

Ep 45: The Scottish Hate Crime Bill

<https://www.secularism.org.uk/podcast/2021/03/ep-45>

0:00:05.920,0:00:12.240

[Jamie Gillies] Society only works when free speech is there, only grows, only flourishes, when free speech is there.

0:00:12.240,0:00:15.600

And so, when you start to chip away at free speech, you're kind of

0:00:15.600,0:00:22.480

starting to chip away at society itself.

0:00:22.480,0:00:25.920

[Emma Park] You're listening to Episode 45 of the National Secular Society podcast,

0:00:25.920,0:00:31.120

produced by Emma Park. The Hate Crime and Public Order Scotland Bill has just been approved by

0:00:31.120,0:00:35.520

the Scottish Parliament, and has now only to receive royal assent before it comes into law.

0:00:35.520,0:00:40.560

The Hate Crime Bill, as it is known, has been one of the most controversial in Holyrood's brief history.

0:00:40.560,0:00:44.320

Part two of the bill will create a series of new offenses of stirring up hatred against

0:00:44.320,0:00:49.440

certain groups of people, identified by a list of protected characteristics, including religion.

0:00:49.440,0:00:53.440

Opponents of the Bill, including the National

Secular Society, have worked hard to ensure that

0:00:53.440,0:00:57.600

it was properly scrutinized, and amendments were made in order to protect free speech.

0:00:57.600,0:01:02.320

In particular, thanks to the work of the NSS and others, the bill now includes clause 9a which

0:01:02.320,0:01:06.400

provides an additional protection for freedom of speech about religion on the face of the Bill.

0:01:06.400,0:01:09.840

The Bill also abolishes the common law offence of blasphemy, a move to which the

0:01:09.840,0:01:14.240

NSS has long been campaigning. However, there is arguably still a serious risk that the

0:01:14.240,0:01:19.120

creation of new stirring up offences will exert a chilling effect over free speech in Scotland.

0:01:19.120,0:01:24.160

In this episode I discuss the Bill with two different speakers. My first guest, Liam Kerr,

0:01:24.160,0:01:28.640

is Conservative MSP for North East Scotland and the Shadow Cabinet Secretary for Justice.

0:01:28.640,0:01:33.009

He was on the Justice Committee that scrutinized the Bill during his passage through Parliament.

0:01:33.009,0:01:38.400

My second guest, Jamie Gillies, is a spokesman for Free to Disagree. This is a coalition of organizations

0:01:38.400,0:01:42.800
opposed to the Bill, including, among others, the National Secular Society, the Christian Institute,

0:01:42.800,0:01:52.298
the Peter Tatchell Foundation, the Network of Sikh Organizations, and the Index on Censorship.

0:01:53.520,0:02:00.240
I'm joined now by Liam Kerr MSP. Liam was on the Justice Committee that examined the Bill

0:02:00.240,0:02:04.815
as it passed through the Scottish Parliament. Liam, welcome to the podcast.

0:02:04.815,0:02:09.809
[Liam Kerr] Thank you.
[EP] First of all, what were the reasons why this bill

0:02:09.809,0:02:14.872
was introduced in the first place?
[LK] Well, from my understanding of it,

0:02:14.872,0:02:21.680
because remember I'm the opposition here, but the Scottish Government decided that it wanted to

0:02:21.680,0:02:27.760
basically consolidate a lot of law that we have already, which is quite a crucial point, that an

0:02:27.760,0:02:35.040
awful lot of the protections this Bill seeks to bring in, are in place already. But my understanding

0:02:35.040,0:02:41.040
is the Scottish Government looked to consolidate existing legislation, it wanted to abolish the

0:02:41.040,0:02:46.240
offence of blasphemy, so we have a common law offense of blasphemy in Scotland, which this bill

0:02:46.240,0:02:53.200
will take away, but it also wanted to introduce what I will refer to as Part Two, which was

0:02:53.200,0:03:00.080
to prescribe certain stirring up offences, the stirring up of hate, and it sought to do all of

0:03:00.080,0:03:06.080
this in a Bill which, quite crucially, it called the Hate Crime and Public Order Scotland Bill.

0:03:06.080,0:03:12.240
And, as we'll perhaps see later, the public order bit seems to have rather been forgotten about

0:03:12.240,0:03:18.865
in certain aspects of this Bill.
[EP] The stirring up of hate offences are the new offences

0:03:18.865,0:03:23.760
which weren't in the law before, and we'll come on to the question of why those offences might have

0:03:23.760,0:03:31.120
been necessary. But let's start with the positives:
How do you think the Bill improved as a result of,

0:03:31.120,0:03:37.040
if it did improve, as a result of scrutiny
by the Justice Committee and others over
the

0:03:37.040,0:03:43.200
course of its passage through Parliament?
[LK] Well, I have to say it has been improved
dramatically

0:03:43.200,0:03:45.840
through the course of its passage
through Parliament. When it was, introduced

0:03:46.880,0:03:55.280
around about last April, it swiftly became
the single most controversial Bill in the
history

0:03:55.280,0:04:02.240
of the devolved Scottish Parliament, so in the
last
21 years or so. And I say that because there
were

0:04:02.240,0:04:09.597
over 2000 responses to the consultation, that
the
Scottish Government always does when it
introduces a Bill.

