

Justice Committee

7th Meeting, 2021 (Session 5), Monday 22 February 2021

Hate Crime and Public Order (Scotland) Bill

Freedom of Expression Amendments

Written submissions of evidence from witnesses

This document contains written submissions of evidence received from the witnesses attending the Committee's meeting on Monday 22 February (Annex A).

**Clerks to the Committee
February 2021**

BEMIS

The Stage 1 Report on **The Hate Crime and Public Order (Scotland) Bill** acknowledged:

*“The Committee is of the view that there is a strong case to be made for treating race differently in relation to offences of stirring up racial hatred provided for at Section 3(1)(b). The historic nature of racial hate crime and the relative volume of offences is justification for this approach. In this respect, we agree with conclusion of the Cabinet Secretary”.*¹

- BEMIS Scotland continue to support this position in relation to the Stirring up of Racial Hatred offence and its Freedom of Expression engagement.
- **The 1986 Public Order Act Stirring up of Racial Hatred offence is well established both in terms of its application as a protection against racial hatred and in its relationship with convention rights.**
- We welcome the Government and committee’s agreement with this position and the maintenance of the insulting threshold reflecting the specific nature and types of crime captured in the stirring up of racial hatred offence.
- There is an established consensus evident in the stage 1 report and evidence received from Race Equality organisations and others such as Murray, Blackburn Mackenzie, and the Equality Network as to the longstanding specificity of stirring up of hatred in regard to Race.
- **Importantly, our members and network, the people whom this bill is being drafted to protect, have expressed no appetite for a change in their legal protections, thus we cannot support any amendments that include Race in a new freedom of expression clause.**
- BEMIS Scotland believe the consolidation aspiration of **Bracadale** is met by containing all of the aggravations and stirring up offences in the one place, but we do not believe it is necessary to treat every single characteristic in the exact same way in so far as freedom of expression is concerned. Bespoke responses are required, and this is reflected in the maintenance of the ‘insulting’ threshold creating a clear distinction between Race and the other characteristics. We do not perceive this to mean or intend to convey that we are top of a hierarchy of hate crime, just that we are equal but different. It is a matter of fact that racially aggravated hate crime dominates the annual publication of hate crime figures,

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but this does not negate the shared experience of isolation, fear and alarm that accompanies all forms of hate crime.

- **The definition of Race covering ‘Colour, nationality, ethnic and national origin’ reflects the international consensus encapsulated in the International Convention on the Elimination of All forms of Racial Discrimination and outlined in Article 1 of the Convention.²**
- These broad provisions of protection from racial discrimination reflect a reality that racism is a ubiquitous global challenge to which we must remain vigilant. To this day, people across the world face persecution, inequality and death on the basis of the provisions of colour, nationality, ethnic or national origin and Scotland/UK is not unique in facing these challenges.
- Based upon the text of the **1986 Public Order Act**, the **European Court of Human Rights** has adjudicated on the admissibility of Freedom of Expression in relation to the stirring up of racial hatred³. Thus, we have no appetite and there is no beneficial or constructive need to deviate from a body of jurisprudence and text that has been firmly established and can be successfully integrated into Scotland’s Hate Crime Bill.
- A potential test case to check the thresholds of ‘abusive, threatening or insulting’ communication in relation to ‘discussion or criticism’ of Race would be a counter intuitive outcome to a bill seeking to protect people from racist hate crime. It is a step and a risk that we do not believe is worth taking.
- As such, our position is that **Race should be excluded from any Freedom of Expression Clause as it does not need to be there, and the risks of its inclusion substantially outweigh its benefits**. The aim of legislation is to protect people and not merely to make things neater on paper or stimulate unnecessarily debating points.
- Given the international profile of Race and the presence of racism across jurisdictions, Scotland should be mindful of the socio/political message that may be interpreted from moving away from an established anti-racism norm developed over 34 years of the stirring up of racial hatred offense. Permitting ‘discussion and criticism’ of race even if having no material impact on the lives

² 1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which 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.

³ <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-67632%22%5D%7D> SECOND SECTION DECISION AS TO THE ADMISSIBILITY OF Application no. 23131/03 by Mark Anthony NORWOOD against the United Kingdom

of citizens in Scotland/UK may be utilised by more hostile jurisdictions to justify regressions in the provisions of racial protection.

- On Freedom of Expression more generally and in relation to the other characteristics, there may be lessons learned from the experience of Race over the last 34 years that has not highlighted significant FOE concerns. The text in the 1986 Public Order Act Stirring up of Hatred offence which offers protection to people from wrongful prosecution outlines:

A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.

- BEMIS Scotland's general preference to freedom of expression challenges is to re-affirm the positive rights and responsibilities that are contained within **Article 10 of the ECHR**⁴. Freedom of expression is fundamental to a democratic society and robust debate and critique of various ideologies and beliefs that co-exist within our country must be allowed to take place in a transparent, inclusive, and respectful way.

⁴ The European Convention of Human Rights: 10. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.*

Catholic Parliamentary Office of the Bishops' Conference of Scotland

We welcome this opportunity to express a view on the draft amendments proposed by the Cabinet Secretary for Justice relating to freedom of expression in the Hate Crime and Public Order (Scotland) Bill ('the Bill').

As Christians we are committed to the free and open exchange of ideas in society. We believe that people should be completely free to disagree with our faith in any way, including mocking and ridiculing us, and we welcome open debate. Freedom of Expression is a fundamental right in a democratic society, and it is vital that ideas can be openly discussed and criticised without fear or threat of prosecution.

We therefore welcomed amendments to Section 11 of the Bill at Stage 2 which clarified that, in relation to religious belief, mere expressions of antipathy, dislike, ridicule and insult would not, on their own, amount to criminal behaviour, and that this amendment would also be extended to those of no belief. We support a robust approach to freedom of expression in relation to religion in the Bill in accordance with Article 10 of the European Convention on Human Rights. Options one and two in the Cabinet Secretary's paper meet this standard.

However, we are very concerned that a similarly robust approach has not been taken in relation to other protected characteristics; a theme common across all four options.

We have particular concerns in relation to the approach taken in relation to sexual orientation and transgender identity. Some of the ideas and beliefs promulgated under the protected characteristics of sexual orientation and transgender identity run contrary to beliefs held by many people in society, including but not limited to, some religious groups. It is important to emphasise the deliberate use of the word 'beliefs.' Beliefs are not to be taken to be the exclusive domain of religious groups. Beliefs are also held by those who take positions in relation to the ideologies of transgender identity and sexual orientation.

We understand marriage may only be between one man and one woman. This, for us, is a positive position which is critical to the flourishing of human life, however, we accept that not all people agree, and it is a fundamental right to be able to criticise our position.

The original Clause 12 in the Bill, which included protection for discussion or criticism of 'sexual conduct and practices', was in our view correctly termed and we argued that it be extended to also allow for discussion and criticism of marriage which 'concerns the sex of the parties to the marriage'. We believe that this should be explicit in the new clause.

Transgender identity has been the subject of extensive and emotional public discussion. It is a highly contentious and deeply sensitive area of debate. We firmly believe that this debate, and free discussion and criticism of views, is vital as society wrestles with these ideas. We cannot accept that any position or opinion at variance with the proposition that sex (or gender) is fluid and changeable should not be heard. Open and honest debate on the very essence of the human person should not be stifled. We understand sex to be immutable, and we accept the widely held definition of woman as 'adult human female' and man as 'adult human male'. Many people may

disagree with these views, but nobody ought to be criminalised for expressing them. We are also concerned about compelled speech by criminalising people who use birth names and pronouns, commonly referred to as 'misgendering'. We acknowledge the delicate and sensitive nature of this issue and the need for compassion, respect and understanding. However, this should not automatically exclude the right to free expression nor attract the attention of the criminal law.

We believe provision must therefore be made in the Bill for discussion and criticism of views on transgender identity without fear of criminal sanctions. We believe that, to avoid confusion, specific reference ought to be made and protection given to, for example: the belief that sex is immutable; that there are only two sexes or genders; the right to reject concepts or beliefs relating to transgender identity; questioning whether an individual should undergo, or should have undergone, the process of gender reassignment; use of the terms 'woman' and 'man' and equivalent terms and third person pronouns; and the freedom to use past names.

The right to express, for example, the view that binary sex does not exist or is fluid, or that there are more than two genders, must be matched with a right to disagree and protection from prosecution for simply holding an opposite view.

Some who promote transgender ideology or same-sex marriage are often critical of religious groups, accusing those groups of error for holding doctrinal positions at odds with their own ideological position. This exposes a clear tension in the different belief systems of both groups and highlights disagreement on certain issues.

