



To the Justice Committee,

We are grateful for your desire to hear from the public on the Hate Crime and Public Order (Scotland) Bill. As you know, this draft legislation has provoked some debate since it was published in April.

Free to Disagree is a broad campaign whose supporters include Jim Sillars, former Deputy Leader of the Scottish National Party, the National Secular Society and The Christian Institute. The campaign was established due to concerns over the draft stirring up of hatred offences found in Part 2 of the Hate Crime Bill. Our submission focuses on these provisions.

We believe that free speech is a vital right that should only be limited by the state when it has strong grounds for doing so. The right to free speech must include the ability for citizens to discuss, criticise and refute ideas, beliefs and practices in robust terms, including by expressions of antipathy, dislike, ridicule, insult and abuse directed against those ideas, beliefs or practices.

This may result in some people being offended. We do not advocate deliberately offending people. But there is a difference between giving offence and taking offence. Many people take offence as a means of shutting down debate. In a free, pluralistic society there is no right not to be offended.

We are concerned that the draft stirring up of hatred offences pose a serious threat to freedom of expression and religious liberty. These provisions could criminalise speech that is merely deemed offensive to certain people. In doing so, free speech in Scotland would be chilled. That is to say, people would censor or self-censor speech out of fear of accidentally transgressing the new law.

Specifically, we note that:

1. The term 'hatred' is subjective and difficult to define, especially when it relates to hatred being 'stirred up' in other people. How can police, prosecutors and judges know this? They cannot make windows into people's souls. The criminal law should focus on concepts that are demonstrable and easily defined.
2. People can commit a stirring up hatred offence without intending to do so, and without actually having done so, if the court feels their actions were merely 'likely' to stir up hatred. This lack of mens rea – mental culpability – drastically widens the reach of the offence.
3. Public order laws like these would normally include a defence for words spoken in the privacy of your own home and not heard or seen by anyone outside. The Hate Crime Bill contains no such defence, making it possible for people to be prosecuted over remarks made at the dinner table.

4. The proposed stirring up hatred offences would criminalise 'threatening or abusive' behaviour deemed 'likely' to stir up hatred. While threatening behaviour is wrong and clearly understood in case law, the term 'abusive' is vague and open to interpretation – especially in the absence of mens rea, or any objective definition of hatred.
5. Free speech provisions in the Bill only protect the 'discussion or criticism' of religion and sexual orientation. While the presence of any free speech clause is welcome, these apply to just two grounds and only go so far. The terms 'discussion' and 'criticism' are academic. There is a risk this would not protect forthright speech and debate by ordinary people on contentious issues like religious belief and morality.

It is our belief that the proposed new stirring up hatred offences in relation to age, disability, religion, sexual orientation, transgender identity and variations in sex characteristics should be scrapped or amended in ways that ensure the protection of free speech for all. In terms of amendments to the Bill, we would urge MSPs on the committee to do the following:

1. Ensure that mens rea is included in the new offences, as in other aspects of criminal legislation. The committing of a stirring up of hatred offence must require knowledge or intent on the part of the offender.
2. Include a 'dwelling defence' to ensure that the provisions do not cover words spoken in the privacy of the home, or heard outside the home. The Public Order Act in England and Wales includes such a defence in section 18.
3. Drop the term 'abusive' from the offences relating to age, disability, religion, sexual orientation, transgender identity and variations in sex characteristics. This term is vague and open to interpretation. It provides too low a threshold at which an offence can be committed.
4. Strengthen the free speech provisions related to the stirring up offences. We note that the free speech provision in the, now repealed, Offensive Behaviour at Football Act allowed expressions of "antipathy, dislike, ridicule, insult or abuse" directed against ideas, beliefs or practices. This wording is more suitable and would better protect free expression in Scotland.

We hope that you find these suggestions useful and wish you all the best in your scrutiny of the legislation in the coming months. If you would benefit from oral evidence from a representative of the campaign, we are happy to oblige.

Sincerely,

The Free to Disagree campaign