Monitoring is of vital importance in order accurately to assess progress towards building “the inclusive and equal society that Scotland aspires to ... [making] it clear to victims, perpetrators, and communities and to wider society that offences motivated by prejudice will be treated more seriously and will not be tolerated by society.” Reliable and accurate data is a prerequisite for effective monitoring, and we therefore urge that the Bill should include a duty to develop an effective and accurate system for recording hate crime and hate incidents that, amongst other things, disaggregates racist and religious hatred, and also further disaggregates ethnicity and religions so that, for example, hate crimes perpetrated by an individual from one minority community against a victim in another minority community are visible in the statistics.

2. The Bill brings together the majority of existing hate crime laws into one piece of legislation. Do you believe there is merit in the consolidation of existing hate crime laws and should all such laws be covered?

There is a strong case for simplifying and consolidating all relevant legislation, including regarding sentencing, because there is too often a feeling that although there is a consensus in society that some conduct is wrong, it is not clear under what label to prosecute. We therefore strongly agree with the consolidation of the patchwork of existing hate crime laws into a single piece of legislation. Consolidated legislation and general definitions will also help ensure uniformity across the protected characteristics – for example with regard to harassment – and help avoid any one group feeling either ignored or targeted or the creation of a "hierarchy of inequality". Unfortunately under the Bill as proposed, there would remain such a hierarchy for the reason explained in the previous answer.

3. Do you think that the statutory aggravation model should be the main means for prosecuting hate crimes in Scotland? Should it be used in all circumstances or are there protected characteristics that should be approached differently and why? For example, the merits of a statutory aggravation for sex hostility rather than a standalone offence for misogynistic harassment?

(a) The statutory aggravation is an effective means by which to indicate the increased gravity of an offence motivated by hatred. This sends a strong message that society at large will not tolerate certain kinds of behaviour, provides reassurance to victims and those who share relevant protected characteristics, and sends a strong message to perpetrators that hate crime will be severely dealt with.

There is, however, one drawback to the statutory aggravation model, namely that there has to be an established offence before the question of whether it is aggravated by hate can even come into play. That does not always work because so much that happens by way of open racism and other hatreds is done in ways that fall short of criminality. For example, when a pig's head was dumped on a woman's lawn in Aberdeen, pork pies left with a blue pencil note at Dundee Synagogue, and a

passenger made the gesture of firing a gun at a pedestrian from a passing car, it is not certain that any offence was committed. These would all have been recorded by the police as "hate incidents", rather than "hate crimes". But the motivation and effect are the same, and indeed the cumulative effect of such "incidents" without action being taken can be devastating both for individuals and communities.

We recognise the possibility of prosecuting such generic aggression as Breach of the Peace, for want of anything better, but as one communal leader remarked, "that 'for want of anything better', is surely why it ought to be possible to prosecute hateful behaviour as a crime in its own right".

We have experience of a prosecution for "racially aggravated conduct", and we would urge that proposed legislation should make this option available for incidents such as those we have described above. Even relatively trivial actions have foreseeable serious effects, and, given the general legal principle about "taking your victim as you find him", legislation needs to protect, for example, the traumatised victim of a hate crime who, in revenge for the original perpetrator being convicted, is subsequently subjected to low level but regular harassment by the perpetrator's associates. (It should be noted that some such situations could be avoided by the introduction of a duty to consider the implementation of an anonymity order, reporting restrictions, and/or special measures, as we have suggested in 1a(d) above.)

(b) It is important that all groups in society are able to feel safe as they go about their daily business, so, in order to prevent a hierarchy of (in)equality, all protected characteristics should be equally protected by the use of statutory aggravations rather than by creating a new patchwork of standalone offences for hate crimes against particular groups.

Since, however, changes in societal attitudes will affect those characteristics regarded as deserving of protection, we do not agree that they should be listed in the primary legislation, as it would be preferable for the legislation to define the aggravation in completely general terms as malice against any identifiable group. If for some reason that is not possible, then we strongly urge that they should be listed in a separate Schedule or Statutory Instrument so that the list can be amended by a much simpler and less cumbersome procedure by statutory instrument.

4. Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation? Would any alternative means be measured effective? For example, would there have been merit in introducing a statutory aggravation (outwith hate crime legislation) for the exploitation of the vulnerability of the victim?

As we have already suggested, amending the Bill by the removal of lists that specify protected characteristics and identifying aggravation in completely general terms, would facilitate its use to outlaw and prosecute malice against any identifiable group including on grounds of age.

There may be merit in the introduction of a statutory aggravation relating to exploitation of a victim's vulnerability, but, as we have already stated, hate crime is

targeted against an individual on account of their belonging, or perceived belonging to or association with, a particular group. The introduction of a statutory aggravation relating to personal vulnerability is a completely separate issue which does not relate to sharing a group identity, and should be considered separately from hate crime legislation, i.e. not as part of this Bill. It should also be noted that the definition of personal vulnerability has proved difficult in relation to previous legislation. For example, the Protection of Vulnerable Groups (Scotland) Act 2007 refers to “protected” rather than “vulnerable” individuals as a result of representations made by people who might otherwise have been regarded as being vulnerable to exploitation or abuse, and similarly defines relevant situations and contexts rather than personal attributes that might result in increased vulnerability.

5. Do you think that sectarianism should have been specifically addressed in this Bill and defined in hate crime legislation? For example, should a statutory aggravation relating to sectarianism or a standalone offence have been created and added?

All groups in society, including those from any faith who are targeted on sectarian grounds, should be equally protected under the law. As generally understood, “sectarianism” refers to friction between different Christian groups, and not, for example, between Shiites and Sunnis; we therefore have a concern that singling out “sectarianism”, an intra-Christian problem, is itself discriminatory, and urge that legislation should speak of religious hatred in general terms.

As we have already stated, our preference would be to remove lists, which by definition limit protection to those groups specified, from the face of the Bill. The Bill should then be amended to describe all offences and aggravations in completely general terms. Alternatively, although this is not our preference, a list of protected characteristics could be specified by Statutory Instrument, which can be more simply amended than the primary legislation.

6. Do you have views on the merits of Part 2 of the Bill and the plans to introduce a new offence of stirring up of hatred?

We agree with Lord Bracadale that “stirring up hatred has the potential to contribute to a social atmosphere in which prejudice and discrimination are accepted as normal” and that its introduction has “an educative function” and “communicates to the groups with protected characteristics, and to society in general, that the law has taken steps to protect those with a protected characteristic from hatred.” We therefore strongly support both the introduction of this new offence and its application across all protected characteristics.

7. Do you have any views on the Scottish Government’s plans to retain the threshold of ‘threatening, abusive or insulting’ behaviour in relation to the stirring up of racial hatred, contrary to Lord Bracadale’s views that ‘insulting’ should be removed?

We agree with the retention of “insulting” behaviour as an offence in relation to both stirring up of hatred and the possession of inflammatory material, but are unclear why it should only apply in relation to “race, colour, nationality (including citizenship), or ethnic or national origins” (SS. 3.1 and 5.1) and not to the other characteristics (SS. 3.2 and 5.2). There should not be any hierarchy of equality, and all people in

society should have the right to be and to feel safe as they go about their daily lives. We therefore urge that the relevant sections of Part 2 should be amended to extend this provision to all protected characteristics.

8. Do you have any comments on what should be covered by the 'protection of freedom of expression' provision in the Bill?

As recognised by the European Convention of Human Rights, freedom of expression is not an absolute right but must be qualified "as necessary in a democratic society" for, amongst other things, "the protection of the reputation or rights of others".

Proportionality is the key, and legislation should give guidance on how to achieve a proportionate balance. There is a clear distinction between rational and robust argument and criticism, and rabble-rousing. Context, demeanour, vocabulary, and previous conduct all contribute to making that judgement. We are strongly of the opinion that the offence of stirring up hatred need not criminalise or even stifle rational discussion or humour.

We are, however, concerned that it has been thought necessary to include specific exceptions to the offence for just two protected characteristics, religion and sexual orientation, and do not consider it sufficient justification that "Lord Bracadale did not make any recommendation in his report on this matter, and that consultation respondents' concerns about the impact of the offence on freedom of expression related specifically to religion and sexual orientation."