As previously stated, we welcome the robust approach being taken in relation to religion; a position we argued for. This was the right thing to do and we now have a widely accepted, clear, robust provision allowing religion to be subject to expressions of antipathy, dislike, ridicule, or insult, as well as being open to discussion and criticism. An equally robust approach must be extended to transgender identity and sexual orientation (or sexual conduct and practices which we believe to be a more appropriate term).

We acknowledge that there may be a view which holds that not every protected characteristic need be subjected to the same rigorous freedom of expression provision as religion, though we believe if the Bill is to contain a catch-all Freedom of Expression provision, as is being proposed, then the religion clause should be used as a model. And given the clear disagreement on important issues like marriage and human sexuality, it is reasonable to expect that the characteristics of transgender identity and sexual orientation should be raised to a similar standard of freedom of expression as that which we propose for religion. Like religion, these characteristics are linked to actions which are a proper subject matter for moral evaluation.

In the same way that people of religion are open to discussion and criticism of our beliefs, including our understanding of the human person, sex, gender and marriage; those who hold the opposite beliefs on these crucial issues, which go to the very fundamentals of human existence, ought to be similarly open to discussion and criticism.

The lack of specificity in relation to transgender identity and sexual orientation, a failing which runs across all four of the Cabinet Secretary's proposals, is likely to create confusion. Clarity is required in terms of the type of behaviour or speech being criminalised under these characteristics. An additional complication is that these characteristics involve questions about the nature of human sexuality and gender identity. If the Parliament wants this legislation to be effective and to function as it should, it must be more specific about the type of behaviour or speech that is acceptable and that which is unacceptable under these characteristics.

Lord Bracadale pointed out in his evidence to the Committee at Stage 1, "If you are going to use [freedom of expression clauses], they should reflect the approach of the ECHR and, in particular, they should make clear where the line is drawn between offensive behaviour that has not been criminalised and the type of behaviour that is being criminalised."

Lord Bracadale's point is not only important in calling for a clear line of demarcation between acceptable and unacceptable behaviour, it is also crucial in pointing out that offensive behaviour should not, in and of itself, be criminalised.

It is important to recall the words of Lord Justice Sedley who said that "Freedom only to speak inoffensively is not worth having"⁵, and Lord Rodger who said that the right to freedom of expression under Article 10 ECHR 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."

⁵ Redmond-Bate v DPP [1999] EWHC Admin 733

Equality Network and Scottish Trans Alliance

We thank the Justice Committee for the opportunity to submit our views on the freedom of expression amendments recently proposed by the Justice Secretary.

The overall approach to freedom of expression

The Equality Network and Scottish Trans Alliance strongly support the right to free speech, and to discuss, debate and criticise matters of public interest and public policy. We are aware that sometimes these discussions can be uncomfortable and even offensive. We wish, however, to make it abundantly clear that there is a recognisable difference between controversial yet civil speech, and speech that is threatening or abusive with the intention of stirring up hatred towards historically marginalised people.

We note that, following stage 2 amendments, the threshold for the stirring up hatred offence is now high, requiring (for the “new” characteristics) behaviour or material that is objectively threatening or abusive, and also requiring the intent to stir up hatred. We believe that the threshold now in the bill makes clear the distinction between controversial speech which may be offensive, and hateful speech which threatens or abuses.

We do feel that something that has seemingly been lost in all of the discussions about the supposed threats to freedom of expression posed by this bill is the practical lessons that can be learnt from the stirring up offences related to race, that have existed for decades. These offences have neither had a chilling effect on freedom of expression in discussions about race, nor have they criminalised all racist speech, even in situations where such speech is abhorrent and we would reject it in the strongest terms.

In our view, therefore, the offence as set out in the bill does not impinge on legitimate free speech. However, we note that concerns have been raised that the existence of the offence might lead people to self-censor legitimate expression, and we do not object to reassurance being provided about its scope. The framing of this reassurance is critical.

Given that the purpose of the freedom of expression provision is to provide reassurance, rather than to alter the threshold of the offence, it is particularly important to get the “messaging” of the provision right.

The primary purpose of hate crime legislation is to protect historically marginalised people from criminal behaviour motivated by hatred and to discourage the general public from engaging in such harmful behaviour. Poorly framed reassurance around freedom of expression could lead to an increase in this harm.

Such negative consequences could include for example:

- a false sense of impunity for speech that, while not constituting the stirring up offence, might constitute some other offence, or a civil wrong of discrimination or harassment under the Equality Act 2010,

- undermining the central purpose of the bill by indicating to groups of people whom the bill is intended to protect, that criticism of their rights is now subject to new additional protection or encouragement, and
- the explicit or implicit message that despite public rhetoric claiming that Scotland is a fair and inclusive country, the Scottish Parliament does in fact believe that some groups of people are less valuable than others.

We think that the right approach to provide reassurance without these negative consequences is a freedom of expression provision that covers the stirring up hatred offence generally, rather than singling out certain protected characteristics. That would avoid creating the situation, as the bill currently does (and as some of the proposed stage 2 freedom of expression amendments did), where some characteristics, including sexual orientation and transgender identity, are singled out as being more acceptable to criticise.

Singling out certain groups for specific freedom of expression provisions would be interpreted by some as indicating that it is more acceptable to behave badly towards those groups. That would have a chilling effect on the confidence of LGBTI people in the Scottish Parliament's intention to protect them from hate. It could also embolden potential perpetrators by reinforcing the idea that LGBTI people are less valuable.

Our preferred approach to a freedom of expression provision was set out in the joint evidence we submitted with a number of other equality organisations here:

https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS520HC1768_EqualityNetworketal.pdf

It is for a provision that reaffirms that the stirring up offence does not affect the exercise of the rights to freedom of expression, and to freedom of thought, conscience and religion, under the European Convention on Human Rights. This would follow the example in section 16 of the Marriage and Civil Partnership (Scotland) Act 2014.

However, we understand that the Scottish Government's legal advice is that such a provision is not suitable for a criminal justice bill. We do not understand why that is the case, and we would be keen that this option continues to be considered.

In the case that this approach is rejected, then the Justice Secretary's latest proposals are certainly a significant improvement over the government's, and several other, proposed stage 2 amendments.

The government's proposals

The government's four options differ only in their treatment of the race and religion characteristics.

The general approach in all four options is to make clear that discussion or criticism related to the characteristics covered by the stirring up offence is not, in itself, to be taken as threatening or abusive for the purposes of the offence, and therefore would not constitute the offence.

This would give reassurance that legitimate comment, criticism and debate would not fall foul of the offence. That would include the examples that have been raised during debate on the bill, such as opposition to proposed reforms to gender recognition law.

Of course, if such comment was couched in objectively threatening or abusive terms, and was done with the intention of stirring up hatred, it would still constitute the offence. The purpose of the freedom of expression provision is to provide reassurance, and to avoid self-censorship of legitimate free speech, not to carve a hole in the stirring up offence.

Depending on detail and context, some forms of criticism of matters relating to the characteristics, while not constituting the stirring up offence, could constitute a different offence, or a civil wrong under the Equality Act 2010. It is important that the freedom of expression provision does not inadvertently give people the impression that such unlawful acts now have impunity.

Singling out some of the characteristics only, as the government's stage 2 amendments did, sends a strong message that those characteristics, and the people who have them, are more worthy of criticism. If the purpose of the freedom of expression provision is to give reassurance that the new stirring up hatred offence will not curtail legitimate free speech about the characteristics, it should cover all of the characteristics that the offence covers. Freedom of expression is a general right applying to all subjects.

We have been disturbed by some of the evidence presented about the subject of freedom of expression, in that it has implied that freedom of expression is a one way street in which people wishing to criticise groups of people with protected characteristics should have immunity from any challenges to their criticism. In fact, as we have said and as litigation has confirmed, freedom of expression applies to all people and includes the right to challenge someone's criticism as well.

Particularly problematic are provisions that provide a "laundry list" of "approved" things to express. That approach is flawed in part because it is impossible for a single piece of legislation to comprehensively list all things that are not criminal. Trying to do so is contradictory to the general concept that the criminal law is designed to articulate what behaviour is not allowed in our society.

Whatever the formal legal effect, the impression given is that discussion or criticism of the subjects in the "laundry list" is approved of, and so it is likely to be encouraged. That could increase discrimination, and could cause people to fall foul of other law. For example, if someone thought that current section 12 of the bill gave them the green light to repeatedly criticise a work colleague's same-sex relationship or urge them to end the relationship, an employment tribunal case could result, and find unlawful sexual orientation harassment in breach of the Equality Act.