0:04:09.597,0:04:16.320
And it's not surprising. Because,
what was originally in the Bill really,

0:04:16.320,0:04:21.200
from my perspective, was terrifying in some
of the things that it sought to proscribe.

0:04:21.200,0:04:27.680
Now, during the passage of this Bill,
I called a debate back in the autumn

0:04:27.680,0:04:32.720
in which I said "Look, we've got very little
time left, we are in the middle of a
pandemic,

0:04:32.720,0:04:38.720
the Parliament is operating at very much
reduced capacity, and we have to hear

0:04:38.720,0:04:46.240
the views of civic Scotland as to the nature of
this Bill. The Parliament wasn't with me on
that,

0:04:46.240,0:04:50.160
Scottish Conservatives were with me
obviously, but
the rest of the Parliament wasn't, so we had
to

0:04:50.160,0:04:55.600
go through with this process. So it was a very
tight process. We heard some excellent
evidence

0:04:55.600,0:05:00.480
from very many witnesses. I mean, in some
ways, it
showed the best of the Scottish Parliament:
just

0:05:00.480,0:05:09.280
how well we were able to take evidence, and
how erudite and persuasive many witnesses
were.

0:05:09.280,0:05:14.000
What we've come out with from stage
two, which happened earlier this year,

0:05:14.000,0:05:20.400
which is where you really get into
the amending of a Bill, is, for example, we

0:05:20.400,0:05:24.400
managed to introduce, or parliament
managed to
introduce, a reasonableness test, a
reasonable

0:05:24.400,0:05:32.480
person test, the stirring up offences became

intent only. We managed to remove some of the

0:05:33.360,0:05:40.480

really most terrifying areas, I thought, in terms

of you could be arrested for stirring up in your

0:05:40.480,0:05:48.480

production of plays, in your possession of inflammatory material. So, in that sense

0:05:48.480,0:05:55.120

we made some really serious improvements to it.

However, as I said yesterday in the final debate,

0:05:55.120,0:06:02.987

it came in as a fundamentally flawed bill and it remains fundamentally flawed in what has been passed.

0:06:02.987,0:06:07.520

[EP] Well, let's look at the Bill now, in a bit more detail. So, I've just got it here in

0:06:07.520,0:06:12.720

front of me. So we're looking at Part Two of the Bill, which is section three onwards, the

0:06:12.720,0:06:18.000

offences of stirring up hatred. Now there are two different categories of stirring up hatred:

0:06:18.000,0:06:23.120

one is stirring up hatred against race, color, nationality and ethnic or national origins,

0:06:23.120,0:06:29.360

which has a slightly higher test. But if we look

at the second type of offence, this is when you

0:06:29.360,0:06:35.440

stir up hatred against a group of persons based on characteristics specifically mentioned which are

0:06:35.440,0:06:40.960

age, disability, religion or perceived religious affiliation, sexual orientation, transgender

0:06:40.960,0:06:47.600

identity, and variations in sexual characteristics.

And for this, as you said Liam, what the

0:06:47.600,0:06:52.960

passage of the Committee managed to achieve was

to say that you have to have intention to stir

0:06:52.960,0:06:58.640

up hatred against this group, whereas for the racial offence you don't actually have to have

0:06:58.640,0:07:04.720

in the intention to stir up hatred. Why is it important that there should be

0:07:04.720,0:07:13.520

this element of intention in this offence?

[LK] Well, what the evidence was saying to the Committee

0:07:13.520,0:07:22.400

was that it would be too easy to be arrested, to be considered to have stirred up hatred,

0:07:22.400,0:07:28.560

on the original drafting of the bill. Actually what we needed to do was qualify this so that, at

0:07:28.560,0:07:34.400

least in theory, and we'll come on to protections

for freedom of expression I've no doubt later on,

0:07:34.400,0:07:41.200

but at least in theory you would have to have the intent to stir up hatred were you to

0:07:41.200,0:07:46.800

have committed the crime. I think that, of itself, that does raise the bar, that does raise

0:07:46.800,0:07:52.487

a threshold for committing a stirring up offence.

That was very important to get in there.

0:07:52.487,0:07:57.909

Has it gone far enough? No, I don't think it has, but we'll no doubt discuss that shortly.

0:07:57.909,0:08:03.840

[EP] But if it's stirring up hatred against the group, is there any requirement that the group needs to be present

0:08:03.840,0:08:11.280

when the offence is committed?

[LK] Well, I think that goes towards this dwelling defence,

0:08:11.280,0:08:18.640

that I looked to amend into the legislation. What I tried to do

0:08:18.640,0:08:25.280

was to say: Look, by all means bring in a stirring up offence, if that's where the government wants

0:08:25.280,0:08:31.840

to go, they are the government, that's their prerogative. But at the moment in the Act, or in

0:08:31.840,0:08:38.480

the Bill, there is no dwelling defence, there is no respect for privacy and family life defence.

