

December 2020

# MSP Briefing

Hate Crime and Public Order  
(Scotland) Bill - Stage 1

**FREE** TO DISAGREE .SCOT

Free to Disagree is a coalition of civil liberties  
groups and individuals with one aim – to protect  
freedom of expression.

[www.freetodisagree.scot](http://www.freetodisagree.scot)

## Allies



National Secular Society



The Christian Institute



Peter Tatchell Foundation



Network of Sikh Orgs



Adam Smith Institute



Freedom Association



Index on Censorship



Manifesto Club



Jim Sillars



Peter Tatchell



Ruth Smeeth



Dr Stuart Waiton



Emma Webb



Josie Appleton



Maddie Kearns



Kapil Summan



Simon Calvert



Jamie Gillies

## Foreword



Jamie Gillies, campaign spokesman

Thank you for taking the time to read this briefing. The Free to Disagree campaign believes the stirring up hatred offences in Part 2 of the Hate Crime Bill should be dropped or significantly amended in order to avoid an unintended erosion of freedom of speech and expression.

We all recognise the laudable aims behind these proposals. Protecting vulnerable groups from crimes motivated by hatred is vitally important. However, the need for new 'stirring up' offences has not been demonstrated, and their intended scope has not been explained. This is why such a significant number of people have warned of a threat to civil liberties.

The Scottish Government has pledged amendments to limit the offences to 'intent', remove a provision on theatre performances and broaden a free speech clause on religion. Whilst these commitments go some way towards addressing concerns, other vital questions remain unanswered.

The offences lack definition and the concepts they deal with – most notably hatred itself – are difficult to express precisely in law. In the current political climate, the offences could be applied too broadly, bringing citizens into contact with the criminal justice system for

expressing unorthodox, controversial or offensive views.

If this happens, Scotland would be divorced from its proud free speech tradition – the tradition of Burns, Hume and Adam Smith. As Lord Justice Sedley famously said, 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". Free speech is a vital right for all citizens, and especially for marginalised groups.

Of course, the experience of victims must not be overlooked. Current legislation catches threatening and abusive behaviour and statutory aggravators exist to punish crimes motivated by prejudice. By consolidating existing provisions and investing in the current framework, the government can aid the police and prosecutors in tackling truly hateful behaviour.

Please consider the five arguments overleaf for leaving Part 2 out of the Hate Crime Bill. If the stirring up hatred offences are to proceed, we also include suggested amendments. If I can assist with anything please don't hesitate to get in touch using the contact details at the back of this briefing.

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# Part 1

## Key arguments



## Five reasons to leave out Part 2

The stirring up hatred offences in Part 2 of the Hate Crime Bill are highly contentious. Over the past six months, numerous groups have raised concerns over their potential to undermine freedom of expression.

The best way to resolve uncertainties and ensure that vital liberties are protected is to drop the offences from the bill and allow other non-contentious provisions to proceed. Here are five reasons why leaving out Part 2 is a sensible solution.

### 1. No gap in the law

Several groups have highlighted a lack of evidence that the stirring up offences are necessary. In evidence to the Justice Committee, policy analysis collective Murray Blackburn Mackenzie said the Scottish Government has failed to demonstrate how “expanding stirring up offences will fill a legislative gap on paper, or reduce in practice the number of hate-related attacks on individuals in particular groups”.<sup>1</sup>

The Scottish Police Federation, which represents frontline officers in Scotland, described the offences as “unnecessary”.<sup>2</sup> And Community Justice Scotland, which lobbies for improvements to the criminal justice system, questioned “whether creating additional legislation is proportionate or the most appropriate route to follow”.<sup>3</sup>

The government's statements on the draft proposals appear contradictory. On the one hand, the government has said that behaviour caught by the offences "would already constitute existing criminal offences".<sup>4</sup> On the other, it says the offences will extend the law to ensure that "sufficient protection is provided".<sup>5</sup> No detail has been given on what behaviour they will catch in practice.

## 2. Lack of definition

The government has not explained what is meant by the term 'hatred'. The meaning of this word is complex and highly subjective. In the culture we live in, many opinions on issues covered by the offences – religion, sexual orientation and transgender identity – would quickly be described as 'hateful'. Expressing merely offensive or controversial opinions should not be a hate crime.

Other terms in the draft legislation also lack clear definition. The offences catch 'threatening or abusive' behaviour. Whilst the meaning of threatening is clearly understood, 'abusive' is not. Cabinet Secretary for Justice Humza Yousaf suggests that the dictionary definition of the word will suffice.<sup>6</sup> However, this definition – 'using rude or offensive words' – is much too low a threshold.

The term 'inflammatory' is vague. The Roman Catholic Church has questioned whether certain passages in the Bible could be deemed 'inflammatory' under the stirring up offences.<sup>7</sup> It has also been suggested that the works of gender critical feminists like Germaine Greer could be caught.<sup>8</sup>

All of these terms need to be much more clearly defined. It will, however, be hard to reach a consensus on definitions. To some extent, it means agreeing on the parameters of free speech itself – a seismic task for any legislature and especially for MSPs as they approach the election in 2021.

## 3. Fostering division

The societal debate over transgender rights and women's rights has been highly emotive in recent years. There are many examples of individuals alleging 'hatred' and 'abuse' when certain views are expressed – even when such views are expressed with the greatest civility.