Similarly, section 12(2)(b) of the bill has been widely read as giving encouragement to conversion therapy. Conversion therapy (the attempt to change a person's sexual orientation or gender identity) is condemned internationally, and, we think, by the large majority in this Parliament and in the country.

A “laundry list” type amendment proposed at stage 2 read like a list of the things that are said to trans people that they find offensive and distressing. The right to free speech includes the right to offend, and even to distress, so long as that does not breach the law. But it surely cannot be proper to write onto the face of legislation a list of offensive and distressing behaviours aimed at one particular group of people.

The messaging provided by “laundry lists” of this kind undermines the impact of the law. We do not want to see this bill undermined in that way.

The four options

The government’s four options differ only in their approach to the race and religion characteristics.

Option 3 is the simplest, because it applies in the same way to all six “new” characteristics, and to the existing characteristic of race.

It could of course be said that the stirring up racial hatred offence has existed for 34 years without any evidence of an impact, either legally, or through self-censorship or over-zealous police action, on legitimate freedom of speech. Option 4 is the same as option 3, but with race omitted. We defer to the expertise of BME-led organisations on this choice.

We note that religious and secular stakeholders have raised particular concerns about the application of the stirring up offence in relation to religion, and these are presumably why options 1 and 2 take a different approach to religion. We do not have a particular view on that.

However, we would be very strongly opposed to any extension to other characteristics of the different approach taken to religion in options 1 and 2. People with other characteristics, for example trans people and disabled people, are already frequently subjected to antipathy, dislike, ridicule or insult because of their characteristic, something that is inherent to their identity.

Antipathy, dislike, ridicule or insult is directed at people with these characteristics often on a daily basis, and has a devastating impact on people’s lives, for example making them fear to step outside their home. It would be entirely wrong to place a provision in the bill that could encourage that behaviour. To do that would undermine the whole purpose of the bill, which is to provide some protection to people who are subject to such behaviours. It could also encourage breaches of the Equality Act provisions on unlawful harassment.

In addition, for people with these characteristics it is easy to visualise circumstances where ridicule or insult could become threatening or abusive, and such a provision risks blurring the line between what is criminal and what is not to a degree that seriously undermines the application of the stirring up offence to those characteristics.

Summary

- We believe that the bill as amended at stage 2 sets an appropriate threshold for what should constitute a criminal stirring up offence.
- We acknowledge that it is important for the Scottish Parliament to include reassurance to some people that these new offences will not impinge upon their freedom of expression.
- We believe that the reassurance for freedom of expression must be framed in such a way as to not undermine the primary purpose of the bill, which is to protect historically marginalised people.
- We believe that the best approach to providing these reassurances would be through a uniform provision that applies across the characteristics and ideally makes positive reference to ECHR rights.
- If reference to ECHR rights is not possible, the government's proposed amendments are a significant improvement on stage 2 amendments.
- We defer to the expertise of others on the differences between the four options, but we are clear that the specific provision for religion, proposed in options 1 and 2, must not be extended to other characteristics, where it would be counterproductive and harmful.

Engender

Engender's prior support for a general Freedom of Expression clause

When Engender provided our written evidence to the Committee at Stage 1, we noted that freedom of expression has long been relied on by women and women's organisations to advocate for equality and rights.⁶ We remain strongly opposed to the use of a stirring up offence to prevent criticism of political action or social debate that affects women and gender equality outcomes. We also noted that concerns about the scope of criminalised hate speech could have a chilling effect on protest, and restrict the voicing of concerns from marginalised groups with lesser access to power and to advice that prevents them from engaging in – sometimes difficult - public discourse in pursuit of their own rights. Feminist speech and advocacy for equality and rights must not be undermined.

We reiterate our view here that:

- A perceived threat of criminality may stifle necessary political and social debate;
- Marginalised groups and causes are more vulnerable to interference and less capable of inspiring actual hatred to a majority or state-backed power;
- Exceptions should be narrowly constituted and not used to further or excuse oppression, and therefore the scales must be weighted in favour of the oppressed.

We noted that the freedom of expression clauses in the Bill as introduced were focussed on specific aspects of a person's identity or behaviour without a strong justification for their being singled out. We suggested that replacing the specific exemptions with a more general provision which explicitly provides reassurance of protection for speech made as part of political or social debate in the public interest. This reflects the approach the European Court of Human Rights has adopted, weighing the need to promote democracy and advance political, artistic, scientific or commercial development and the need to protect the rights of individuals and minority or marginalised groups, and would focus on protecting the forum rather than narrow subject matter.

We continue to believe that this approach balances the need to provide reassurance that discussions on all matters is protected by existing human rights law while protecting marginalised minorities from harm.

This is because the value of any freedom of expression clause is ultimately secondary to the threshold for criminality and provides reassurance that underlying protections in the European Convention on Human Rights, mainly Article 10 and Article 17, apply. It is worth stating again here that 'hate speech' of the sort the stirring up offences in the Bill aim to address is generally excluded from protection under Article 17 and that Article 10 is not absolute, often involving an examination of the facts and the context

⁶ Engender (2020) Engender submission of evidence to the Scottish Parliament Justice Committee call for views on the Hate Crime and Public Order (Scotland) Bill. Available at <
<https://www.engender.org.uk/content/publications/Engender-submission-of-evidence-on-Hate-Crime-and-Public-Order-Scotland-Bill-.pdf>>

in cases relating to hate speech.⁷ A freedom of expression clause, because it is not absolute, will not prevent the need for an examination of whether the threshold for criminality has been met in cases when an offence is alleged.

We believe that section 3(2) of the Bill, especially following amendments at stage 2, creates an appropriately high threshold for an offence – behaviour or material must be **objectively** threatening or abusive, and there must be intent to stir up hatred. This leaves considerable space for difficult, challenging and offensive comments to be made.

We do not believe it is appropriate to single out aspects of protected characteristics or identity as being more or less worthy of criticism than others and welcome that consensus is being sought that would treat all protected characteristics in the Bill the same. We suggest that fixing aspects of current social and political debate on the face of the Bill runs the risk of the law becoming out of date as what is contested or accepted may shift over time.

Prescriptive yet narrow freedom of expression clauses will not prevent criminality where the high threshold for criminal offence is met, yet there is risk that such an approach causes unnecessary distress to people the Bill aims to protect. Additionally, we are not convinced that such reassurance is possible given that somebody may still commit an offence while engaging in criticism of a sort included in a freedom of expression clause, and that it may in fact lead people to commit offences capable of crossing the threshold in section 3(2), under the mistaken belief their speech is protected in absolute because its content corresponded with a matter listed on the face of the Bill.

The Scottish Government's draft amendments

Specifically on the options proposed, all four options make clear that discussion or criticism of any protected characteristic, relevant attribute, or behaviour thereof, is not in itself to be taken as threatening or abusive and cannot itself amount to an offence unless delivered in objectively threatening or abusive terms or manner and delivered with the intention of stirring up hatred.

Engender takes no strong view on the degree to which race and religion should be treated the same as all other protected characteristics and would defer to other stakeholders on this point. We would however not support extending “expressions of antipathy, ridicule, dislike or insult” to other protected characteristics because the freedom of expression clause will make no difference to the level of protection speakers are provided by the Bill. It will however send a clear message to those the Bill is intended to protect that “expressions of antipathy, ridicule, dislike or insult” are appropriate. There is a difference between speech not being criminalised and being expressly sanctioned or condoned. There is no need for the Bill to create this distress when it will offer no additional protection from criminality.

We also note that concern about the process of agreeing these amendments has led to an impression that it is somehow unusual for parties and stakeholders to meet

⁷ Vejdeland and others v. Sweden. ECHR No. 1813/07

outside of formal sessions of a Committee to test ideas. We are concerned that this may impede the quality of amendments on future Bills and would suggest that more discussion with more stakeholders in this process may have actually led to better drafting, avoided considerable upset and contributed to better public discourse about what risk to freedom of expression actually exists and how best to manage that. We welcome the openness of the Committee and opportunity to contribute to this particular discussion while also hoping an environment of meaningful dialogue, reflection and cooperation can be preserved, even where we disagree.