0:08:38.480,0:08:45.920

I've tried to amend that in on several occasions, which basically picks up on this public

0:08:45.920,0:08:52.331

order element of the Bill. What I tried to say at Stage Two, the first amending stage, was:

0:08:52.560,0:08:59.680

if there is no public element to what's going on, then you shouldn't be in the frame for

0:08:59.680,0:09:08.240

committing a criminal offence. So if I commit this alleged offence in the safety of my own home

0:09:08.240,0:09:14.720

that shouldn't pose me a problem. Now the Cabinet Secretary's response to that was that it doesn't

0:09:14.720,0:09:22.160

necessarily stack up, because I could invite a whole load of people into my home, stir them up to

0:09:22.800,0:09:28.960

hatred, and out they go and commit some nefarious acts. They obviously get arrested, they obviously

0:09:29.680,0:09:33.280

have done the wrong thing, but, because of the dwelling defence,

0:09:33.920,0:09:42.880

I, the stirrer, wouldn't be in the frame. So I said: well, okay, if that's your concern,

0:09:42.880,0:09:51.040

then I will bring back some different amendments.

So myself and my colleague, Adam Tomkins
MSP,

0:09:51.040,0:09:57.360

put forward these 'respect to privacy and
family
life' amendments, to try and get them into
the

0:09:57.360,0:10:02.960

final Bill. Adam Tomkin's amendment tried to
say: if there's no public element to this,

0:10:02.960,0:10:08.411

then it shouldn't constitute an offence.
Parliament
wasn't with him on that, and so that didn't
go through.

0:10:08.411,0:10:16.720

I offered two solutions to this:
if I do something in my house, but

0:10:16.720,0:10:22.640

the only people present are my family or let's
say my flatmates, plus one other person, who
is

0:10:22.640,0:10:28.560

not part of my family or a flatmate, then there
is
no offence committed. Parliament wasn't with
me

0:10:28.560,0:10:34.400

on that and voted that down. So I then gave
them
an alternative and said: if I am in my house,

0:10:34.400,0:10:41.920

I'm around the dinner table and I say
something
hateful, I start hatred in front of my family,

0:10:41.920,0:10:46.320

but it's only in my house, no one else
hears it, it never gets out of my house,

0:10:46.320,0:10:52.800

then I shouldn't be liable for an offence.
Again, Parliament wasn't with me. So right
now

0:10:52.800,0:10:58.800

there is no dwelling defense in this Bill, that
was passed yesterday. Where I think that

0:10:58.800,0:11:05.120

gets you to is that, let's run an example that
says we're all around the dinner table, my
uncle

0:11:05.120,0:11:13.840

says something pretty unpleasant, around
the
dinner table, somebody decides to report
him,

0:11:13.840,0:11:21.200

or perhaps my kid goes to school, says
something
in a playground, it's overheard and it is
reported.

0:11:21.200,0:11:27.600

Then, logically, the police need to investigate
that, if a hate crime might have been
committed, and

0:11:27.600,0:11:33.120

they start the process. Presumably they come
to my
house and they need to take witness
statements

0:11:33.120,0:11:40.080

from those who heard the hate speech. Now
that
could be my kid. But that is the evidence
that

0:11:40.080,0:11:45.840

presumably they're going to have to take,
because
there is no dwelling defence in this Bill, which
is

0:11:45.840,0:11:51.760

about to become an Act, which is very dangerous indeed.

[EP] And the Bill specifically provides for

0:11:51.760,0:11:56.000

the powers of entry if there's some reasonable grounds for suspecting that an

0:11:56.000,0:11:59.267

offence has been committed?

[LK] That's correct.

0:11:59.267,0:12:03.440

[EP] So, in other words, this looks to be an extremely

0:12:03.440,0:12:08.800

egregious interference with the right to private and family life. Is it even compatible with

0:12:08.800,0:12:14.960

the right to private and family life in the ECHR?

[LK] Well, I think that's a very good question and goes

0:12:14.960,0:12:21.920

towards what happens next. I think there are a number of options as to what happens next.

0:12:21.920,0:12:26.989

But one of those might be that there's some kind of legal challenge to this.

0:12:26.989,0:12:34.000

[EP] Is it also going to be harsh on citizens, in so far as

we think of a tyrannical or arbitrary law as one in which

0:12:34.000,0:12:39.920

citizens don't know whether or not what they're

doing constitutes breaking the law? Is it the case

0:12:39.920,0:12:45.011

that a law should be sufficiently clear, so that citizens know

whether or not they're committing a criminal offence?

0:12:45.011,0:12:50.880

[LK] Absolutely. This, I think, goes to the core of the problem. Because,

0:12:50.880,0:12:58.160

even after all we've done to try and make this Bill work, we still needed to put in,

0:12:58.160,0:13:04.960

to try and give some comfort, to try and give some clarity, a freedom of expression clause, to say:

0:13:04.960,0:13:09.280

okay, there are certain things that you can say, so to try and say to people that

0:13:09.280,0:13:14.960

let's be under no illusions: there are things where it is appropriate to maintain

0:13:14.960,0:13:21.487

freedom of expression. But I actually think that what's going to happen here is that

0:13:21.680,0:13:26.320

we will end up in a situation where people are almost self-policing. There is

0:13:26.320,0:13:33.680

a chilling effect on freedom of expression if you like, because the Bill itself proscribes

0:13:33.680,0:13:39.040

what people can and can't say. The freedom of

expression clause then comes in to give people

0:13:39.040,0:13:45.520
some comfort, but there are many voices who are saying the form and structure

0:13:45.520,0:13:52.640
of that freedom of expression clause could give difficulties in terms of interpretation. It could