In June this year, Harry Potter author J.K. Rowling was accused of 'hatred' and 'bigotry' for explaining her views on these subjects in a blog post, citing academic research.<sup>9</sup> SNP MP Joanna Cherry has also recently cited the vitriol she receives online for expressing certain opinions on gender recognition reform.<sup>10</sup>

The stirring up offences could add fuel to the fire of this debate by allowing indi-



viduals to allege the 'stirring up of hatred' and pursue political opponents through the courts.

Debates around contentious issues could see criminal legislation being weaponised for political gain, abusing the proper function of the courts and fostering further division and animosity between certain groups.

#### 4. Danger of vexatious complaints

Representatives from the police force in Scotland have cautioned of the likelihood of "vexatious reports" <sup>11</sup> if there is any uncertainty as to the scope of the stirring up offences.

Police Scotland said that failing to include adequate free speech protections could result in the force "being burdened with vexatious reports of 'crimes' which are not in fact criminal in nature but which still require to be recorded and investigated to confirm if criminality is involved". <sup>12</sup>

The Scottish Police Federation has said: "this proposed legislation would see officers policing speech and would devastate the legitimacy of the police in the eyes of the public... Police officers are all too aware that there are individuals in society who believe that to feel insulted or offended is a police matter. The Bill would move even further from policing and criminalising of deeds and acts to the potential policing of what people think or feel". <sup>13</sup>

If the police force in Scotland is required to waste time and resources pursuing complaints and investigations that will not result in prosecutions, this will affect their wider work in preventing crime. If public trust in the police is eroded, as the Police Federation suggests, it may result in the victims of hate crime being less willing to come forward.

## 5. Chilling effect

There is wide concern today that freedom of speech and expression are being undermined.

ComRes polling carried out for Free to Disagree in August found that 64 per cent of Scots think “people today are too quick to shut down debate.”<sup>14</sup> The effect of new stirring up offences could further undermine confidence in free speech, even if few prosecutions occur in practice.

The Faculty of Advocates has cautioned that the offences could have a potential, unintended “impact on freedom of expression” and cited a potential “chilling effect on legitimate, if controversial, debate and the performing arts.”<sup>15</sup>

The UK-wide Society of Editors has also warned that, although the stirring up offences are designed for Scotland, “any media organisation that publishes or broadcasts north of the border could find themselves caught up or at the very least there will be a chill placed on their work.”<sup>16</sup>

“

Freedom only to speak inoffensively is not worth having.

Lord Justice Sir Stephen Sedley

”

## Part 2

### Amendments

## Free to Disagree proposed changes to Part 2

If the stirring up hatred offences are to go ahead, several additional amendments are required to mitigate the risk to freedom of speech and expression. Free to Disagree has four recommendations.



# 1

## Revised free speech clauses

The government has pledged to 'broaden and deepen' the free speech clause on religion to allow expressions of "antipathy, dislike, ridicule and insult" <sup>17</sup> towards different beliefs. They also plan to amend it so that it treats religious and non-religious beliefs even-handedly.

These changes provide welcome clarity. However, the freedom to disagree on issues linked to the other protected characteristics must also be protected. We have two specific recommendations.

Firstly, it is crucial that a free speech provision on transgender issues is included. Legislating for new stirring up hatred offences without such a provision could be highly problematic given the forthright debate that occurs around transgender and women's rights issues.

Secondly, the existing free speech clause on sexual orientation must be extended to protect criticism of same-sex marriage, as in parallel legislation in England and Wales. Religious groups may fall foul of the law if this is not included.

## What the experts say

**'Criticism and discussion are very wide concepts.'**

Law Society of Scotland

**'Detailed provisions are more important for a public understanding of what offending involves.'**

Police Scotland

**'The absence of a statutory protection for free expression, relative to what are currently clauses 3(1) and 5(1), militates against the achievement of consistency.'**

Senators of the College of Justice

## 2

### Drop 'abusive'

The proposed stirring up hatred offences would criminalise 'threatening or abusive' behaviour.

In evidence to the Justice Committee on 24 November 2020, Cabinet Secretary for Justice Humza Yousaf stated:

"I see no reason why the ordinary meaning of the word 'abusive' – its dictionary definition – cannot be used or would not be well understood."<sup>18</sup>

The dictionary definition of 'abusive' includes "using rude and offensive words". This is far too low a threshold for a criminal offence and threatens to undermine freedom of speech.

We recommend removing the term 'abusive' and limiting the offences to 'threatening' behaviour intended to stir up hatred.

At the very least, the term 'abusive' needs to be more precisely defined. Incorporating an objective test, as in Section 38 of the Criminal Justice and Licensing Act, could be a solution.

This states that to be 'abusive', conduct must cause 'fear or alarm' to the reasonable person.

### What the experts say

**"If there is any doubt about the meaning of the term, there couldn't be any objection to an amendment to make it clearer"**

Roddy Dunlop QC, Dean of the  
Faculty of Advocates

**"Things that are insulting could easily be redefined from insulting to abusive to meet the criminal test"**

Callum Steel,  
Scottish Police Federation

### 3

## Prosecution lock

Both the Public Order Act 1986 and the Public Order (Northern Ireland) Order 1987 require the consent of a very senior public prosecutor before proceedings can be instituted.

