

Hate Crime and Public Order (Scotland) Bill 2020.

Call for Views

Views Submitted by the Free Church of Scotland, 23rd July 2020.

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

General

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

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

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

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

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

Consolidation

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

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

How to prosecute hate crime?

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

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

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

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

Other forms of crime not included in the Bill

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

We are not clear as to what the distinction is between aggravation relating to sectarianism and aggravation relating to a “religion or, in the case of a social or cultural group, perceived religious affiliation” which is already covered in the Bill. Accordingly, we do not think it is necessary to add another form of aggravation.

Stirring up offences

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

This is the area of the Bill which most concerns us as a church. We are not at all persuaded there is a need to introduce a new offence of “stirring up of hatred.” We are in agreement with Part 1 of the Bill in relation to aggravations because they do not create new offences – they merely enhance the sentencing provisions. However, it is in adding new offences that the Bill goes too far and there is no evidence offered of a significant gap in the law to justify the new offences.

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

We are concerned that the offence does not require people to intend to commit the offence – all that is needed is that it was likely that hatred would be stirred up. This strict liability offence is potentially far reaching and means that someone could unwittingly commit the offence even where they had no intention at all to stir up hatred.

We also noted that it is not clear what is meant by “likely” to stir up “hatred”. This is incredibly subjective and potentially far reaching. Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 specifically refers to behaviour likely to cause a reasonable person to suffer fear or alarm. The absence of reference to a “reasonable” person in the Bill concerns us as it makes the test entirely subjective. In our society often people take any disagreement in relation to religion, sexual orientation and transgender as “hatred” of the individual and so would likely feel “hatred” simply because someone disagreed with them. Any person can state that they felt hatred was stirred up against them and this would have to be taken seriously by the police and the courts.

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

We accept that our beliefs are not shared, nor necessarily understood by everyone. We welcome challenge, debate and open discussion of our beliefs both from within our Christian community and the wider community. The effect of the Bill is that, notwithstanding the fact that we do not undertake preaching and discussion of our beliefs with an intent to stir up hatred (whatever that means), normal activity becomes criminalised and debate of any sort is closed down by individuals who simply disagree with our views. Their mere disagreement is construed as a “feeling” that we are “stirring up hatred”. We believe that this encourages the culture that is normally promoted in totalitarian rather than democratic states.

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

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

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

We also note the additional offences of possessing inflammatory material combined with the right for a warrant to be issued to enter a premise and remove inflammatory material and ultimately destroy

it. This is deeply worrying to us as it could lead to certain books and publications essentially being banned. As books are confiscated and destroyed, precedents would develop that would amount to a list of banned books. Often people possess material they disagree with for critiquing purposes so prescribing the banning of books will have a major impact on debate and academic freedom. It is an unwarranted prohibition on freedom of speech. And as Christians we are deeply concerned that the Bible could fall foul of this offence. Given people have been reported to the police for potential hate crimes for displaying verses from the Bible, we are deeply concerned that the proposed protections in sections 11 and 12 will not cover the whole of Scripture. The result would be to require secular courts to try and identify what, for example, is “religion” and what are “religious beliefs or practices” potentially exposing the Bible, or parts of the Bible to being viewed as inflammatory material, confiscated and destroyed.

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

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

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

Other issues

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

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

We note that in relation to religion, the protection of freedom of expression can be interpreted in a narrow sense of only offering a defence where confined to the areas listed. We are concerned that certain positions adopted by mainstream Christianity in relation to ethical issues might not be protected by this provision. We believe the protection offered by the equivalent English legislation is stronger and more helpful. Section 29J of the Public Order Act 1986 gives the following protection:

“Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.”

As already stated, we believe that those who disagree with our religion should be free to mock us, ridicule us and insult us. That is part of free debate and we welcome the chance to seek to persuade people in the marketplace of ideas that our beliefs are true and can withstand criticism. We note that the apostle Paul made clear in 2 Corinthians 5:11 that he sought to “persuade others” – he never wanted to force conversion – people must genuinely come to faith themselves.

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

“(1) In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.

(2) In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.”

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

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

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

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

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

The Free Church of Scotland declared in Act 12 of our General Assembly of 1846 that “she disclaims intolerant or persecuting principles, and does not regard her Confession of Faith, or any portion thereof, when fairly interpreted, as favouring intolerance or persecution, or consider that her office-bearers, by subscribing it, profess any principles inconsistent with liberty of conscience and the right of private judgment.”

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

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

On behalf of the Board of Trustees of the Free Church of Scotland.