Treatment of Sex

It is not clear at this stage, but we would expect an enabling power to add 'sex' to the freedom of expression clause on the same basis as the approach to 'sex' in the rest of the Bill to be forthcoming. Without seeing or having specific opportunity to consider how such an amendment could work, we cannot yet draw any firm conclusions on such an approach. However, Engender's concern about the symmetrical application of 'sex' remains, and we think it vital to consider what statements about women, gender norms and sex could be given tacit approval under the guise of freedom of expression. For example, would it be appropriate to question women's suitability for particular jobs or industries or to make comments about women's bodies or physical appearance? Even if such comments were not of themselves criminal, we would not expect to find such comments in legislation in 21st century Scotland. For this reason, we would be even more concerned by, and strongly opposed to, any proposal to craft a prescriptive freedom of expression protection for 'sex' that listed aspects of women's lives deemed acceptable for debate.

Additionally, we would want to be sure that a symmetrical freedom of speech protection for sex did not undermine any new misogyny-related offence or any reform proposed by the Working Group on Misogyny. This needs to be properly and fully considered before any such clause is added to the Bill.

Evangelical Alliance

1. The Evangelical Alliance is grateful for the opportunity to comment further on the Hate Crime and Public Order Bill, especially in the light of fresh amendments proposed to consider how best to protect freedom of speech. We have engaged constructively throughout the bill process with both the Scottish Government and Justice Committee. Despite the latest timescale being far from ideal we will continue to engage using this approach.
2. While we are an organisation primarily focused on religion and belief our concerns regarding free speech are not limited to that one strand. In particular we are concerned about areas which in the outworking of one's religion may intersect with other characteristics protected in hate crime legislation. In reference to the current proposals and contemporary debate this is most readily apparent with regards to sexual orientation and transgender identity.
3. From the outset we have made the case for both breadth and depth in relation to freedom of expression provisions. We believe this reflects the approach of Lord Bracadale (itself reflecting the Public Order Act 1986 and the now repealed Offensive Behaviour and Threatening Communications Act 2012) and offers the greatest chance for the general and specific protections that are needed across characteristics.
4. Such an approach does not require an identical approach to characteristics however it is important not to create a significant difference and therefore perceived hierarchy of protected characteristics. Nuance is required and we believe Lord Bracadale's evidence to committee provided a starting point for how this could be achieved.
5. We therefore welcome the Scottish Government's amendment to the breadth of characteristics covered by the freedom of expression clauses. On balance we support the inclusion of race due to reasons outlined in our previous evidence to committee, namely the definition of race extending to nationality and citizenship. We therefore would be supportive of Option 1 of those currently under discussion in relation to breadth.
6. In relation to depth, freedom of religion or belief is central to the work of the Evangelical Alliance and we consider it vital that as we wish to share our faith with others, others should be free to accept or reject that, including in the strong terms permitted within the proposed exceptions in Options 1 and 2. We therefore consider that Options 1 and 2 are significantly preferable to Options 3 and 4 which provide inadequate protection.
7. However, it is our view that neither Options 1 nor 2 go far enough to protect freedom of expression in matters that are contentious and subject to reasonable disagreement. These characteristics are subject to significant public debate, and

categorising speech on these issues as a hate crime without the strongest possible protections for free speech potentially criminalises political debate. We believe therefore greater depth is required across characteristics in addition to religion and belief.

8. We are therefore disappointed that the government have removed the proposed free speech clause for sexual orientation that was originally in Section 12 of the bill. The equivalent in English and Welsh legislation (Public Order Act 1986 Section JA) as amended) has worked well since its introduction and formed the basis for this section.
9. Discussion around transgender identity is a significant matter of political and public debate and while such discussion should never be hateful it is not hard to envisage a situation where what one person considers to be an expression of discussion or criticism, is regarded and reported by another as dislike, antipathy or insult. Further definition is therefore required in this area as well.
10. We do not think any community should fear such further definition being added to freedom of expression provisions. As the bill stands, if the proposed two-part criminal threshold was met by additional means an offence would still be committed, regardless of whether as part of doing so, a statement was made that was covered by freedom of expression provisions. Therefore, the provisions are not a get out of jail free card. They would not inhibit legitimate prosecution under the proposed bill but they would, crucially, provide clarity and definition about where the line is between offensive speech and abusive speech. They would therefore protect fundamental freedoms, as well as the policy intentions of the bill, allowing police, prosecutors and crucially the general public to be clear about what is and is not appropriate speech in these areas.
11. Therefore it is our view that none of the four options proposed are fit for purpose in their current form. While Option 1 provides additional breadth and the necessary defences to protect freedom of expression in regard to religion or belief, the government should bring forward additional amendments that adequately protect free speech in other areas such as matters of sexual orientation and transgender identity. If the current approach is to be pursued we would advocate for an 'Option 1+' that allows for suitable and robust definition to be built in across characteristics as required.

For Women Scotland

We are troubled that it has taken so long for these crucial amendments to be considered in this Bill. Cynically we are frightened that the Government is running the clock down and is looking for a botched compromise rather than a proper examination of the issues at stake.

As far as the proposals are concerned; Option One is the least worst. However, it does not cover all our concerns. At this stage we would draw the Committee's attention to a similar hate crime bill in Spain where the hanging of an effigy of the Deputy Prime Minister Carmen Calvo, who has defended women's rights, is not a hate crime [1]. However, a renowned feminist campaigner, Lidia Falcon (85 years old and who was tortured by Franco) can be prosecuted under their hate crime law for campaigning for the rights of women as a sex class [2].

If this is what the Scottish Government want for women in Scotland, they need to state this on the face of the Bill. If not, they must incorporate definitions and protections.

As trans rights campaigner Debbie Hayton has written in the Spectator, women are being prosecuted under similar laws in Norway where "female rape" has increased by 300% but if women challenge male bodied people in women's spaces they fall foul of the law [3].

Women associated with For Women Scotland have engaged in the workshops and providing evidence and submissions on the Hate Crime Bill from the start. We have provided a huge body of evidence to suggest that campaigners, some closely allied to political parties are ready and waiting to use this law to persecute women. This has not been addressed.

No definitions have been provided on transgender identity, transphobia, non-binary or even sex. We have been fobbed off with vague assurances that the Justice Secretary is reluctant to write into the Bill. Our worst fears were realised when the incredibly benign amendments of Liam Kerr which stated, inter alia, that saying there were only two sexes should not be a hate crime were called shocking and transphobic by a political leader in the Scottish Parliament. Comments like this have increased rather than allayed our fears as did the extraordinary reluctance of the Justice Secretary to make a simple statement of scientific fact; we would like to know if he was worried of falling foul of his own proposed legislation.

At this point we think there are number of MSPs and Civil Servants who are frightened that they may be caught by this Bill and are not willing to commit to ensure it will even allow women to state their rights under UK and Equality Law.

It has been left to unfunded women's organisations to argue this in the face of appalling abuse, some from office bearers in the political parties. We note the expressions of fear made by MSPs at the last Committee meeting and the commitments to ensure open debate to be held. We call on Committee members to ensure that these protections are enshrined in law.

Meanwhile, representatives of funded lobby groups argue that "wrong pronouns" or referring to someone by an old name could be an act of hate. We would ask members

of the Committee to consider if they would enforce compelled speech on abused women. If they would require a rape victim to call her attacker “she” or tell women abandoned or abused by a husband and a father that they are never allowed to call him by his name? Will they lock these women up?

These things have already happened to abused or assaulted women. Lobby groups in Scotland would make this worse. This has never been discussed in this Committee, it has never been considered by the Justice Secretary.

If this sounds angry, it is angry, and we are saying it now before we are criminalised for it.