This prosecution lock recognises the serious nature of stirring up hatred offences, which have a maximum seven-year sentence, and provides an added safeguard to help avoid miscarriages of justice.

The stirring up hatred provisions in the Hate Crime and Public Order (Scotland) Bill include no such safeguard. We believe this should be specified in the legislation.

At the very least, guidance by the Lord Advocate should specify that any decision to take proceedings in relation to stirring up hatred cases will have to be approved by Crown Counsel.

### 4

## 'Dwelling defence'

Public order laws normally include a 'dwelling 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, raising the prospect of people being prosecuted over remarks made at the dinner table. This is highly controversial.

It is also unnecessary. Lord Bracadale QC, who led the review of Scotland's hate crime laws, told MSPs on 27 October 2020: "No suggestion has been made to me that the existence of the exception [has] inhibited the use of the [stirring up hatred provisions]" in England and Wales.<sup>19</sup>

# Part 3

## Polling



## Scottish public

A poll carried out for the Free to Disagree campaign earlier this year found wide support for freedom of speech and concern over elements of the Hate Crime Bill.

The Savanta ComRes poll of 1,008 Scottish adults showed that almost 9 in 10 (87%) think free speech is an “important right”; 6 in 10 (63%) think disagreement and debate “benefit society” and 3 in 4 (73%) think disagreement is not a sign of hatred.<sup>20</sup>

More than 6 in 10 respondents (64%) voiced support for a classical approach to free speech where “words that incite violence” are criminalised, whereas just 29% said the law should criminalise ‘offensive’ words.

More than 6 in 10 (64%) respondents agreed that people today are “too quick to shut down debate”.

A significant number of respondents also expressed opposition to elements that form the basis of the Hate Crime and Public Order (Scotland) Bill:

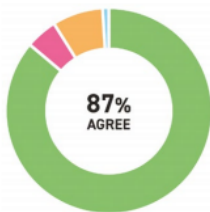
Three quarters of respondents (75%) said that the term ‘hatred’ “means different things to different people”.

While many were uncertain about the specifics of the bill, more than 4 in 10 respondents (41%) agreed that a clause should be included in the Bill to protect the freedom to publicly disagree with trans rights, with just 21% disagreeing.

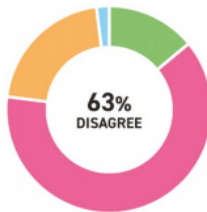


## Summary of results<sup>21</sup>

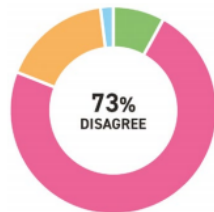
**FREE SPEECH IS AN  
IMPORTANT RIGHT**



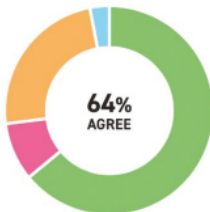
**DISAGREEMENT AND DEBATE  
DO NOT BENEFIT SOCIETY**



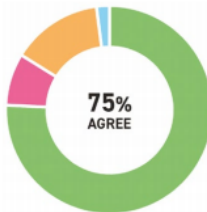
**IF SOMEONE DISAGREES WITH  
ME, THEY PROBABLY HATE ME**



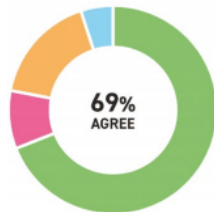
**PEOPLE TODAY ARE TOO QUICK  
TO SHUT DOWN DEBATE**



**THE TERM 'HATRED' MEANS  
DIFFERENT THINGS TO  
DIFFERENT PEOPLE**



**FOR A CRIMINAL OFFENCE TO BE  
COMMITTED, THERE MUST BE A PROVEN  
INTENTION TO STIR UP HATRED**



■ Agree ■ Disagree ■ Neither agree nor disagree ■ Don't know

## Councillors

In September 2020, Free to Disagree asked councillors across Scotland for their views on free speech and the Hate Crime Bill. Around 14 per cent of all Scotland's councillors (176/1,227) responded.<sup>22</sup> Of this number:

- 2 in 3 expressed opposition to the bill;
- 8 in 10 said the bill is "controversial";
- 7 in 10 said it "threatens free speech".

Opposition to the bill was significant across party lines with a majority of Conservative and Independent councillors and half of Labour and Lib Dem councillors expressing opposition to the plans. Strikingly, less than half of SNP councillors expressed support for the bill and 1 in 4 expressed opposition.

### Opposition to the Hate Crime Bill

Asked whether or not they "support the Hate Crime Bill", two thirds of all councillors who responded expressed opposition (64% said they were opposed, and 2% said they were opposed to the bill in its current form).

### 'Stirring up' offences

Councillors also expressed strong opposition to key aspects of contentious 'stirring up' provisions in Part 2 of the bill.

More than 7 in 10 agreed that for an "offence under the Hate Crime Bill to be committed, there should be a proven intention to stir up hatred". The Scottish Government has agreed to amend the bill to achieve this.

Almost 9 in 10 councillors also agreed that "the term 'hatred' means different things to different people". In recent months, many critics have said that the vague language in Part 2, including the term 'hatred', could create too low a threshold for offending.