0:13:52.640,0:14:00.160
give difficulties in terms of precedent. We had the Law Society of Scotland, who

0:14:00.160,0:14:06.640
sent in a briefing note, as many organizations do during these debates, to say even though this

0:14:06.640,0:14:12.720
freedom of expression clause, which historically during this process has been very challenging,

0:14:12.720,0:14:18.880
even though we've got to something now, that clause is not going to be as easily understood, it

0:14:18.880,0:14:25.920
lacks clarity, and it sends out confusing messages. [EP] Fundamentally, could it be said this legislation is

0:14:25.920,0:14:34.400
really just about sending a message to certain minorities, and minorities not majorities or

0:14:34.400,0:14:39.520
an equally balanced number - such as women and men are - is it just about sending a message to

0:14:39.520,0:14:45.042
certain minorities within Scotland that abusive speech against them is no longer acceptable?

0:14:45.042,0:14:50.480
[LK] Well, certainly the Cabinet Secretary said that several times, that there is a large part of this

0:14:50.480,0:14:56.080
legislation which is about sending a message. So going right back to the question that you posed

0:14:56.080,0:15:01.600
at the start: what is this Bill about? A part of it is definitely about consolidation, as we said,

0:15:01.600,0:15:07.280
part of it is about removing this blasphemy offence, but there is unquestionably, according to

0:15:07.280,0:15:11.760
representations that were made in the chamber yesterday, this element of sending a message.

0:15:11.760,0:15:18.160
So, yes, that is part of it. What I would argue is that by all means send a message.

0:15:18.160,0:15:24.320
I think there's some debate about whether that is the function of the law, but nevertheless if

0:15:24.320,0:15:29.680
that is what this law is for, that's fine. But it has to work. It is no good sending a message to

0:15:29.680,0:15:37.239
people that you are going to be protected,

your rights are going to be upheld, if actually, in practice,

0:15:37.239,0:15:42.080
the law that you passed might not achieve that.

[EP] Is there a danger that in this law

0:15:42.080,0:15:48.000
certain groups who find something offensive that other people say, will use this law as a

0:15:48.000,0:15:55.440
way of suppressing their freedom of speech?

[LK] Well, that was certainly an argument that was made by

0:15:55.440,0:16:02.320
a number of stakeholders who came forward to the committee, and said actually what we risk here -

0:16:02.320,0:16:07.280
and this was Roddy Dunlop QC's point, when he when he talked about the weaponization.

0:16:07.280,0:16:16.080
There is a risk that people will report things as hate crimes, that may or may not be

0:16:16.080,0:16:22.400
in practice, but the reason that they're being reported as such, might be to kind of suppress it,

0:16:22.400,0:16:27.600
to make people self-police, and to not speak quite as freely as they might otherwise

0:16:27.600,0:16:33.487
have done. I think that is a risk - I go back to the point I made about this chilling effect -

0:16:33.487,0:16:40.400
I think the risk here is we end up in a situation where people are saying

0:16:40.400,0:16:47.520
if I've got this wrong, if I write down something that's pretty challenging, that is

0:16:47.520,0:16:52.800
more than mere discussion or criticism, is pretty robust debate,

0:16:52.800,0:16:59.120
I may have committed a hate crime. And if I have,

do I really want to risk being taken through the

0:16:59.120,0:17:03.760
court system? I may be innocent at the end of that.

I may not have committed a hate crime, but I've

0:17:03.760,0:17:08.960
been taken through this whole system to prove that.

[EP] And doubtless you'll have a stigma attached too.

0:17:08.960,0:17:14.720
[LK] Well, precisely. Precisely. I think there is that risk of a stigma being attached,

0:17:14.720,0:17:20.000
at least certainly while that process is ongoing.

[EP] Liam Kerr, thank you very much.

0:17:20.000,0:17:24.204
[LK] Pleasure, thank you.

0:17:26.400,0:17:32.160
[EP] I'm joined now by Jamie Gillies spokesman at Free to Disagree. Free to Disagree has been supported

0:17:32.160,0:17:38.400
by a wide variety of groups including the National Secular Society, the Network of Sikh Organizations,

0:17:38.400,0:17:45.360
the Peter Tatchell Foundation, and others.
They've
all come together on this issue of contesting
the

0:17:45.360,0:17:49.931
Hate Crime Bill. Jamie Gillies, hello.
[Jamie Gillies] Good morning.

0:17:49.931,0:17:56.125
[EP] First of all, why has your campaign been
joined by
such a wide variety of different organizations?

0:17:56.125,0:18:04.480
[JG] Yes, it's not something you see very
often in society today, I think.
But essentially I think these groups have come
together

0:18:04.480,0:18:10.000
despite their many differences and
ideological
disagreements because they support the
right

0:18:10.000,0:18:13.920
to freedom of speech and expression.
They believe that these rights are
fundamental

0:18:13.920,0:18:20.640
democratic rights, which must be supported
and
protected in society. They recognize that

0:18:20.640,0:18:26.679
people can profoundly disagree with one
another,
and indeed they should be able to do that,

0:18:26.679,0:18:33.040
and undermining free speech will not
affect only one's own position, but also

0:18:33.040,0:18:38.480

others with whom they disagree with. So
there should be a mutual standing up
together

0:18:38.480,0:18:44.334
in defense of free speech.
[EP] Free to Disagree, your campaign, was set
up specifically

0:18:44.334,0:18:50.335
to campaign against the creation of the
stirring up hatred
offences under the Hate Crime Bill.