The excepted activities may be carried out in a way that does or does not become threatening or abusive. For example proselytising may lie anywhere on a continuum from simply active promotion of the favoured religion to abusive denigration of a person's current religion, faith, or belief, couched in terms that could stir up hatred against its adherents. Similarly, the "urging of persons to refrain from or modify sexual conduct or practices" could be conducted in ways that range from rational debate to threatening and abusive diatribe. In addition, it appears particularly irrational for some behaviours relating to sexual orientation to be excepted while the same type of activities relating to transgender are not. And once again Sikhism and Judaism would remain protected as "racial groups" despite this exception, while other religions would not. We therefore recommend that sections 11 and 12 of Part 2 should be replaced by a general provision excepting robust but non-abusive, nonthreatening, and non-insulting discussion, criticism, and opinion of the protected characteristics.

9. Do you agree with the Scottish Government that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should not be repealed?

The Policy Memorandum recognises that repeal would "contribute towards the overarching aim of new hate crime legislation, which is to consolidate and simplify hate crime legislation and avoid having different thresholds and tests for offences or aggravations relating to different characteristics" and "create consistency in the law by removing the standalone offence that exists only for racially motivated crimes.[Because] there is no equivalent to the section 50A offence in relation to any

other characteristic within hate crime law and, as noted above, if left in force it could be perceived as creating a hierarchy of characteristics.” We are, therefore, at a loss to understand the justification that “as the Bill is not introducing equivalent offences in relation to the other characteristics the Scottish Government has taken the decision not to consolidate [Section 50A].”

As we have already stated, all groups in society should be equally protected against hate crime. The retention of Section 50A perpetuates a hierarchy of equalities including that Sikhs and Jews would continue to be protected but other faiths would remain outwith the scope of this protection.¹⁴ We therefore urge that Section 50A should be repealed but that an equivalent offence covering all protected characteristics should be incorporated into the Bill.

(Note that there is internal precedent for this since the “new offences relating to stirring up hatred ... will apply in relation to all listed characteristics ... [whereas] existing offences, which these new offences largely replace, apply only in relation to race”.

10. What is your view on the plans for the abolition of the offence of blasphemy?

We are content with the abolition of the offence of blasphemy.

National Secular Society

About the National Secular Society

This submission is made by the National Secular Society (NSS). The NSS is a not-for-profit non-governmental organisation founded in 1866, funded by its members and by donations. We advocate for separation of religion and state and promote secularism as the best means of creating a society in which people of all religions and none can live together fairly and cohesively. We seek a diverse society where all are free to practise their faith, change it, or to have no faith at all. We uphold the universality of individual human rights, which should never be overridden on the grounds of religion, tradition or culture. We promote free speech as a positive value.

Summary

Freedom of expression is a fundamental building block of a free society. It drives inclusivity, equality and tolerance – values that should be at the heart of Scottish politics and culture. It is a vital right that should only be limited by the state when it has strong grounds for doing so.

Whilst we share the aspiration of building a more equal and inclusive Scotland, we believe aspects of the Hate Crime and Public Order (Scotland) Bill are excessive and represent an unacceptable erosion of freedom of expression.

All citizens have a responsibility to challenge prejudice in order to ensure Scotland is an inclusive and respectful society. However, criminalising speech is a draconian and ultimately counterproductive means of achieving that aim.

We do not doubt the Scottish Government's positive intentions in bringing forward the Hate Crime and Public Order (Scotland) Bill. But the ambition to introduce new 'stirring up hatred' offences – with dangerously low thresholds for prosecution – needs to be fully scrutinised and resisted.

Stirring up offences

Our greatest concerns centre around the creation of new and wholly unnecessary 'stirring up' of hatred offences, which threaten freedom of expression and conscience.

Introducing the Bill, Justice Secretary Humza Yousaf remarked: "Stirring up of hatred can contribute to a social atmosphere in which discrimination is accepted as normal."

The idea that speech "can contribute to a social atmosphere" is flimsy grounds for prosecuting those who say it. Well-established anti-discrimination laws already protect individuals with protected characteristics from discrimination and send the clear signal that such discrimination is unacceptable.