For Women Scotland

21 February 2021

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[2] <https://www.spectator.co.uk/article/spain-s-transgender-wars-are-turning-nasty>
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Humanist Society

1. We thank the Justice Committee for the opportunity to submit our views on the freedom of expression amendments recently proposed by the Cabinet Secretary for Justice.
2. We welcome the amendments that have been made as part of stage two deliberations so far which removes sections of the bill on theatre performances and offensive material. As we highlighted both in written correspondence and at the previous evidence committee meeting we had concerns with regard to the specific offences aimed at those involved in the arts and the resultant chilling effect this may have on artistic freedom and in general freedom of expression.
3. We also welcome amendments passed at stage two which ensures that stirring up offences are 'intent only'. As you will recall this was the main concern submitted in our evidence and our joint letter with artists, writers, cartoonists and human rights advocates. Requiring 'proof of intent' behind stirring up offences gives significant reassurance that freedom of expression may not be curtailed by the stirring up provisions of the Bill. In connection with this the introduction of a 'reasonable person' test is a welcome amendment again further strengthening protections to freedom of expression. We believe that these amendments ensure that stirring up offences have a high bar to prosecution to ensure prosecution would only be taken of clear, unambiguous threats that intend to stir up hatred. We believe that the freedom of expression clauses are useful provide additional clarity and – most importantly – ensure that there is no unintended chilling effect on freedom of expression and self-censorship. This is true for the public at large but is particularly true for those engaged in artistic endeavours where censorship is an emotive topic and something that has been hard fought to remove at a statutory level across the twentieth century.
4. In addition we were pleased to note the passing of the amendment unanimously on by the committee regarding the freedom of expression clause on religion and belief. This introduced an additional elements to the freedom of expression clause regarding religion and belief that stated expressions of 'antipathy, ridicule, dislike and insult' of religion or belief were not considered to be stirring up hatred. This mirrors provisions which exist in equivalent legislation on religion in England and Wales Racial and Religious Hatred Act and something the Humanist Society Scotland had requested made as an amendment to the bill. We believe this amendment to be key to ensuring no rolling back of 'censored' speech on religion/belief. Censorship in relation to religion/belief is particularly damaging where it is used to silence 'dissidents' 'apostates' and 'blasphemers'. Members are reminded that another part of the bill removes the common law offence against blasphemy in a welcome tidying up of the law. It is often those who have left a religious community or converted to another who face the harshest backlash against their freedom of expression, have spurious complaints made against them and/or face widespread harassment. The committee must be mindful of the potential impact rolling back the strong free expression clause it

has just recently agreed on religion and belief on these particularly vulnerable individuals.

5. We are concerned therefore that of the options for proposed amendments before the committee two (options 3 and 4) undo the Cabinet Secretary's amendment on religion/belief freedom of expression which was backed unanimously by committee members. This would see the freedom of expression clause on religion and belief limited to 'discussion or criticism' and leave out 'expressions of antipathy, dislike, ridicule or insult' as previously agreed by the committee. It would be highly unusual for the committee to have passed amendments to a bill so recently and then propose to undo the provisions of that amendment only weeks later. We are aware of no concerns that have been raised in the between period by faith groups or secular groups as to the nature of these provisions – at least if protestations have been forthcoming they have not been in the public domain as to allow the committee the opportunity to scrutinise the veracity of such concerns. In fact it would appear there is broad alignment of both religious and secular groups that the 'expressions of antipathy, dislike, ridicule or insult' amendments approved was a sound one and protected both religious expression and freedom to criticise religion and criticism of non-religious beliefs too.
6. The only argument to be made with regard to opting for option 3 or 4 is to treat all the characteristics the same. This is an approach that we consider would be a highly erroneous one and does not consider the differing nature of the other characteristics compared to the unique philosophical nature of the religion/belief characteristic. The differences between religion/belief and other characteristics are many (we set out some simple examples in paragraph 7 which apply to religions/beliefs but which do not equally apply to other characteristics) and as such there is good argument that the provisions in relation to religion/belief should remain the expanded version (Option 1 or 2) as was already passed by the committee.
7. Religions/beliefs can be chosen, changed or put aside.
Religions/beliefs make extensive and often mutually incompatible claims about the nature of life and the world – claims that can be legitimately appraised and argued over.
Religions/beliefs set out as a core purpose to influence their followers' attitudes and behaviours, sometimes in ways which can be controversial.
Religions/beliefs are in principle, and often in practice, in competition with each other: people go door to door to spread their religion, they set up television and radio stations and run campaigns to convert people.
Religions/beliefs are often run or espoused by organisations that are wealthy and powerful. They exercise this influence outside of the realm of religion including on social attitudes, national and international policies.
Religions/beliefs are by their nature philosophical concepts. While they may influence other aspects of people's lives - at their core they are a philosophy.
The above statements do not apply to the other characteristics which is why there is a unique need to have the wider provisions that were already passed by the

committee in relation to religion/belief uniquely. It is for these good reasons that 'antipathy, dislike, ridicule or insult' are applied to the freedom of expression clause on religion or belief. It is the unique philosophical nature of this characteristic that sees for example 'ridicule' or 'insult' as a legitimate protection in a way that might not be considered appropriate for other characteristics.

8. Such a unique approach to religion and belief is supported by rulings of the European Court of Human Rights. For example in *Otto-Preminger-Institut v Austria (1994)*, para. 47 the court notes:

'Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and **even the propagation by others of doctrines hostile to their faith.**'

The Law Commission of England and Wales likewise notes:

'Ridicule has for long been an acceptable means of focussing attention upon a particular aspect of religious practice or dogma which its opponents regard as offending against the wider interests of society, and **in that context the use of abuse or insults may well be regarded as a legitimate means of expressing a point of view upon the matter at issue.**'

The United Nations Special Rapporteur on Freedom of Opinion and Expressions wrote in 2008:

'The Special Rapporteur further emphasizes that, although limitations to the right to freedom of opinion and expression are foreseen in international instruments to prevent war propaganda and incitement of national, racial or religious hatred, these limitations were designed in order to protect individuals against direct violations of their rights. **These limitations are not intended to suppress the expression of critical views, controversial opinions or politically incorrect statements. Finally, they are not designed to protect belief systems from external or internal criticism.**'

9. The difference between option one and option two relate only to the inclusion of race in this particular section and we don't have any particular view on the matter of its inclusion and other representative groups will be better placed to advise on this matter.
10. In summary we would not favour options three or four as we believe these would have a potential to manifestly impact on self-censorship in relation to religion and belief. On that basis we would encourage the use of options one or two from those presented.

Inclusion Scotland

Inclusion Scotland is a 'Disabled People's Organisation' (DPO) – led by disabled people ourselves. Inclusion Scotland works to achieve positive changes to policy and practice, so that we disabled people are fully included throughout all Scottish society as equal citizens.

Inclusion Scotland is concerned that consideration of the Bill has been overly focussed on the theoretical impact of the Bill on freedom of expression rather than the actual impact of hate crime on real people, including disabled people.

There is little doubt that negative portrayals of groups with protected characteristics leads to an increase in hostility towards these groups, and an increase in hate crimes.

Disabled people report that antipathy, dislike, ridicule, and insult is a backdrop to their everyday lives. Too often the perpetrators are unaware of the consequences of their actions, thinking that it is just a bit of fun. In reality it impacts on their health and wellbeing and their human rights, including being able to go about their daily life to participate in society safely, without fear of intimidation or harassment, in the same way as everyone else.

Inclusion Scotland does not believe that the proposed stirring up hatred offence presents any restrictions on freedom of expression. This is particularly the case following the amendment to the Bill at Stage 2 to restrict the "stirring up" offence to threatening or abusive language intended to stir up hatred. This is a very high threshold that would require to be met before any consideration of prosecution for the offence.

In broad terms, Inclusion Scotland endorses the approach outlined in the Equality Network and Scottish Trans Alliance submission to the Committee's roundtable.

Despite the absence of any evidence that the stirring up of racial hatred offence has had a negative impact on freedom of expression, the protections to freedom of expression contained within article 10 of the European Convention on Human Rights (ECHR) and the high threshold set for the stirring up hatred offence, should the Justice Committee feel that reassurance is required, Inclusion Scotland would prefer a general provision based on the ECHR.

If the Scottish Government can provide justification as to why this is not appropriate for a criminal justice Bill, then our preference would be for a general provision that applies to all protected characteristics in a consistent way and does not set out a pecking order of protection against hate speech. In this regard, Option 3 would seem to be the best approach.

It is important that the Bill sends out clear a clear message about what is and what is not acceptable. In this regard, Inclusion Scotland does not think it appropriate that the Bill should list behaviour or language that is “acceptable”. As stated above, expressions of antipathy, dislike, ridicule or insult are not without consequences for those who are subjected to it. It can legitimise prejudice and can lead to more serious consequences, even if that is not intended.

Inclusion Scotland urges you and other members of the Justice Committee to consider very carefully the potential impact of any of the proposed amendments on the victims of hate crime.

Preventing the stirring up of hatred does not restrict the legitimate expression of opinions. But those who fear that the offence of stirring up hatred will restrict their freedom of speech should perhaps ask themselves first what is it in what they want to say they believe could be interpreted as threatening or abusive and intended to stir up hatred?

Law Society of Scotland

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Criminal Law Committee welcomes the opportunity to attend the Scottish Parliament's Justice Committee's roundtable event to provide evidence on the proposed amendments to the Hate Crime and Public Order (Scotland) Bill (the Bill)⁸ relating to the proposed provisions dealing freedom of expression in advance of the Bill's Stage 3.