0:18:50.335,0:18:56.794
[JG] Yeah that's true. The stirring up hatred
offences are
the controversial aspect of the Hate
Crime Bill.

0:18:56.794,0:19:01.760
The Bill does a couple of things: firstly
it consolidates existing hate crime laws.
That's

0:19:01.760,0:19:06.080
something that's not controversial. But Part
Two of the Bill, the stirring up offenses
would

0:19:06.080,0:19:12.000
extend this stirring up hatred offences, in
Scotland, which currently only apply to race,

0:19:12.000,0:19:17.120
to include all sorts of other characteristics
like age, disability, religion, sexual
orientation,

0:19:17.120,0:19:22.320
and transgender identity. And whilst that
might sound laudable on the face of it,

0:19:22.320,0:19:29.440
and, of course, we do oppose hatred and
prejudice,
the offences are also going to cover and
capture

0:19:29.440,0:19:36.480

all sorts of speech related to these many characteristics, so speech relating to

0:19:36.480,0:19:42.640

religion, relating to transgender identity, and other issues which are very hotly contested

0:19:42.640,0:19:49.840

in society. So the concern is that actually speech on these issues will be reported and

0:19:49.840,0:19:55.920

perhaps investigated by the police, or, at the very least, there'll be a chill on speech on these

0:19:55.920,0:20:01.520

kind of issues, because people fear that they're going to commit an offence. That's the

0:20:01.520,0:20:07.520

main concern about these offences, and it's what saw such a huge backlash against the

0:20:07.520,0:20:12.000

government in the first few months after the Bill was published, not just members of our campaign, of

0:20:12.000,0:20:17.840

course, but many, many other disparate groups and individuals in Scottish society and further afield,

0:20:17.840,0:20:23.200

comedians and actors and writers and playwrights. I almost felt like the world and her auntie

0:20:23.200,0:20:30.240

at one point was coming out against these plans.

So they're highly controversial offences and,

0:20:30.240,0:20:35.120

although there have been changes over the last few months, which I think we'll come on to discuss,

0:20:35.120,0:20:39.520

they're certainly still a threat to freedom of speech and expression.

0:20:39.520,0:20:46.320

[EP] So let's start with the process of getting the Bill through.

0:20:46.320,0:20:53.200

What changes has Free to Disagree and related campaigns managed to make to the Bill?

0:20:53.200,0:20:58.320

How far have you managed to make amendments that would at least give some safeguards to

0:20:58.320,0:21:02.480

freedom of expression, compared with what the Bill would have been like, had it gone through in

0:21:02.480,0:21:08.720

its originally proposed form?

[JG] Well, it's true to say that some very, very important changes

0:21:08.720,0:21:14.000

were secured early on in the process. I think the most important, probably, was

0:21:14.000,0:21:19.280

the requirement for intention on the part of an offender to commit an offence, so what might be

0:21:19.280,0:21:25.440
called 'mens rea' in legal terminology.
The Bill, when first published, would have

0:21:25.440,0:21:33.760
criminalized abusive behavior which was
'likely'
to stir up hatred. That was a very vague term,
and

0:21:33.760,0:21:39.680
it would have created a very, very low
threshold
for offending. Of course, there was a lack

0:21:39.680,0:21:44.480
of understanding about what the term
'abusive' means,
and what the term 'likely' means, and what
the term

0:21:44.480,0:21:51.475
'hatred' means. ultimately. So I think that's
why
the Bill was so deeply unpopular initially.

0:21:51.475,0:21:57.360
It was largely related to this very low
threshold and
the ambiguity of the language in the Bill.

0:21:57.360,0:22:02.560
There were more changes made
subsequently,
which helped as well. One of the more
controversial

0:22:02.560,0:22:09.120
aspects of the legislation was a section
covering
inflammatory material, which again was very
vaguely

0:22:09.120,0:22:15.840
defined, and threatened to catch all sorts of
books and perhaps newspaper articles and
things

0:22:15.840,0:22:20.320
which made controversial statements,
or statements which could be deemed

0:22:20.320,0:22:25.920
offensive to some people, and the provisions
on
inflammatory material were removed from
the Bill

0:22:25.920,0:22:34.000
after a backlash which was welcome.
Thirdly, provisions covering theatre
performances,

0:22:34.000,0:22:40.800
which also sort of outraged the lobbies, and
they
felt singled out, these were removed from the
Bill

0:22:40.800,0:22:46.320
as well. So I think these three changes were
perhaps the most key changes which were
made

0:22:46.320,0:22:50.000
quite early on in the process,
I think at the end of last year.

0:22:50.080,0:22:57.440
They've definitely improved what
a Bill, which was felt universally

0:22:57.440,0:23:04.320
to be completely unacceptable, and made
it perhaps a little bit less of a menace to

0:23:04.320,0:23:09.360
free speech than it might have been.
[EP] We've talked a bit about the idea that
speech might be

0:23:09.360,0:23:15.520
criminalized. I think that people, such as
Adam Tomkins, when he was discussing the
Bill

0:23:15.520,0:23:20.800
before the Scottish Parliament, he used both the terms 'what would be lawful' and also 'what would be

0:23:20.800,0:23:26.960
acceptable', and there has been this idea that in criminalizing certain forms of abusive or

0:23:26.960,0:23:33.200
threatening speech against groups, it would send a message as to what is acceptable in Scotland.