The new law is also unnecessary in that genuine criminal activity that the proposed offences are seeking to address are already captured by existing law. The proposed offence (in Section 3) of stirring up hatred makes it an offence for a person to behave

in a threatening or abusive manner against a group of persons defined by reference to certain characteristics. However, Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 already outlaws threatening or abusive behaviour against anyone where such behaviour would be likely to “cause a reasonable person to suffer fear or alarm”.

Furthermore, under this existing legislation the offender must also either intend to cause fear or alarm or be reckless as to whether or not they did. This is a necessary safeguard, lacking in the newly proposed ‘stirring up’ offences.

Because of the potential adverse impact on freedom of expression, including the chilling effects of the new offences in encouraging self-censorship, and because the offences are punishable by up to seven years’ imprisonment, we believe it necessary for the prosecution to prove criminal intent.

The ‘stirring up hatred’ offence may even chill the reporting of facts. We are aware that some journalists and government departments have been reluctant to report on issues involving sensitivities around race, religion and other protected characteristics out of fear of being accused of racism, intolerance or inciting hatred. Criminalising the ‘stirring up of hatred’, especially where no intention of stirring up hatred is necessary to meet the threshold, will exacerbate the problem.

Far from achieving greater tolerance and inclusivity in Scotland, criminalising speech may worsen relationships between different communities by feeding mistrust and ‘persecution narratives’ at the root of many conflicts between groups. Extremists who want to create division capitalise on such grievances and exploit them to further their ideologies. Thresholds

Any new stirring up hatred offences should only cover threatening conduct.

We disagree with the conclusions of Lord Bracadale that the requirement for ‘threatening’ behaviour alone sets the legal threshold too high. On the contrary, the inclusion of “abusive” poses a serious risk to freedom of expression by promoting the idea that there should be a right not to be offended. It risks capturing a vast array of robust yet legitimate speech and will create an unreasonable expectation that religious sensibilities are protected by something akin to a blasphemy law.

The Oxford dictionary defines abusive as “offensive and insulting”. The term is ambiguous and highly subjective and can quite easily be utilised to stifle robust commentary about religious beliefs and practices. Beliefs should not be protected by law in this way.

Defending the Bill in the media, the Cabinet Secretary for Justice has said it “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.” There is a circularity to this argument in that anyone who finds a view “offensive” could argue that expressing it is inherently “abusive” and “likely to stir up hatred”.

Where someone is abusive about someone else's beliefs, the believer can quite reasonably argue that they are abusing them personally too. Therefore, if we wish to apply criminal sanctions to protect people from feeling "abused" when someone criticises or attacks their beliefs, it is obvious that the beliefs themselves as well as the individual who feels insulted or abused are being protected. Some sincerely held religious beliefs and practices are seen as profoundly irrational and inhumane by others. Rational and liberal critics may reasonably regard some beliefs as 'hateful' and themselves deserving of mockery, abuse and hatred. The right to express this must not be restricted by law.

The Bill as drafted risks capturing comedians, performing artists, cartoonists, and all manner of expressions that may subjectively cause offence and be perceived as "abusive". The chilling scope of this law is evident in section 4 – 'Culpability where offence committed during public performance of play'. If the Theatres Act 1968 abolished censorship of the stage, the Hate Crime and Public Order (Scotland) Bill brings it back.

Although the sections on "Protection of freedom of expression: religion" and "Protection of freedom of expression: sexual orientation" in the Bill are intended to enable religious groups to express tenets of their faith without fear of prosecution, we are aware of examples of religious institutions (which are also registered charities in Scotland) whose statements on sexual orientation could still fall foul of the proposed 'stirring up hatred' offences due to their abusive (i.e. offensive and insulting) nature.

On its website, the Free Presbyterian Church of Scotland refers to same-sex relationships as "heinous", "vile", "great evil", an "abominable practice" and "a lifestyle of disease and death". It also says "fearful uncleanness ensues" from cross-dressing and transgender identity.

Similarly, the Christadelphian Auxiliary Lecturing Society, without any condemnation, quotes a Bible passage that says men who have sex with other men "must be put to death".