### Support for free speech

The survey found broad support for free speech, with almost 100 per cent of respondents agreeing that it is an "important right", and the same percentage agreeing that disagreement and debate "benefit society".

More than 8 in 10 councillors agreed that “people today are too quick to shut down debate” and more than 9 in 10 thought that disagreement with someone else’s views is not a sign of hatred.

Results by party - ‘Do you support the Hate Crime Bill?’

PARTY	SUPPORT	OPPOSE	UNSURE
Conservative	6%	90%	4%
Independent	9%	74%	17%
Labour	21%	50%	21%
Lib Dem	17%	50%	33%
SNP	46%	25%	21%

“

Local councillors, like others across Scotland, are highly critical of the government’s hate crime plans. Regardless of their individual party affiliation, they’re aware of the threat posed by the new stirring up of hatred offences.<sup>23</sup>

”

Free to Disagree, September 2020

# Part 4

## Catalogue of concerns

## Statements on the Hate Crime Bill

Over the last six months, we've kept a record of statements on the Hate Crime Bill by various expert groups and individuals. Here's a handy catalogue of statements for you to browse whilst considering your response to the proposals.

### Legal profession



#### Law Society Scotland

In its submission to the Justice Committee call for views, the Law Society Scotland said there are "major flaws" with the proposals.<sup>24</sup>

It criticised the 'vagueness' of the stirring up offences in Part 2 of the bill which "could result in a lack of certainty for the public in understanding what constituted criminal behaviour", adding that this would "impact on solicitors, whether prosecuting or defending those accused of offences".

The Society added that "the Bill presents a significant threat to freedom of expression, with the potential for what may be abusive or insulting to become criminalised. These terms are highly subjective, requiring judicial clarification on a case by case basis."

#### The Faculty of Advocates

"The Faculty have concerns regarding some potential unintended consequences of the legislation. These concerns relate to the potential impact on freedom of expression and the potential which the bill, if enacted, would

have in terms of a chilling effect on legitimate, if controversial, debate and the performing arts.”<sup>25</sup>

### Thomas Ross QC

A past president of the Scottish Criminal Bar Association, Thomas Ross QC, said the language used in the bill is difficult to understand for lay people, making it unlikely that most people would know when they had crossed the line into criminality.

Ross told the Daily Mail: “If the Scottish Government is going to create an offence that can be committed unintentionally, drafters of the legislation have to make the essentials of the offence crystal clear. They’ve failed to do that.”

“The language used in the Bill is so difficult to understand that it will be impossible for the man or woman in the street to know when the line is likely to be crossed. A person might think, ‘I don’t intend to be offensive and I don’t think this comment is abusive, but what might a mythical sheriff think about it if the procurator fiscal is persuaded to prosecute? Why take the chance.’ As a result a lot of interesting debate simply will never take place.”<sup>26</sup>

### Fred Mackintosh QC

Commenting on the Hate Crime bill Fred Mackintosh QC, of Terra Firma Chambers, warned that there is a “real risk of unintended consequences.” He noted that the ‘stirring up’ offences lack important detail found in existing

legislation:

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

“All five of the existing defences have a defence which enables the argument to be made by an accused, who did not intend to stir up racial hatred, to prove he did not intend, and had no reason to suspect, that his conduct was threatening, abusive or insulting. It is proposed that this defence now be replaced by an objective ‘reasonableness’ defence which is set out in sub clause 3(4) and (5).

“It is possible that persons who might have succeeded with the old defence – which turned on their knowledge and understanding – will fail to meet a prosecution and shrieval assessment of whether their conduct was objectively reasonable. Sheriffs will have to decide, for example, whether conduct by stand-up comics, preachers, journalists, writers, tweeters and indeed the merely angry is ‘reasonable in the circumstances’ in order to engage the new defence of reasonable conduct.”

The QC also noted that, unlike other criminal legislation, the Hate Crime bill covers words spoken in the privacy of the home:

“Are Scottish Ministers clear that, as currently drafted, the bill will criminalise conduct even when the accused had no reason to believe that what

they have said or written would be heard or seen outside their home?"

He concluded: "Without greater clarity regarding the sort of conduct which is currently not criminal but which the Scottish Ministers wish to criminalise, the concerns of those who fear the effects of these proposed new offences are unlikely to go away."<sup>27</sup>

### Senators of the College of Justice

Representing Scotland's top judges and sheriffs, Senators of the College of Justice echo that: "Freedom of expression is a fundamental part of our

liberties and civil society", and warn of the legislation's inconsistencies and ambiguity.

It noted that free speech provisions in clauses 11 and 12 of the Hate Crime Bill only apply to religion and sexual orientation, meaning speech on other categories listed under the bill, including age, disability and transgender identity, is not protected. And it highlighted that a previous free speech clause in the, now repealed, Offensive Behaviour at Football Act was much more robust than the Hate Crime Bill provisions, allowing "expressions of antipathy, dislike, ridicule, insult or abuse".<sup>28</sup>

“

The language used in the Bill is so difficult to understand that it will be impossible for the man or woman in the street to know when the line is likely to be crossed.

Thomas Ross QC

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“

Without greater clarity regarding the sort of conduct which is currently not criminal but which the Scottish Ministers wish to criminalise, the concerns of those who fear the effects of these proposed new offences are unlikely to go away.