We discuss the background to the roundtable concluding that **Option 3** is our preference. We also include a note on Article 10 of the European Convention on Human Rights (ECHR) in Appendix 2.

Background to the roundtable discussions

The letter from the Cabinet Secretary for Justice, Humza Yousaf MSP to the Justice Committee dated 17 February 2021 provides the background to these roundtable discussions. That letter sets out four options to deal with the freedom of expression provisions which were not what was included in the Bill as it was originally introduced.

Each of the four options approaches the issue of freedom of expression in a slightly different fashion, though their actual format is generally similar in terms of drafting. The standard of criminality outlined in sections 3(1) and (2) of the Bill will not be reached where such behaviour or material involves or includes certain types of expression specified in the four suggested options (the premise for each option being slightly different)

Illustrative scenarios alongside the options have been provided which are helpful in clarifying the Bill's policy intentions.

Since the implications of being convicted of an offence under section 3(1) and (2) of the Bill are considerable, those offending must be aware of the risk of offending and when their conduct merits prosecution. Ultimately, that decision to prosecute lies at the discretion of the Crown Office and Procurator Fiscal Service (COPFS), based on sufficient admissible evidence as to a crime having been committed and prosecution being in the public interest. Where that burden of proof is satisfied, it will be for the defence to establish that the defence to the actions under freedom of expression has

⁸ The Bill as amended at Stage 2- <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/stage-2/bill-as-amended-at-stage-2.pdf>

been made out as a reverse burden. This is a burden placed on the accused to demonstrate that the freedom of expression has been made out.

It is therefore of considerable importance in relation to which offences that the accused can avail themselves as to the freedom of expression defence and as what constitutes that defence such as criticism and discussion. It is therefore important that the scope of the defence and the circumstances as to when it can be relied upon is clear and easily understood.

Our Position

We responded to the Justice Committee's Call for Evidence⁹ on 24 July 2021. We discussed Sections 11 and 12 of the Bill that dealt with the protection of freedom of expression for religion and sexual orientation, respectively.

At that time, we questioned whether the scope of these sections went far enough. There may have been a historic justification on retaining freedom of expression provisions for certain categories of characteristics such as religion. However, in the interests of the Bill's over-riding modernisation agenda, we prefer the inclusion of a defence that does not differentiate among the characteristics set out in section 1(2) of the Bill, thereby either creating intentionally a hierarchy or a perception of a hierarchy of victims/characteristics.

Hate crime is unacceptable in 21st Scotland; all victims of whatever characteristics should have similar expectations of what amounts to offending behaviour.

We had suggested then that a similar defence for all characteristics should be included, reflecting the terms of the now repealed section 7 of the Offensive Behaviour and Threatening Communications Act 2012 (2012 Act) where it stated:

(1)... nothingprohibits or restricts (a) discussion or criticism of religions¹⁰ or the beliefs or practices of adherents of religions, (b) expressions of antipathy, dislike, ridicule, insult or abuse towards those matters, (c) proselytising, or (d) urging of adherents of religions to cease practising their religions.

We note that each of the four options follow substantially the wording from that section albeit that they contain modification depending on which characteristics are included.

Generally, discussion and criticism are wide concepts and should not justify prosecution except where the respective threshold of offending outlined in sections 3(1) and (2) is reached. Deciding what amounts to criticism is subjective and difficult to establish when offensive behaviour stops being just criticism and potentially actionable.

The Cabinet Secretary's letter supports that "very robust criticism, is in itself not a matter for prosecution under this Bill." As Lord Justice Sedley in *Redmond-Bate v. DPP*¹¹ stated:

⁹ <https://www.lawscot.org.uk/media/369185/2020-07-24-call-for-evidence-hate-crime-and-public-order-scotland-bill-2020.pdf>

¹⁰ Religions includes a) religions generally, (b) particular religions, and (c) other belief systems.

¹¹ 1999 Crim LR 998

“Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative... Freedom only to speak inoffensively is not worth having ..”

Freedom of expression provisions help to reinforce the boundaries of the criminal law by protecting the right to express views that may be distasteful or offensive to many, but nonetheless are not and should not be the business of the criminal law and subsequent prosecution.

The freedom of expression provisions applied collectively across the four options will provide clarity for those engaging in the exercise of their rights to free speech. If the freedom of expression defences are available for some rather than all characteristics effectively sends a message that offers greater protection to certain individuals and groups and inevitably less to others. That seems not to be the clear message required.

Supporting option 3 as our favoured approach as outlined above has several advantages. It is simple. It is easy understood. It has clarity and ensures that each of the characteristics is treated equality. It sends a comprehensive message about boundaries and what is /what is not acceptable. It protects freedom of discussion and criticism.

For completeness, we outline a summary of our views in respect of each option below

- **Option 1 includes provisions applying to all characteristics in the Bill. It includes additional provisions in respect of religion. This additional provision relates to types of expression that are not necessarily merely discussion or criticism**

This has the benefit of including all the characteristics in section 1(2) of the Bill.

The Bill as introduced only offered specific freedom of expression protections in respect of religion and sexual orientation. This continues the specific protections outlined under sub-section 2 which echo section 7 of the 2012 Act. This creates a hierarchy of victims.

It is not necessarily clear in policy terms why additional protections are required for religion. We are aware that these were included and agreed at Stage 2 so careful consideration is needed now to exclude them.

However, this option, as highlighted above, risks sending message that expressions of religious bigotry are treated with greater sensitivity than any criticism of the other characteristics.

Option 2 has the same effect as option 1 except no provision for race is included

This has the benefit of including all the characteristics in section 1(2) of the Bill. It has the same effect on religion as stated above.

What this means is that there would be no freedom of expression protection in respect of discussions concerning race. We look forward to hearing the Scottish Government’s policy justification for this approach. From the COPFS’s Report on Hate Crime in Scotland 2019-2020¹²,

¹² <https://www.copfs.gov.uk/images/Documents/Statistics/Hate%20Crime%20in%20Scotland%202019-20/Hate%20Crime%20in%20Scotland%202019-20.pdf>

racial crime remains the most commonly reported hate crime where 3,038 charges relating to race crime were reported in 2019-20 which was an increase of 4% compared to 2018-19.

Option 3 has the same effect as option 1 except no additional provision for religion is included.

Our preferred option for the reasons stated above. This takes the most consistent approach across all the characteristics. No characteristic is singled out for what may be perceived to be preferential treatment. All characteristics should be equal before the law.

The option allows an opportunity to adopt a holistic approach to send this clear message.

Option 4 has the same effect as option 1 except no provision for race is included and no additional provisions

This has the benefit of including all the characteristics in section 1(2) of the Bill except race. Our comments under option 2 apply. This approach may be appropriate if it is perceived on policy grounds that the defence of freedom of expression should not apply to race.

Finally, we would highlight too the need to consider possible changes being made to the list of characteristics in section 1(2) of the Bill. While focused perhaps on the possible inclusion following Baroness Kennedy's¹³ Misogyny and Criminal Justice in Scotland Working Group Report to include sex, there is a further benefit in the option 3 approach. That would allow that freedom of expression provision to apply equally to that or any other characteristic to be applied in the future. That would avoid any debate on the tiering of future modified or varied characteristics.

Appendix 1

Article 10 of the European Convention on Human Rights (ECHR) -Freedom of Expression

Since the question of Article 10 is relevant we felt that we should include some discussion as to Article 10 which underpins the freedom of expression provisions however included in the Bill.

The right to freedom of expression is described as one of "the essential foundations of a democratic society."¹⁴ This right includes the freedom to hold opinions and to receive and relay information and ideas without interference by public authorities and regardless of any frontiers.¹⁵ In exercising these rights, restrictions as those intended by the Bill and other legislation apply to prevent disorder and

¹³ <https://www.gov.scot/groups/misogyny-and-criminal-justice-in-scotland-working-group/>

¹⁴ Handyside v. United Kingdom (1976) 1 E.H.R.R.737

¹⁵ Pillans, Brian Delict: Law& Policy 5th Edition W Green at page 41

crime, to maintain public safety and order and to respect the protection of others. Breaches that follow are dealt with by criminal sanctions. These restrictions conflict with Article 8 ECHR guaranteeing the right to respect for private life, family life, home and correspondence.

Article 10 states:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Any interference regarding freedom of expression must be proportionate. The Bill however it is finally framed must be careful to ensure that is achieved.