Finally, Al-Mawrid Global's website says: "Lesbianism is obviously one of the practices whose abomination is ingrained in us. Only women whose nature have become perverted indulge in it."

While we condemn any organisation, religious or secular, that uses such hateful language about LGBT+ people, we do not believe the correct response is to criminalise such speech. There are better alternatives to disincentivise hate speech and promote tolerance than criminalising speech. We have proposed some of these alternatives in paragraphs 29-33. Removing "abusive" is necessary to protect free speech in Scotland and would be in alignment with the reasonable threshold applied in English law.

Free speech protections

European Council Resolution 1510 on freedom of expression and respect for religious beliefs, states: "The progress of society and the development of every individual depend on the possibility of receiving and imparting information and ideas.

This freedom is not only applicable to expressions that are favourably received or regarded as inoffensive but also to those that may shock, offend or disturb the state or any sector of the population, in accordance with Article 10 of the European Convention on Human Rights.”

Any ‘protection of freedom of expression’ provision should reflect this. The protections offered in the Bill fail to do so. A free speech protection that only protects polite discussion or criticism offers no meaningful protection at all.

The protection of freedom of expression sections are substantially weaker than the much more robust equivalent in England and Wales. The Racial and Religious Hatred Act 2006 explicitly says the law doesn’t restrict “discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents”.

In Scotland, by contrast, complainants will be likely to argue that speech they dislike is “abusive” and not ‘solely’ a discussion or critique of religion. If stirring up offences are introduced the protection clause must be strengthened to avoid seriously chilling freedom of expression. Alternatives to legislation to challenge hate speech and intolerance

Promoting societal harmony and ensuring that existing legislation is properly enforced must be the priority, rather than introducing new measures that will merely make it harder to express unpopular viewpoints and reinforce divisions.

Instead of putting free expression in jeopardy through the creation of ‘stirring up hate’ offenses and other aspects of this Bill that would criminalise speech, we propose further alternative measures to support Scotland’s goal of protecting people from hate crime and building a more tolerant and inclusive society for all.

First, the Scottish education system should be one where children from a diverse range of backgrounds are educated together. At present, Scotland’s schools are often divided along sectarian lines, with parents’ religious backgrounds frequently determining what school their child attends. All of Scotland’s schools should be equally welcoming and inclusive of all children, regardless of their family’s religion, beliefs, culture or ethnicity. Reforms to create one secular school system are an essential step in eliminating sectarianism and fostering cohesion, understanding and tolerance between communities.

Scotland’s schools could also place more emphasis on citizenship education, based on shared values including democracy, the rule of law, individual liberty and tolerance. Citizenship education should also aim to foster intercultural understanding, equality, kindness, and other personal characteristics and interpersonal skills to prepare young people for life in 21st century Scotland.

Finally, many organisations that promote intolerance and hatred, especially towards LGBT+ people, are registered charities (see paragraphs 20-23). Because charities must provide a public benefit and not cause harm, charities that promote messages contrary to the public benefit should lose their charitable status and be deregistered. This would help ensure organisations promoting hate do not gain access to tax

exemptions, gift aid and other benefits given to charities, and disincentivise organisations seeking charitable status from promoting hate.

Repeal of blasphemy

We very much welcome the proposal to abolish of the common law offence of blasphemy. Religious ideas should not enjoy privileged legal protection. The fact that these laws are seldom used only serve to highlight their inapplicability and provides no justification for keeping these archaic offences in statute.

Around the world blasphemy laws continue to be used to target religious and political minorities. The existence of Scotland's blasphemy laws seriously undermines its ability to speak out against human rights abuses under the guise of blasphemy and heresy elsewhere in the world.

It would be deeply regrettable if this advancement for human rights is fundamentally undermined by the introduction of vague 'stirring up' of hatred offences without much more robust freedom of expression protections.

Network of Sikh Organisations

What is good about the proposed legislation?

To start on a positive note - the blasphemy law will be repealed. This is something that has not been used in Scotland for over 175 years. The second thing which is noteworthy is age will become a protected characteristic under these proposals – this in our view is indeed a positive step. The Bill will thus extend protective characteristics to the following:

Age, Disability, Race, colour, nationality (including citizenship), or ethnic or national origins, Religion, Sexual orientation, Transgender identity, Variations in sex characteristics.