Fred Mackintosh QC

”



### Scottish Police Federation

The Scottish Police Federation launched a scathing attack on the hate crime proposals in its response to the Justice Committee call for views. Calum Steele, General Secretary of the Scottish Police Federation, commented:

"We are firmly of the view this proposed legislation would see officers policing speech and would devastate the legitimacy of the police in the eyes of the public. That can never be an acceptable outcome – and we should never forget that the police in Scotland police only with the consent of the people.

"Police officers are all too aware that there are individuals in society who believe that to feel insulted or offend-

ed is a police matter. The Bill would move even further from policing and criminalising of deeds and acts to the potential policing of what people think or feel, as well as the criminalisation of what is said in private." <sup>29</sup>

The estimated cost to policing of implementing the Bill is around £100,000. However, the SPF believes this estimate is inadequate:

"Given the sheer scale of emotion that discussions on the hate provisions of the Bill are capable of, and have already generated the SPF would consider that as a minimum police officers would require detailed training (spanning several days) to learn from various groups and bodies on why their particular point of view required to be considered.

"Training of this scale results in abstractions that require to be covered at additional cost. A very conservative estimate of the cost of a single day's training for every police officer in Scotland is £3.5 – £4M." <sup>30</sup>

## Police Scotland

Police Scotland add: "All officers up to and including the rank of Superintendent would need to be trained, which equates to approx. 17,190 officers", incurring a "total estimated training cost of £932,000". <sup>31</sup>

## The Association of Scottish Police Superintendents (ASPS)

The President of the ASPS, Chief Superintendent Stewart Carle, commented in The Daily Telegraph (5 Sep) that "a mature, democratic and truly toler-

ant society should be able to negotiate robust and even rude and insulting public and social discourse without recourse to the criminal law". <sup>32</sup>

This reflects the concerns raised by the Superintendent to the Justice Committee:

"The Bill in its current draft does not, in the Association's view, provide sufficient, qualified protection for the human right of freedom of expression."

"We have some concerns that the enactment of this Bill may regularly situate police officers as the arbiters of relatively minor social disputes or expressions of opinion, a circumstance which neither the public nor the Police Service would likely welcome." <sup>33</sup>

“

We have some concerns that the enactment of this Bill may regularly situate police officers as the arbiters of relatively minor social disputes or expressions of opinion, a circumstance which neither the public nor the Police Service would likely welcome.

”

Superintendent Stewart Carle



### Scottish Newspaper Society

The Scottish Newspaper Society (SNS) has strongly criticised the draft 'stirring up' offences in Part 2 of the bill. SNS Director John McLellan has said:

"While the abolition of blasphemy is long overdue, much of the legislation poses considerable threats to freedom of expression.

"In these times of increasingly bitter division over Brexit, Scottish independence and the environment, as well as gender politics, it is not too far-fetched to see the possibility of the police being drawn into political disputes because they would have to investigate complaints and be used as a tool to attack media organisations and close down debate.

"It could be used by those who at-

tacked JK Rowling for her views on gender to instigate a police investigation which could lead to conviction and it's clear that plenty of her critics would like to see that happen. It might not be the purpose of this legislation to put someone like JK Rowling in the dock, but that could easily be the consequence.

"Social media is awash with people bearing extreme grudges against those with whom they disagree and this legislation has the potential to give them a legal means to silence their opponents."<sup>34</sup>

In its submission to the Justice Committee, SNS stated: "Publishing robust opinion and comment is an essential part of open accountability but by its very nature it can be subject to legal attack and this legislation creates another, potentially more potent, weapon.

We strongly believe this bill represents such a considerable threat to freedom of the Press that if it does make it into statute it must only be with absolute exemptions to prevent expensive, damaging and dangerous investigations before they start.”<sup>35</sup>

### **BBC Scotland**

In BBC Scotland’s official Committee response, the broadcaster announced that it “strongly shares the concerns expressed by the Scottish Newspaper Society as to the impact on freedom of expression of this Bill and would align itself with that submission.”<sup>36</sup>

These concerns include that the Bill constitutes a “serious threat to freedom of expression in its broadest sense” which create the possibility for “grievances to move through the criminal justice system”.

### **Society of Editors**

The UK-wide Society of Editors was one of the first groups to warn about the potential consequences of the Hate Crime Bill – including for journalists outside Scotland. Executive Director Ian Murray commented:

“These proposals, while on the surface designed to protect vulnerable people, have the potential to usher in draconian measures where a host of pressure groups will be able to stifle or close down debate on important issues.

“And although these are designed for Scotland, any media organisation that

publishes or broadcasts north of the border could find themselves caught up or at the very least there will be a chill placed on their work.”<sup>37</sup>

### **The Times**

In an editorial published on 29 July 2020, under the headline ‘Act of Folly’ The Times Scotland stated:

“The threats posed by this legislation to key tenets of a free society are significantly greater than any benefit likely to come from passing the act, as written, unamended.

“Good intentions are not enough unless they are backed by legislation that is both clear and enforceable. The proposed hate crime bill fails on both counts.”<sup>38</sup>

### **The Scottish Sun**

In an editorial published on 29 July 2020 the Scottish Sun stated:

“The Police Federation makes the point there are plenty of people who are all too ready to make hurt feelings a police matter. It’s ludicrous.