0:23:33.200,0:23:39.680
Do you think that criminalizing speech is the way to send a message about what is acceptable,

0:23:39.680,0:23:44.800
and should this be the role of the government?

[JG] It's a very interesting question.

0:23:44.800,0:23:50.480
I think I should say that I've been quite disappointed, personally, by Humza Yousaf, who

0:23:50.480,0:23:58.160
has seemingly failed to understand the laws that already exist in Scotland. I think he's implied

0:23:58.160,0:24:04.000
constantly that this Bill is going to provide protections and entitlement to minority groups

0:24:04.000,0:24:09.440
which weren't there already. But that's not true. Of course abusive and threatening language is already

0:24:09.440,0:24:14.400
potentially criminal. You can't harass people, you can't be violent towards people

0:24:14.400,0:24:19.840
in Scottish society, and I think that's right. So there's not really any evidence that these

0:24:19.840,0:24:25.200
offences will improve protections, and, in fact, as we've discussed, they might actually undermine

0:24:25.200,0:24:32.560
freedom of speech and have a negative effect on social cohesion in Scotland. I think the membership

0:24:32.560,0:24:36.720
of the Free to Disagree campaign would take different views on whether or not the hate crime

0:24:36.720,0:24:43.200
approach, generally speaking, is the right approach.

I think, speaking in a personal capacity,

0:24:43.200,0:24:50.000
I don't feel that the blunt force of criminal legislation is always the right way

0:24:50.560,0:24:55.200
to tackle prejudice and hatred. I think there are other ways to tackle hatred and prejudice,

0:24:55.200,0:25:03.120
which would go to the root of these things, through

education and rehabilitation. I think actually

0:25:03.120,0:25:07.760
through promoting free speech and protecting

free speech, rather than narrowing it,
because

0:25:07.760,0:25:13.600
there's that old adage about intolerant views
and
hateful views being out in the public domain
and

0:25:13.600,0:25:19.120
being challenged and being attacked and
being torn down,
and it's through open and robust speech

0:25:19.120,0:25:25.600
that we can actually counter prejudice. There
have been some quite significant bodies

0:25:25.600,0:25:31.760
in Scotland, like courts and criminal justice
system representatives, who have said
actually that

0:25:31.760,0:25:38.480
more laws is not the answer here, and
locking people up doesn't tend to address
the

0:25:38.480,0:25:44.560
underlying issues which might be the source
of
prejudice, and in some cases it can make it
worse.

0:25:44.560,0:25:48.560
So I think it's fair to say that the approach
being taken by the Government is

0:25:48.560,0:25:56.240
not universally accepted, including by
victim support groups themselves, and

0:25:56.240,0:26:01.040
that's another reason why Free to Disagree
were so worried really about the

0:26:01.040,0:26:08.240
legislation and what it might do.

[EP] So perhaps the idea is that if you
suppress hatred, or the

0:26:08.240,0:26:12.960
expression of hatred, it's a bit like
a pressure cooker: you can suppress, you can
put

0:26:12.960,0:26:18.800
put down the lid, but the steam will build up
inside and it might explode in different
ways?

0:26:18.800,0:26:24.000
[JG] I think that's fair. You force
things underground and they fester there,
and

0:26:24.000,0:26:29.200
that can be made worse. I think that's a
very liberal interpretation of free speech,
and

0:26:29.200,0:26:36.000
probably quite a good one.
[EP] Let's talk now about freedom of religion
specifically, as that's

0:26:36.000,0:26:39.600
an issue that concerns, in particular,
the National Secular Society and also

0:26:39.600,0:26:45.040
the Christian Institute. There is a
particular clause which has now been
inserted,

0:26:45.040,0:26:51.360
which was clause 9a. We've got
protection of discussion or criticism of

0:26:51.360,0:26:58.592
other factors, and then we've got
"Protection of freedom of expression of
discussion or criticism relating to,

0:26:58.592,0:27:04.318

or expressions of antipathy, dislike, ridicule or insult towards religion"

0:27:04.318,0:27:10.880

So it seems that religion has extra safeguards on freedom of speech regarding religion compared

0:27:10.880,0:27:16.720

with other characteristics. Why has this come about, that religion has these extra safeguards?

0:27:16.720,0:27:22.320

[JG] Well it's interesting, actually, because that's a wording that the Christian Institute, and

0:27:22.320,0:27:28.400

the National Secular Society, and the Network of Sikh Organizations all agreed was important.