Could this Bill censor debate on matters of public interest?

We believe the answer to this is yes. The offences relating to ‘stirring up hatred’ in the Hate Crime and Public Order (Scotland) Bill are a real cause for concern and have serious consequences on being able to speak freely on matters of public interest – be it the ongoing debate around ‘transgender identity’, or matters of religious extremism, in particular in relation to the debate around Islam, and support for violent jihad by some in the Muslim community.

The Bill aims introduces these new offences related to ‘stirring up hatred’ in respect of the characteristics of age, disability, religion, sexual orientation, transgender identity, and variations in sex characteristics. It is the vague elements of this Bill which are dangerous because they are open to wide interpretation and are highly subjective. Most controversially, a person will not even have to show intent to ‘stir up hatred’. It will be enough that his behaviour or communications are considered ‘threatening’ or ‘abusive’ and that a court deems it ‘likely that hatred will be stirred up’. This could result in a seven-year prison stretch. We believe this is repressive and insidious, and not befitting of a Western democratic nation. In its current form the Bill would make Scotland one of the most hostile places for free speech in Europe.

Additionally, the Bill also introduces offences of ‘possession of inflammatory material’, and the same issue applies here around subjectivity with the drafting of the legislation. We understand the only difference being the threshold for the conduct is that the material is ‘threatening, abusive or insulting’.

Self-censorship or prison

We believe these proposals could lead to an environment of self-censorship, or worst still a seven-year prison stretch for those who choose to express strong and legitimate opinions on controversial, but important issues. Offence archaeologists could wade through historical social media postings to garner evidence which may infringe the proposed legislation – this would amplify the curtailment of free and open discussion and have a chilling effect. It has been suggested the introduction of this legislation could result in the likes of J K Rowling facing proceedings for her position on transgenderism. This is because her views (which she has every right to freely

express) could be viewed as 'threatening' and 'abusive' by transgender campaigners and therefore subject to a criminal complaint. The legislation would also have consequences for investigative journalists, historians and commentators who express criticism of Islam, expose Islamic extremism, or discuss the behaviour of Muslim extremists. For a start, the republication of the Charlie Hebdo cartoons, would almost certainly be viewed as 'inflammatory' under the offence of 'possession of inflammatory material'.

Moreover, activists or groups who want to shut down opponents could easily interpret criticism of ideology or doctrine as an attack on their community. We have already seen an indication of what this might look like, with the publication of the APPG on British Muslim's Islamophobia Defined report, which sought to secure a legally binding definition of 'Islamophobia'. The APPG report asserts: 'the recourse to the notion of free speech and a supposed right to criticise Islam results in nothing more than another subtle form of anti-Muslim racism whereby the criticism humiliates, marginalises, and stigmatises Muslims'.

The Scottish government and the Minister behind this Bill, Humza Yousaf, gives reassurances the Bill will not hamper free speech. However, if the same convoluted APPG reasoning is extended to this legislation, then it is indeed a slippery slope, which could incentivise various groups to weaponize the vague 'threatening' and 'abusive' (and 'insulting' for 'possession of inflammatory material') elements of this legislation to silence, persecute, or worst still attempt to imprison critics, by dragging them through the criminal courts for expressing legitimate opinions.

Following significant opposition to these proposals, we are pleased to hear Mr Yousaf is considering withdrawing clauses which will chill free speech, and agree unequivocally with the Scottish Police Federation who say the Bill could absurdly leave officers in a position where they have to determine what passes as free speech, or not.

They say: 'concern 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'.

We note that people involved in the acting and legal industry in Scotland are equally concerned for the implications on free speech, and have asked the Scottish government for clarity on the massive 'grey area' for what exactly is 'likely' to stir up hatred as part of an acting performance. As it stands, if the Bill is passed an actor could be prosecuted for playing a character with bigoted views, because language in a script can fall foul of 'likely to stir up hatred', as charges could be brought regardless of intent.

How the proposed legislation will impact freedom of belief

All faiths have the right to express their beliefs, but this extends to the right of faith groups to hold critical views of the practices of others, without censure or the threat of prosecution.