“Of course we all deserve equal treatment. Of course we all deserve to be treated with courtesy and respect. Of course it’s wrong that anybody should be made to suffer because of their physical disability or their religion or their sexual orientation.

“But is it really acceptable to dial 999 because somebody has been rude?



"There is still time for ministers to take a step back from this, still time to amend this legislation so the protections we all deserve can be secured in law.

"But without a proper definition the courts can recognise and understand, it is bound to fail in its present form.

"And the price of that, as the lawyers are already warning, could be an uncomfortable gag on the free speech rights which the law is meant to protect." <sup>39</sup>

### The Scottish Daily Mail

On Tuesday 28 July 2020, the Mail called for the Scottish Government to "see sense and drop the sinister Bill".

"The right to free speech is an integral part of any modern democratic state. Any attempt to place curbs upon it must be viewed with the deepest of suspicion.

"The SNP's Hate Crime Bill is a bid to impose further restrictions on what can and cannot be said in a public forum. But the scope of the proposed law is so great, and its wording so vague that, if passed, it could lead to unpalatable consequences.

"This is an ill-conceived and sinister Bill – and it must be dropped now before it causes irrevocable damage to one of the key pillars of our democracy." <sup>40</sup>

## The Daily Record

On 25 July 2020, the Daily Record published an editorial calling for caution with the Hate Crime Bill:

"The Record welcomes moves to bring hate-mongers to justice – but the Scottish Government must tread carefully when it proceeds with its new Hate Crime Bill.

"You don't have to look far to find critics who say certain aspects of the bill need significant tightening.

"Ministers insist the bill will not prevent people expressing controversial, challenging or even offensive views. But when it comes to protecting freedom of speech, the Government must ensure it gets this piece of legislation right.

"No one wants a repeat of the Offensive Behaviour at Football Act – a bill so bad it united the legal community, football fans and opposition MSPs against it. Protecting our minority communities is vital – but so is protecting long-cherished rights to express controversial views." <sup>41</sup>

## The Express

An Express editorial posted on 29 July 2020 stated:

"In the novel 1984, the Thought Police punish personal and political thoughts unapproved by the government. Nobody is suggesting that Nicola Sturgeon's Scotland is the equivalent of the dystopian nightmare portrayed so vividly by George Orwell, but the new Hate Crime and Public Order (Scotland) Bill would certainly push the country in that general direction." <sup>42</sup>

## The Scotsman

A Scotsman leader dated 29 July stated:

"The Scottish Government needs to rethink the Bill and find a better way to achieve its good intentions. This cannot be allowed to turn into a battle between those who support free speech and those opposed to bigotry. Both have justice on their side." <sup>43</sup>

## Scotland on Sunday

In a leading article on 23 August, Scotland on Sunday read: "There are undoubtedly good intentions in the bill, but equally it is obvious that in its present form it is not just a bad law but effectively unenforceable. It is now for the Justice Secretary to alter [the Bill] by proving he has listened to the genuine concerns expressed by various parties, and deliver legislation which achieves its laudable aims without attacking basic democratic rights." <sup>44</sup>

“

In these times of increasingly bitter division over Brexit, Scottish independence and the environment, as well as gender politics, it is not too far-fetched to see the possibility of the police being drawn into political disputes...

Scottish Newspaper Society

”

“

No one wants a repeat of the Offensive Behaviour at Football Act – a bill so bad it united the legal community, football fans and opposition MSPs against it. Protecting our minority communities is vital – but so is protecting long-cherished rights to express controversial views.

The Daily Record

”

“

...although these proposals are designed for Scotland, any media organisation that publishes or broadcasts north of the border could find themselves caught up or at the very least there will be a chill placed on their work.

Society of Editors

”



### Dr Stuart Waiton

Dr Stuart Waiton, a senior lecturer in criminology and sociology at Abertay University, is a leading critic of the bill and an ally of Free to Disagree.

Writing in *The Herald* he said the Bill is possibly “the most illiberal and intolerant piece of legislation in any liberal democracy, worldwide”, adding that the wording of the bill is “incredibly flexible and subjective”.

Dr Waiton said that the legislation encroaches so far into the private sphere that it is “opening up the possibility of comments at dinner parties becoming criminal offences”.<sup>45</sup>

### Professor Alistair Bonnington

In an article for *The Scotsman* on 3 August 2020 Alistair Bonnington, Professor of Law at Glasgow University wrote:

“This particular Bill is even worse than normal, in that the Government admits there is no evidence that it is necessary, and the Bill will interfere with freedom of speech. Fundamental human rights freedoms, such as free speech, are not understood or respected by the Scottish Government”.

“The Scottish Government seems to believe that they can create a lovely *Mary Poppins* world by passing well-meant, but naïve laws.”<sup>46</sup>

“

[the stirring up offences] open up the possibility of comments at dinner parties becoming criminal offences

Dr Stuart Waiton

”

“

This particular Bill is even worse than normal, in that the Government admits there is no evidence that it is necessary, and the Bill will interfere with freedom of speech.

Prof Alistair Bonnington

”

## Women's groups



### For Women Scot

In its submission to the Justice Committee call for views, women's group For Women Scot called for the 'stirring up' offences to be scrapped altogether:

"The Bill as it currently stands is fundamentally flawed and, unless amendments are made, is inevitably heading towards charges being brought against women for stating universal truths about sex, science and biology. We note, for example, the recent case where a woman was banned from a social media site for hateful conduct after stating 'Only females get cervical cancer.'