Murray Blackburn McKenzie

The Issue

Our concern is whether the law will provide a clear point of reference on what it does not criminalise, for individuals and organisations who may be threatened with legal action, or fear such threats, and for those working in the criminal justice system under pressure to investigate complaints, most specifically in the context of the expression of views about the nature of sex and gender identity. We do not believe any of the options set out in the Scottish Government paper will achieve this.

We suggest here some principles to follow in constructing the freedom of expression provisions, as a contribution to the process now underway. We do not think there is time to resolve all the outstanding issues here in a way which will produce good law, but if the Parliament is determined to pass legislation without taking longer to get the protections here right, it needs at least to go further than a generic protection for “criticism or discussion”.

The offensive should not be criminal of itself

The stated intention here is not to criminalise speech purely for being offensive. From the Stage 1 Report (emphasis added):

The Law Society of Scotland cited with approval a dictum from Lord Justice Sedley that “**Freedom only to speak inoffensively is not worth having**”.... The Faculty of Advocates cited Lord Rodger who said that freedom of speech applies to “ ‘Information’ or ‘ideas ‘that... ‘**offend, shock or disturb**’ ”. ...The Cabinet Secretary ... added that “People should have the right to be **offensive** and to express controversial views”... The Committee agrees that the right to freedom of speech **includes the right to offend, shock or disturb**. The Committee understands that this Bill is not intended to prohibit speech which others may find offensive, and neither is it intended to lead to any self-censorship. The Committee is anxious to ensure, however, that these are not unintended consequences of the Bill.

Giving evidence to the Committee Becky Kaufman of the Scottish Trans Alliance explained, “I have been subject to a fair bit of debate that makes me extremely **uncomfortable** and which is often very **disrespectful** of my identity, yet I would not encourage that behaviour to be made criminal.”

The purpose of freedom of expression sections: drawing a clear line

Lord Bracadale told the Committee that freedom of expression provisions (emphasis added):

“**should make clear where the line is drawn between offensive behaviour that has not been criminalised and the type of behaviour that is being criminalised.**” and

Such amendments to the bill would be an expression of **the kind of line that we want to identify between “offensive behaviour” on one side and “threatening and abusive behaviour”** on the other, with whatever other threshold there is.

‘Discussion or criticism’ does not draw that line

All four government options limit the protection for characteristics other than religion to “discussion or criticism”. Lord Bracadale recommended following the models in the Public Order Act 1986, which for religion includes not only “discussion or criticism”, but also “antipathy, dislike, ridicule, insult” and for sexual orientation refers specifically to “discussion or criticism” of “sexual practices” and, in effect, same sex marriage. He told the Committee:

The formula that was used in the Public Order Act 1986 and in section 7 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 had more strength about it than the formula that is used in relation to religion in the bill.

“Criticism” does not draw a clear line between the offensive and the criminal, but **timidly describes a line falling far short of that boundary.** It fails to meet the rhetorical commitment to protecting speech that is offensive, shocking or disturbing.

It is unreasonable to expect people who feel their freedom of expression is under undue pressure to read into “criticism” the distinct and separate concepts in the longer list above, or protection for a variety of statements in particular areas which others find offensive, and more importantly to persuade other people to read those things into it. “Criticism” is not a synonym of “expressions of antipathy, dislike, ridicule or insult” or for being offensive, shocking, disturbing, disrespectful, discomforting or, quoting the Cabinet Secretary’s letter, distasteful.

We agree with Lord Bracadale that a generic protection simply of “discussion or criticism” is too imprecise to be useful by itself. Further, that we might be at the point of contemplating the need for legislation in Scotland to make it clear that it will not be criminal *merely to discuss or criticise* matters related to any of the listed characteristics should give pause for thought.

The effect of Option 1

It is our understanding that in Option 1, for the non-religious characteristics, “discussion or criticism” will **specifically exclude** the longer list of terms only listed for religion, due to the legal principle of *expressio unius*.

All or some characteristics?

In his evidence to the Committee Lord Bracadale made clear that in recommending the models already contained in the Public Order Act and the closely related one in the OBFA, he had meant that these provisions should be used as models for provisions covering all the characteristics being added to stirring up.

I recommended that there should be freedom of expression clauses, and I would have expected them to extend across all protected characteristics, because I was trying to avoid any kind of hierarchy of protected characteristics.

From the Policy Memorandum to the Bill it is evident that the Scottish Government misread Bracadale's recommendation as narrowly referring only to the characteristics already in the 1986 Act. We believe that the ongoing anxiety around freedom of expression partly stems from this initial, and difficult to understand, failure to cover all characteristics, and the further failure to do so at Stage 2.

We agree with Lord Bracadale that the extension of stirring up should be accompanied by freedom of expression protection across all the new characteristics. We do not have a view in relation to race: in this case, where the provision has been in operation for decades, it ought to be possible to make a decision based on what experience says about the need.

General or specific?

The Bracadale Report recognised that there might need to be tailored protection for some or all characteristics, noting (emphasis added) "**Insofar as specific provisions are required to deal with how freedom of expression is to be safeguarded in relation to a particular characteristic**, that can be done within the framework of a single piece of legislation without making the legislation itself unwieldy".

The same assumption must underpin his recommendation of both on Sections 29J and 29JA of the Public Order Act 1986 as two distinct models. In referring to 29JA as a potential model, Bracadale specifically recognises that for some characteristics it may be necessary to anticipate specific flashpoints. We invite the committee to reject the dismissive language of "laundry lists" as a rhetorical device which deters engagement with the substance of the argument for making specific provision in any particular case.

We agree with Lord Bracadale that what is needed for each characteristic needs to be properly considered in its own right, even if there is some common core of wording that could apply in all cases.

The Scottish Government has introduced instead, only at the start of Stage 2, and with no warning, a wholly new principle which contradicts the basis on which the Bill was presented and examined throughout at Stage 1. This is that all characteristics should have absolutely identical freedom of expression provision (except possibly religion) as *a matter of principle*. We think this is misconceived. It has been introduced late into the process as an oversimplistic interpretation about what it means to have "no hierarchy" of characteristics, without any underpinning substantial analysis or explanation of why Bracadale's more nuanced thinking has now been rejected, and with no consultation.

The Scottish Government has not recognised that it would be possible to include provision for all the new characteristics, without treating most or all identically, and therefore does not explain why that approach has been rejected.

The coverage of the disclaimer

It would be better to be clear that the activities listed should not be taken not only as not “threatening or abusive” but also as **not “stirring up hatred”**, as it is specifically the concept of “hate” that is most often invoked against individuals in the discussion of sex and gender identity. Regardless of whether it is regarded as *legally* necessary, the law should make it clear that the “hatred” threshold specifically is not passed by activities listed *of themselves*. There is a precedent for this formula in the Section 29JA of the 1986 Act.

Coverage for beliefs and practices**Issues related to “beliefs” and “practices” are not uniquely relevant to religion.**

It is differences of *belief* (about the nature of gender identity, its significance relative to sex, how many sexes there are, whether a human being can literally change sex, what defines being a woman or a man etc, whether a person can literally be “born in the wrong body”, and so on) that are generating much of the deep disagreement in relation to transgender identity.

The explicit ability to reject beliefs needs to be as included, as in this particular context rejection of certain beliefs is regarded by some as intrinsically hateful.

In the case of transgender identity, but potentially in other areas too, **propositions for law and policy based on particular beliefs** are often more directly the focus of disagreement than the core beliefs themselves. So in any generic provision it would be desirable for that “beliefs and propositions for law and policy based on particular beliefs” to be within scope of coverage.

The concept of “practices” is already recognised in the 1986 Act, and in Section 12 of the Bill as introduced, as relevant to sexual orientation.

Beliefs, propositions based on beliefs and practices could all prove relevant to the other characteristics in ways the legislative process has not had time to explore.Not favouring certain beliefs

It is not obvious from first principles why a person’s deeply-held beliefs about the nature of gender identity should be less open to “antipathy, dislike, ridicule or insult” than a person’s deeply-held beliefs in the existence of an immortal soul, and their ability to be reunited after death with those they have loved. To the extent that other characteristics raise general questions about beliefs, the starting point should be that the same general protection for freedom of expression as for religious beliefs should apply: the burden of proof should be on those who would wish their beliefs to enjoy more protection than religious ones to explain why they should.¹⁶

¹⁶ None of us hold a religious belief: we take this view as a point of principle.