According to the Rehat Maryada, or Sikh code of conduct, halal, and any other ritually slaughtered meat (like kosher) is strictly forbidden. The method of slaughter is considered inhumane (especially non-stun slaughter) but Sikhs also take the view that it is superstitious to believe reciting prayers whilst sacrificing an animal will serve to make it acceptable for consumption in the eyes of a life-giving, nurturing and benevolent Creator. Many Sikhs are thus strict vegetarians, but those who consume meat are encouraged to eat an animal killed instantaneously with one blow – a method referred to as jhatka. If this legislation is passed then you can see how it could elicit complaints about criticism of such religious practices as ‘Islamophobia’, which in turn could be seen sufficient to meet the litmus of ‘stirring up hatred’, with no need for intent.

The same would apply to criticism within Sikh teachings against any form of idol worship – which could elicit complaint from Hindus who adhere to this practice.

Both Sikhs and Hindus may well find themselves in a quandary when it comes to recounting parts of their history, especially persecution under Muslim rulers (The Mughals) in medieval India. Every year, Sikhs commemorate the martyrdom anniversary of two Guru’s (Shaheedi Gurburabs) Guru Arjan and Guru Tegh Bahadur, and countless others who were executed on the order of Mughal Emperors. An indication of where this could all lead has been previously provided with the APPG on British Muslims report Islamophobia Defined, where:

‘claims of Muslims spreading Islam by the sword or subjugating minority groups under their rule’ may be ‘Islamophobic’. Alongside prominent historian Tom Holland, we warned these proposals could censor discussion of historical facts, such as the gruesome aspects of the Mughal and Ottoman Empires or the Moor conquests, not to mention the crimes of modern-day ISIS. We fear this Bill will have a similar impact on British Sikhs, and gurdwaras who often adorn their walls with images of our hallowed martyrs or shaheeds.

Depictions of our history could be viewed as ‘abusive’ and ‘threatening’ or ‘inflammatory’ by those with a grievance and absurdly criminalised. Charges could be brought regardless of intent – in this case simply marking our history and honouring our shaheeds. Last year there was an attempt by the BBC to censor our Director, Lord Singh of Wimbledon for merely mentioning the martyrdom of our ninth Guruxi - Guru Tegh Bahadur who gave his life standing up for the freedom of belief of Hindus, who were being forcefully converted to Islam.

We believe if this Bill passes then it could give a free pass to those who want to censor inconvenient chapters in history and curtail the freedom of religious belief of faiths (other than their own), which would result in pitting one religious group against another.

Core teachings of Abrahamic traditions which promote supremacy of their prophets over others, and the notion they are the only path to God, could be in difficulty. In John 14, Jesus said to His disciples, ‘I am the way and the truth and the life. No one comes to the Father except through me. If you really know me, you will know my Father as well. From now on, you do know him and have seen him.’

For vexatious complainants, this passage alone from the Bible could be viewed as 'insulting' and 'inflammatory' to their belief in another religious tradition.

In a submission to the Scottish government in opposition to this Bill, The Free Presbyterian Church of Scotland write:

'My main concern in this is the preaching of the Gospel, which involves declaring the truth in spiritual matters. There are such things as right and wrong in human life, and it is the duty of Christian ministers to explain these things. Among the many things that are wrong – such as lying, stealing, murder, adultery, abortion (in most cases), pride, and hatred of our fellow- men – are sodomy and false religion (such as Islam).'

The contents of this part of their submission could be viewed as 'insulting' to Muslims in itself.

They go onto say: 'This bill would make the persecution of Scottish Christians for maintaining the truths of Christianity much more likely. Anyone who hears a Christian say something that he does not like (e.g. that his homosexual or transgender conduct is sinful) could claim that what was said was abusive (perhaps even just reading a passage from the Bible) and could have the Christian punished.'

If the Scottish Government's Hate Crime and Public Order Bill is passed unchallenged, some religious scriptures could be viewed as 'inflammatory' themselves, especially when they incite hatred and violence against 'nonbelievers'.

We oppose the controversial clauses in this Bill and urge the Scottish government to withdraw them or Scotland will be transformed into one of the most hostile places for free speech in Europe.