0:27:28.400,0:27:36.160

Because we, as Christians, as secularists, as Sikhs, recognize

0:27:36.160,0:27:47.120

that religion and beliefs and ideas must be open to robust debate and criticism, and perhaps dislike

0:27:47.120,0:27:53.200

and ridicule. That's really what free speech looks like, and if you start to shut down

0:27:53.200,0:27:59.280

and narrow the parameters of acceptable speech on these kinds of issues -

0:27:59.280,0:28:04.640

ironically that what you saw with the blasphemy law, which this Bill

0:28:04.640,0:28:12.320

also repeals. So it's interesting, I think, that Christians and secularists and others

0:28:12.320,0:28:18.880

accept the right of other people to attack their own views, to ridicule their own views, to

0:28:18.880,0:28:23.920

try to tear them down. It's a mutual agreement, that they should be able to do

0:28:23.920,0:28:29.040

that to one another. And I think that's the correct interpretation of what free speech

0:28:29.040,0:28:35.600

means. So that is why it's discouraging to see that the other remaining aspects of the free

0:28:35.600,0:28:43.840

speech clause are not as robust as that. So you cannot speak so freely on these other issues which

0:28:43.840,0:28:49.920

are related to other protected characteristics, and that's kind of disturbing, to see that that wording

0:28:49.920,0:28:56.720

about religion was lifted from the Public Order Act in England and Wales and

0:28:56.720,0:29:04.160

that does afford greater free speech protection to speech on controversial issues. We had hoped

0:29:04.160,0:29:10.196

that the Scottish Government would at least mirror that

and have the free speech protections in the legislation,

0:29:10.196,0:29:15.518

as good as they are in England and Wales, but they chose to chart a different path.

0:29:15.518,0:29:20.720

[EP] So now we have on the one hand the offence of stirring up hatred, which can be on

0:29:20.720,0:29:26.880

the grounds of religion, it can be threatening or abusive behavior against a

0:29:26.880,0:29:32.480

group on the basis of their religion, but against that we have protection of freedom of expression

0:29:32.480,0:29:37.661

including antipathy. Where is the offence that has been created?

0:29:37.661,0:29:44.240

It sounds like they're almost creating an offence and then taking it away with the amendment.

0:29:44.240,0:29:49.200

[JG] Yeah, it's almost like an exception isn't it? As a Christian believer, I think it's probably fair

0:29:49.200,0:29:57.120

to say that Christianity is something which can be attacked and ridiculed in the public sphere

0:29:57.120,0:30:01.760

in a way that other beliefs can't be. I believe that actually that's wrong, not because I think

0:30:01.760,0:30:06.160

it shouldn't be, but because other beliefs should be as well. It does show

0:30:06.160,0:30:12.400

the mentality in the Government in Scotland. Because it says really that you can express

0:30:12.400,0:30:19.200

basically hate and ridicule and dislike towards religion, but if you say that you hate

0:30:20.400,0:30:25.920

the kind of ideology behind transgenderism, which thinks people can change sex,

0:30:25.920,0:30:32.988

or any other aspect covered by the Bill, then that's not acceptable. I think there

0:30:32.988,0:30:39.520

has to be a difference. There's a difference between protecting people and protecting ideas.

0:30:39.520,0:30:46.800

You cannot make ideas and beliefs and ideologies unassailable.

0:30:46.800,0:30:52.480

I think that if you do in society, that's creating a blasphemy law. You do

0:30:52.480,0:30:58.400

not live in a free society if you're not able to challenge beliefs openly in the most robust terms.

0:30:58.400,0:31:02.800

There's a bit of an irony that which you highlight there.

0:31:02.800,0:31:09.280

Perhaps that will be realized as the legislation is interpreted in the courts, because I think, as

0:31:09.280,0:31:15.120
some people have pointed out, it's interesting because so far I think age, disability, sexual

0:31:15.120,0:31:19.920
orientation, transgender identity, variations and sex characteristics, it's only discussion

0:31:19.920,0:31:28.080
and criticism but for religion it's antipathy, dislike, ridicule and insult. So in including

0:31:28.080,0:31:33.920
these different terms for religion, I think you necessarily exclude the voicing of these

0:31:33.920,0:31:39.200
kind of things for the other characteristics, so it creates an imbalance there. It kind of assumes

0:31:39.200,0:31:45.440
that if you're talking about age, you cannot express antipathy or dislike or ridicule.

0:31:45.440,0:31:51.265
[EP] So presumably you couldn't even say a comedy or a satire about any of those characteristics,

0:31:51.265,0:31:54.960
because that would probably be ridicule. [JG] It's interesting that. Yeah. I think

0:31:54.960,0:32:00.216
the inclusion of 'intent' and the removal of 'likely' probably did improve the threshold for offending,

0:32:00.216,0:32:06.880
but theoretically, if you're a comedian and you make a joke, which is considered to be 'abusive',

0:32:06.880,0:32:14.800
that's the word which is ambiguous, and

intended to stir up hatred on the grounds of,

0:32:14.800,0:32:18.080
I don't know, disability, and we see comedians like that,

0:32:18.080,0:32:24.080
I'm no fan of Frankie Boyle, people like him, but he makes incredibly distasteful jokes about the

0:32:24.080,0:32:31.680
disabled. He made, infamously, a very distasteful joke about Harvey Price, Katie Price's son, and

0:32:31.680,0:32:38.000
you might ask would he be reported? Would he be investigated for that kind of joke today?