Following Lord Bracadale’s recommendation discussed above, and reflecting the consensus the Cabinet Secretary reported at Stage 2 had been reached for religion, **we support the longer formula protection for freedom of expression in relation to religion only offered in Option 1, and believe that should be used as a general template for beliefs applying across all the characteristics.**

Providing examples

Based on the general formula used in S29JA of the 1986 Act, **the Bill should put beyond doubt that certain types of statements, controversial in the context of transgender identity, are not intended of themselves to be criminalised by the Act.** Despite some comments at Stage 2, legislation can be drafted to include non-exhaustive lists of examples. We can provide examples where that has been done, if needed. If the parliament does not do this, it will have ignored the large amount of evidence provided to it of the scale of accusations of hatred and abuse here, and the low threshold often applied in making these. This could be done on the model of a free-standing section, a sub-section specific to transgender identity, or the inclusion of these statements in a list of statements which are described in general terms as not being threatening or abusive, or intended to stir up hatred, in relation to any characteristic.

We are concerned the government paper implies that what counts as “abuse towards trans people” will be unambiguous, and over-relies on the planned “reasonable person” test to prevent chilling effects. We also note that in rejecting a “fear and alarm” test, Tim Hopkins of the Equality Network argued that it ought not to be assumed that “abusive” will have the same meaning here as under s38 of the Criminal Justice and Licensing (Scotland) Act 2010, and that the sort of behaviour which might be constructed as abusive in context of stirring up hatred is potentially different. We agree.

Amendment 82A put forward a list for discussion.

82B As an amendment to amendment 82, line 6, at end insert—

- < () Behaviour or material is not to be taken to be threatening or abusive or as stirring up hatred solely on the basis that it involves or includes—
- (a) discussion, criticism or rejection of any concepts or beliefs relating to transgender identity,
 - (b) questioning whether any person should undergo, or should have undergone, a process of gender reassignment,
 - (c) stating that sex is an immutable biological characteristic,
 - (d) stating that there are only two sexes,
 - (e) the use of—
 - (i) “woman” or “man” and equivalent terms,
 - (ii) third person pronouns
 in a way other than that which a person prefers, or
 - (f) reference to any past name used by a person.>

Its contents were strongly condemned by some people as unacceptable. We think that should be treated as evidence of the need for something on these lines, unless MSPs are willing to say that any of the things on this list should *of themselves* be open to construction as criminally abusive. The Cabinet Secretary’s most recent

letter suggests saying sex is immutable should not be criminal in itself. We do not think this goes far enough, in content or form.

Amending provision

It would make sense to include **a power to make further, more detailed provision as needed**, providing further examples of what statements are not intended to be *of themselves* taken to be abusive and/or intended to stir up hatred, in relation to any characteristic, which can be used as and when there is evidence it is needed.

Confronting the reality of protecting offensive speech

The events around the beginning of Stage 2 have left us concerned that that there is a gap between the commitment to protecting offensive speech in theory and willingness by MSPs to risk criticism for being as specific as is necessary to do that effectively.

The debate about protecting offensive speech has been conducted in the Parliament so far in carefully inoffensive abstract terms. The only opportunity to explore where the line might fall in depth for any characteristic at Stage 2 was rejected.

We would have expected to have established more clearly by this stage in the process where the line is expected to be drawn between what was criminally abusive and what was merely offensive *in itself*, in relation to transgender identity. There is now little time and opportunity left to do that.

The only remaining option to prompt direct engagement with this appears to be include here a series of statements which we understand some people will find offensive, but which others would regard as points it is important they can freely assert. We would like to the Committee to consider as part of the current process whether it is its intention that *just making* any of the statements below could be enough *in itself* to pass the criminal threshold for abuse and so be enough to trigger an investigation into whether a person intended to stir up hatred.

Women have sex-based rights, Only women can get pregnant, A lesbian cannot have a penis, The census should collect data on biological sex, No-one is "cis", Transmen are not men/Transmen are female/Transmen are women who identify as men, People who describe themselves as non-binary are still either male or female, Social contagion explains the recent rapid rise in the number of young people coming out as trans, We should not encourage young people with gender dysphoria to make irreversible changes to their bodies, Cross dressing is a type of sexual fetish

The question is not whether MSPs would agree with or encourage any of these, but only whether their intention is to make any of these criminally abusive statements *in their own right*. This needs to be made clear at this level of detail ahead of Stage 3. Otherwise people for whom the freedom to make these statements matters will be significantly hampered in engaging with MSPs at the Bill's next and final stage.

Process

The significance of the issues raised by freedom of expression have been obvious throughout this process. Yet, the first detailed, substantive discussion about how such protection should be included in the Bill is taking place in the interval between the end of Stage 2 and Stage 3, as part of an extraordinary process, with those outside government's immediate circle having had three working days to consider the government's paper, which gives no guidance about the government's preferred option, and introduces a new principle which contradicts Bracadale and the contents of Bill as introduced and understood until 2 February.

Conclusion

It is our strong view that a general provision covering only “discussion or criticism” cannot provide the secure and clear point of reference that experience already shows is needed for transgender identity; and which further careful exploration might show is needed for others. It is therefore too weak to do the work required here to prevent chilling effects. The line between the criminal and the offensive has to be asserted more clearly. There is not time to do the work required on that properly across all the characteristics, although for transgender identity there are obvious potential flashpoints the Parliament should anticipate.

If the Parliament is nevertheless determined to legislate in this area using only a general provision, we suggest that that ought to be as close as possible to what is already proposed for religion, follow 29JA in referring to “stirring up hatred”, acknowledge the potential relevance of beliefs and practices for characteristics other than religion, and include provision to make more specific provision at a later date.

Veteran Spanish feminist Lidia Falcón, President of the Spanish Feminist Party, once imprisoned by Franco, was summoned to attend the Prosecutor's Office for Hate Crime and Discrimination in Madrid in December 2020, on her 80th birthday, for an interview, after she made a statement about plans to reform gender recognition law. She was subject to a complaint of hate crime by the Trans Platform Federation. The President of the TPF said “the repeated denial of the identity of trans people constitutes a hate crime”. After a two month investigation, on 15 February the Prosecutor dropped charges, declaring that her statements had been an entirely legitimate intervention in a political debate. (Source: <https://www.actuall.com/familia/la-fiscalia-archiva-la-denuncia-por-transfobia-contra-la-feminista-lidia-falcon/>).

We invite the Committee to take active steps to prevent cases like Ms Falcón's occurring in Scotland.

Dr Andrew Tickell

In order to be convicted of stirring up hatred under the Bill as amended at stage 2, the Crown will have to prove beyond a reasonable doubt, on corroborated evidence, that the accused:

1. Behaved in a manner which the reasonable person would consider “threatening” or “abusive” (or in the case of race, “insulting”);
2. That by dint of this behaviour, the accused positively intended to stir up hatred against a relevant group (or in the case of race, that their behaviour was “likely” to stir up hatred); and
3. That the accused person’s behaviour was not “reasonable” in the particular circumstances.

In the absence of any of these three essential elements, by law, an accused person must be acquitted. Any discussion of supplementary free speech provisions must be read in the context of the high legal thresholds now built into the Bill. Under the Human Rights Act 1998, Scottish courts applying this offence must also have regard to the rights protected by the European Convention, including the right to free expression under Article 10, demanding that interferences with free expression must pursue a legitimate aim and be necessary in a democratic society.

The necessity and desirability for introducing additional free expression provisions to this part of the Bill should also be read in this light. Whether option 1, 2, 3 or 4 is embraced at Stage 3, it is unlikely in my judgement to have any significant impact on the enforcement of this legislation.

The **reasonableness** defence, already enshrined in the Bill, represents the principal defence available to accused person charged under this section. It should be axiomatic that bare “criticism or discussion” of an issue is reasonable conduct in a liberal democracy.

It strikes me that in place of any of the four options proposed, sections 12¹⁷ and 13¹⁸ of the Human Rights Act 1998 may provide a more attractive, simpler model for conscience and free expression clauses for this Bill. The 1998 Act indicates that “**particular regard**” is to be had to these two rights in certain legal contexts. The following amendment (or one like it) could be introduced to section 3 of the Bill:

For the purposes of subsection (4), in determining whether behaviour or communication was reasonable, particular regard must be had to the importance of the Convention rights to –

- (a) freedom of expression, and**
- (b) thought, conscience and religion.**

¹⁷ Accessible here: <https://www.legislation.gov.uk/ukpga/1998/42/section/12>

¹⁸ <https://www.legislation.gov.uk/ukpga/1998/42/section/13>

While legally, the courts are already bound by these rights in their application of the criminal law, borrowing this approach from the Human Rights Act may more successfully communicate to the public, the courts, prosecutors and the police the rights-context within which these new provisions must be applied.