"While the likelihood of successful prosecutions is unknown, and perhaps may be low, it is the threat of vexatious complaints made to the police that will impact on people's ability to freely

discuss women's sex-based rights.

"From our experience we foresee significant problems with the proposed extension of stirring up offences to a larger group of characteristics, especially transgender identity. These risks might be somewhat reduced by removing the term 'abusive' which is open to wide interpretation and, as our examples have shown, is all too easily taken as an offence by a person or group, rather than a quite legitimate criticism of an unscientific belief.

"Including transgender identity in the freedom of expression protections may also mitigate the risks, although it is of concern that those already proposed for other characteristics offer significantly weaker protections than the equivalent in England and Wales.

"Overall, we do not think that such

amendments will offer sufficient protection against the problems we have identified and call for Part 2 to be removed from the Bill.”<sup>47</sup>

### Woman’s Place UK

WPUK opposes the proposal to extend the offence of stirring up hatred to all protected characteristics listed in the draft bill, on the grounds that it has the potential to curb Article 10 and 11, rights of freedom of expression and assembly. It notes:

“The debate on women’s rights and the rights of trans people, and the

conceptualisation of sex and gender identity in law and policy, has become a flashpoint over the past few years. It is our view that, across the UK, public authorities and civic institutions have abrogated responsibility for creating space to debate this conflict of rights.

“Governments at all levels and other public authorities have also failed to make clear statements about the parameters of existing anti-discrimination legislation. Until that situation changes, it is likely that the debate about these issues will continue to be highly charged.”<sup>48</sup>

“

The Bill as it currently stands is fundamentally flawed and, unless amendments are made, is inevitably heading towards charges being brought against women for stating universal truths about sex, science and biology.

”

For Women Scot



## Secular and faith groups

### The National Secular Society

The National Secular Society is an ally of Free to Disagree. After submitting evidence to the Scottish Parliament's Justice Committee, NSS Head of Policy and Research Megan Manson said:

"Hatred and extremism are serious social problems that need to be challenged. But the hate crime bill as currently drafted will be counterproductive – it will open the door to prosecutions on vague grounds.

"It will undermine freedom of expression and Scotland's wider commitment to civil liberties, while wasting the time of police and courts. It will encourage demands for censorship and a narrow-

ing of public debate. And this in turn will undermine social harmony rather than promoting it. The justice committee should pressurise ministers to rethink." <sup>49</sup>

### The Free Church of Scotland

In its submission to the Justice Committee call for views, the Free Church said it was "very concerned about the Bill's significant detrimental effect on free speech within our society", and argued the current laws were already sufficient to protect against threatening or abusive behaviour:

"We recognise that there are issues in our society of genuine hatred which are wrong and should be addressed.

However, we are also concerned by the tendency of some to see any criticism of their beliefs and opinions as amounting to hatred."

"We believe it is possible to disagree with someone while loving and respecting them as a person. Indeed, we believe that an understanding that people hold a wide range of opinions and beliefs on a wide range of issues, and acceptance (even encouragement) of free debate about such opinions and beliefs is an essential feature of a mature democratic society.

"The issue we have with this particular Bill is that it encourages a recourse to law where there is a legitimate disagreement. This silences debate and prevents reconciliation between people. It undermines any efforts to understand those you disagree with." <sup>50</sup>

## The Roman Catholic Church

Responding to a previous consultation on the Hate Crime Bill, the Catholic Parliamentary Office of the Bishop's Conference of Scotland warned that the vague language of the bill is open to abuse and stressed that free speech must be protected:

"Clarity is required with regard to the definition of abusive. To be abusive something needs to be 'extremely offensive.' Any test of this threshold should be objective in nature and not based on the subjective response of those who may feel offended against. We live in an age of heightened sensitivity and we must guard against crim-

inalising people for simply expressing disagreement or holding a different point of view.

"The fundamental right to freedom of expression, as detailed in Article 10 of the European Convention on Human Rights, must be upheld. Suppressing this freedom will create divisions and foster grievances across society.

"There is a climate of heightened sensitivity in the present culture and there is a very real danger that expressing or even holding individual or collective opinions or beliefs will become a hate crime. We must guard against this and ensure basic freedoms, including freedom of expression and freedom of thought, conscience and religion (Article 9 of ECHR), are protected.

"Some people might suggest that expressing the Catholic Church's position on marriage or human sexuality could be an attempt to stir up hatred. This would obviously be wrong. There must be room for robust debate and exchange of views. Otherwise we become an intolerant, illiberal society." <sup>51</sup>

## The Christian Institute

Another ally of Free to Disagree, The Christian Institute, warns that the 'stirring up' offences could catch speech and writing by citizens that is merely controversial, undermining free speech:

"The Christian Institute has serious concerns about Part 2 of the Bill. The Bill would be better without it. It is

not clear what behaviour the Scottish Government is seeking to criminalise that both a) deserves it and b) is not already covered by other laws.