0:32:38.000,0:32:43.360
I'm not sure he would make that kind of joke today, interestingly enough, because he probably would be

0:32:43.360,0:32:50.240
too scared of being accused of a hate incident already. It's an interesting question

0:32:50.240,0:32:54.720
that, isn't it? Should comedians who are provocateurs, who are in the business of

0:32:54.720,0:33:01.920
attacking and ridiculing the human condition, should they be at risk off a report

0:33:01.920,0:33:08.160
to the police by an audience member who feels that they have been abused and that he's been

0:33:08.160,0:33:13.440

encouraging hatred against whatever characteristic they hold? It'll be interesting to see the Edinburgh

0:33:13.440,0:33:19.680
Fringe in the next few years, and see if the comedy is toned down somewhat by

0:33:19.680,0:33:26.238
by comedians there.
[EP] Would it be fair to say, overall, you think the fear is this Bill

0:33:26.238,0:33:31.612
is going to have a generally chilling effect on on free speech in all sorts of areas in Scotland?

0:33:31.612,0:33:36.160
[JG] Yes. I think that's true to say. I think, probably because the inflammatory

0:33:36.160,0:33:44.800
material provisions were removed, it won't be so much of a concern to writers, to the media, than it

0:33:44.800,0:33:50.000
was before. But certainly, in terms of the public, I think it's gonna have a chilling

0:33:50.000,0:33:55.600
effect on speech and the Government will say "oh there won't be many prosecutions because

0:33:55.600,0:33:59.920
public order provisions south of the border don't result in many prosecutions" and that's true.

0:33:59.920,0:34:05.120
I think probably there won't be hundreds of prosecutions for the stirring up hatred, but

0:34:05.120,0:34:11.600
I think the impact will be seen in reporting, we live in a society where people are aware

0:34:11.600,0:34:16.800
that they can shut down their ideological opponents by reporting them to the police.

0:34:16.800,0:34:22.560
So you're going to see reporting, malicious reporting, and investigations by the police, the

0:34:22.560,0:34:29.920
police dragged into disputes and arguments perhaps that should not be under their remit.

0:34:29.920,0:34:34.880
And, of course, that's very stressful for the individuals involved. So you're also

0:34:34.880,0:34:39.520
probably going to see people self-censoring and I think that's going to be very damaging.

0:34:39.520,0:34:44.080
Free speech is something which is under attack already, and certainly we live in

0:34:44.080,0:34:51.120
a febrile culture as it stands, so I don't see how this legislation is going to help that climate.

0:34:51.120,0:34:56.560
[EP] Finally, let's go back to the basics. In your view, why is it that free speech on

0:34:56.560,0:35:04.240
all of these topics is so important in our society?

[JG] I think free speech is it's fundamental

0:35:04.240,0:35:12.703
because it helps society to grow and develop

and flourish. It's a very central

0:35:12.703,0:35:18.640

freedom, where if we don't have free speech, then we can't criticize, and I mean that in

0:35:18.640,0:35:25.120

the academic sense of the word, and analyze ideas and come to consensus on them.

0:35:25.120,0:35:30.080

Free speech is just such a fundamental thing. It's why it's enshrined in human rights law.

0:35:30.080,0:35:36.000

Society only works when free speech is there, it only grows, only flourishes, when free speech

0:35:36.000,0:35:40.480

is there, and so when you start to chip away at free speech you're kind of starting to chip away

0:35:40.480,0:35:45.680

at society itself. You only have to look back over the last few centuries

0:35:45.680,0:35:51.520

to see how seminal free speech, free expression, free assembly, rights like these are, from the

0:35:51.520,0:35:56.960

enlightenment onwards in Scotland, which was a proud tradition. You've got to ask

0:35:56.960,0:36:01.600

what positive societal changes and developments would have been made without free speech, without

0:36:01.600,0:36:06.400

free expression, without a free press.

It's only through these things that people were able

0:36:06.400,0:36:15.600

to agitate, and to call out oppression, and to fight for positive change.

0:36:15.600,0:36:22.240

These rights are fundamental to positive change

in society as well. Free speech is a right which

0:36:22.240,0:36:28.800

is fundamental, it's a right which is good for everyone in society, and perhaps, most

0:36:28.800,0:36:36.800

particularly, those in society who are oppressed, those in society who are lacking representation

0:36:36.800,0:36:45.120

or affirmation by their political superiors, and who need to access these rights to

0:36:45.120,0:36:51.040

fight for change and fight for enfranchisement.

[EP] So the irony might be that the

0:36:51.040,0:36:56.480

Scottish Hate Crime Bill, which intends to give minorities greater protection, might actually,

0:36:56.480,0:37:02.480

in the process, be damaging the cause of other minorities by having this chilling effect

0:37:02.480,0:37:05.582

on free speech?

[JG] Yeah. I think that's true.

0:37:05.582,0:37:11.456

[EP] Jamie Gillies, thank you very much.

[JG] Thank you.

0:37:13.520,0:37:17.829

[EP] This episode was produced by the National Secular Society. All rights reserved.

0:37:17.829,0:37:22.795

The views expressed by contributors do not necessarily represent those of the NSS.

0:37:22.795,0:37:30.798

You can access the show notes and subscriber information for this and all our episodes at secularism.org.uk/podcast

0:37:30.798,0:37:36.880

For feedback, comments and suggestions please email podcast@secularism.org.uk

0:37:36.880,0:37:42.080

If you enjoyed this episode, please subscribe and leave us a positive review wherever you can.

0:37:42.080,0:37:49.840

Thanks for listening and I hope you can join us next time.