

# Hate Crime and Public Order (Scotland) Bill

## Submission on freedom of expression amendments

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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](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.