"There must be freedom to disagree on and debate such issues without the threat of censure through the criminal law. The stirring up hatred offence under section 3 and the inflammatory material offence under section 5 jeopardise free speech".<sup>52</sup>

### The Hindu Forum of Britain

The UK's largest Hindu umbrella organisation, the Hindu Forum of Britain, criticises the Bill for its many "grey

areas, especially in the use of terms in the proposed bill which are vague and subjective... there is a reasonable likelihood that this legislation, unless more clearly defined, could criminalise one side in an ongoing public discussion about the law".

"The bill should protect freedom of expression; everything in a democracy should be open for debate and discussion, no matter how controversial it is. The Scotland Chapter of the Hindu Forum of Britain believe this bill as it stands, will undermine open debate and unfairly restrict freedom of expression".<sup>53</sup>

“

Hatred and extremism are serious social problems that need to be challenged. But the hate crime bill as currently drafted will be counterproductive – it will open the door to prosecutions on vague grounds.

National Secular Society

”



## Creatives

A joint letter, co-ordinated by the Humanist Society Scotland, that criticises the Bill was signed by over 20 individuals and organisations, including Rowan Atkinson, Val McDermid, Professor AC Grayling and the Index on Censorship.

The letter, dated 11 August 2020, states: "As currently worded, the Bill could frustrate rational debate and discussion which has a fundamental role in society including in artistic endeavour. The arts play a key part in shaping Scotland's identity in addition to being a significant economic contributor. The right to critique ideas, philosophical, religious and other must be protected to allow an artistic and democratic society to flourish."<sup>54</sup>

On 5 August 2020, writer Alexander McCall-Smith wrote:

"the use of the criminal law to control the expression of views involves a delicate balance if the law is not to become repressive. Authors are affected by this, as are those who possess books and are in the habit of passing them on to others. Speech amongst friends will also constitute a communication for purposes of this legislation"

"Fiction will inevitably give offence to somebody, unless it is exceptionally bland. When an author creates a character, she or he may need to describe that character's attitudes through dialogue. That means that the character will have to say something.

"Nice characters will say nice things that should cause no offence to anybody, but nasty characters – and fiction must have at least some of those – may say nasty things. That is because fiction often sets out to paint a realistic picture of how people are and how they behave. If these things cause offence to some readers, then those who take offence may argue that the book is liable to stir up hatred against a protected group of people – even

if that was not the author's intention. That is where the police come in."

"The difficulty is that there are people who do not appear to appreciate that the views expressed by fictional characters may differ from the views held by the author. You may think that unlikely, but I suspect that most authors will be able to recount incidents where they have been blamed for what their characters do or think." <sup>55</sup>

## LGBT campaigners

On 13 August Peter Tatchell, a veteran gay rights and human rights campaigner, wrote:

"The Hate Crime bill casts the net too wide. Edgy comedians like Ricky Gervais, Jimmy Carr and Frankie Boyle could be caught. These comics often make controversial jokes about people or ideas that are not actually intended to hurt others but could easily meet the threshold of an offence."

"We need to maintain freedom of artistic expression. The bill in its current form does not provide adequate safeguards and protections." <sup>56</sup>

The Peter Tatchell Foundation is a supporter of the Free to Disagree campaign.





## Policy analysts

Murray Blackburn MacKenzie, a policy analysis collective, highlighted several problems with the Hate Crime Bill amidst wider challenge MSPs face. In an article for Holyrood magazine, the group stated:

"It is clear the draft bill raises a raft of questions that will deserve thorough, forensic scrutiny by the Scottish Parliament's Justice Committee. As well as the potential impact on freedom of expression, there are questions about the evidence base for the selection and definition of certain characteristics and omission of others, and the justification for extending 'stirring up' offences to other characteristics, when the existing provision for stirring up racial hatred is barely used, with only nine cases

between 2006 and 2016."

They added: "It is perfectly possible to ask in good faith why the novel and difficult provisions on stirring up hate in the bill are regarded as being so urgent that they must be pushed through the Scottish Parliament in the middle of the largest challenge faced by any recent generation of politicians in Scotland. The bill would raise difficult and sensitive questions at any time.

"But the first and most immediate question for the Scottish Parliament is whether the time required to robustly scrutinize what is already a controversial bill can be justified or is even achievable in this exceptional period."<sup>57</sup>

## Councils

### Aberdeen City Council

Aberdeen City Council's response to the Justice Committee cautioned against the 'stirring up' offence, remarking that "this presents a risk to the right balance between respecting freedom of speech and tackling hate speech", and that the Bill must be amended "to ensure that an appropriate balance is maintained to protect those in society who are most vulnerable to prejudice while preserving the right to comment or debate on matters hence maintaining a thriving democracy and society, where pluralism and freedom of expression are protected".<sup>58</sup>



“

It is perfectly possible to ask in good faith why the novel and difficult provisions on stirring up hate in the bill are regarded as being so urgent that they must be pushed through the Scottish Parliament in the middle of the largest challenge faced by any recent generation of politicians in Scotland. The bill would raise difficult and sensitive questions at any time.

”

Murray Blackburn Mackenzie

# Part 5

## References

## References

A full list of references is available at [bit.ly/36ZsNP9](https://bit.ly/36ZsNP9)



## Contact Free to Disagree

If we can assist you with anything at all, please don't hesitate to get in touch. Contact details are included below. More information about the campaign can be found on our website [www.freetodisagree.scot](http://www.freetodisagree.scot) and on social media.

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