



July 2020

A response to the Justice Committee Hate Crime and Public Order (Scotland) Bill Call for Views

About the National Secular Society

1. This submission is made by the National Secular Society (NSS). The NSS is a not-for-profit non-governmental organisation founded in 1866, funded by its members and by donations. We advocate for separation of religion and state and promote secularism as the best means of creating a society in which people of all religions and none can live together fairly and cohesively. We seek a diverse society where all are free to practise their faith, change it, or to have no faith at all. We uphold the universality of individual human rights, which should never be overridden on the grounds of religion, tradition or culture. We promote free speech as a positive value.

Summary

2. Freedom of expression is a fundamental building block of a free society. It drives inclusivity, equality and tolerance – values that should be at the heart of Scottish politics and culture. It is a vital right that should only be limited by the state when it has strong grounds for doing so.
3. Whilst we share the aspiration of building a more equal and inclusive Scotland, we believe aspects of the Hate Crime and Public Order (Scotland) Bill are excessive and represent an unacceptable erosion of freedom of expression.
4. All citizens have a responsibility to challenge prejudice in order to ensure Scotland is an inclusive and respectful society. However, criminalising speech is a draconian and ultimately counterproductive means of achieving that aim.
5. We do not doubt the Scottish Government's positive intentions in bringing forward the Hate Crime and Public Order (Scotland) Bill. But the ambition to introduce new 'stirring up hatred' offences – with dangerously low thresholds for prosecution – needs to be fully scrutinised and resisted.

Stirring up offences

6. Our greatest concerns centre around the creation of new and wholly unnecessary 'stirring up' of hatred offences, which threaten freedom of expression and conscience.

7. Introducing the Bill, Justice Secretary Humza Yousaf remarked: “Stirring up of hatred can contribute to a social atmosphere in which discrimination is accepted as normal.”
8. The idea that speech "can contribute to a social atmosphere" is flimsy grounds for prosecuting those who say it. Well-established anti-discrimination laws already protect individuals with protected characteristics from discrimination and send the clear signal that such discrimination is unacceptable.
9. The new law is also unnecessary in that genuine criminal activity that the proposed offences are seeking to address are already captured by existing law. The proposed offence (in Section 3) of stirring up hatred makes it an offence for a person to behave in a threatening or abusive manner against a group of persons defined by reference to certain characteristics. However, Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 already outlaws threatening or abusive behaviour against anyone where such behaviour would be likely to “cause a reasonable person to suffer fear or alarm”.¹
10. Furthermore, under this existing legislation the offender must also either intend to cause fear or alarm or be reckless as to whether or not they did. This is a necessary safeguard, lacking in the newly proposed ‘stirring up’ offences.
11. Because of the potential adverse impact on freedom of expression, including the chilling effects of the new offences in encouraging self-censorship, and because the offences are punishable by up to seven years’ imprisonment, **we believe it necessary for the prosecution to prove criminal intent.**
12. The ‘stirring up hatred’ offence may even chill the reporting of facts. We are aware that some journalists and government departments have been reluctant to report on issues involving sensitivities around race, religion and other protected characteristics out of fear of being accused of racism, intolerance or inciting hatred. Criminalising the ‘stirring up of hatred’, especially where no intention of stirring up hatred is necessary to meet the threshold, will exacerbate the problem.
13. Far from achieving greater tolerance and inclusivity in Scotland, criminalising speech may worsen relationships between different communities by feeding mistrust and ‘persecution narratives’ at the root of many conflicts between groups. Extremists who want to create division capitalise on such grievances and exploit them to further their ideologies.

Thresholds

14. **Any new stirring up hatred offences should only cover threatening conduct.**

¹ <http://www.legislation.gov.uk/asp/2010/13/section/38>

15. We disagree with the conclusions of Lord Bracadale that the requirement for ‘threatening’ behaviour alone sets the legal threshold too high. On the contrary, the inclusion of “abusive” poses a serious risk to freedom of expression by promoting the idea that there should be a right not to be offended. It risks capturing a vast array of robust yet legitimate speech and will create an unreasonable expectation that religious sensibilities are protected by something akin to a blasphemy law.
16. The Oxford dictionary defines abusive as “offensive and insulting”². The term is ambiguous and highly subjective and can quite easily be utilised to stifle robust commentary about religious beliefs and practices. Beliefs should not be protected by law in this way.
17. Defending the Bill in the media, the Cabinet Secretary for Justice has said it “will not prevent people expressing controversial, challenging or even offensive views, as long as this is not done in a threatening or abusive way that is intended to stir up hatred or likely to stir up hatred.” There is a circularity to this argument in that anyone who finds a view “offensive” could argue that expressing it is inherently “abusive” and “likely to stir up hatred”.
18. Where someone is abusive about someone else’s beliefs, the believer can quite reasonably argue that they are abusing them personally too. Therefore, if we wish to apply criminal sanctions to protect people from feeling “abused” when someone criticises or attacks their beliefs, it is obvious that the beliefs themselves as well as the individual who feels insulted or abused are being protected. Some sincerely held religious beliefs and practices are seen as profoundly irrational and inhumane by others. Rational and liberal critics may reasonably regard some beliefs as ‘hateful’ and themselves deserving of mockery, abuse and hatred. The right to express this must not be restricted by law.
19. The Bill as drafted risks capturing comedians, performing artists, cartoonists, and all manner of expressions that may subjectively cause offence and be perceived as “abusive”. The chilling scope of this law is evident in section 4 – ‘*Culpability where offence committed during public performance of play*’. If the Theatres Act 1968 abolished censorship of the stage, the Hate Crime and Public Order (Scotland) Bill brings it back.
20. Although the sections on “Protection of freedom of expression: religion” and “Protection of freedom of expression: sexual orientation” in the Bill are intended to enable religious groups to express tenets of their faith without fear of prosecution, we are aware of examples of religious institutions (which are also registered charities in Scotland) whose statements on sexual orientation could still fall foul of the proposed ‘stirring up hatred’ offences due to their abusive (i.e. offensive and insulting) nature.

² <https://www.lexico.com/definition/abusive>

21. On its website, the Free Presbyterian Church of Scotland refers to same-sex relationships as “heinous”, “vile”, “great evil”, an “abominable practice” and “a lifestyle of disease and death”.³ It also says “fearful uncleanness ensues” from cross-dressing and transgender identity.⁴
22. Similarly, the Christadelphian Auxiliary Lecturing Society, without any condemnation, quotes a Bible passage that says men who have sex with other men “must be put to death”.⁵
23. Finally, Al-Mawrid Global's website says: "Lesbianism is obviously one of the practices whose abomination is ingrained in us. Only women whose nature have become perverted indulge in it."⁶
24. While we condemn any organisation, religious or secular, that uses such hateful language about LGBT+ people, we do not believe the correct response is to criminalise such speech. There are better alternatives to disincentivise hate speech and promote tolerance than criminalising speech. We have proposed some of these alternatives in paragraphs 29-33.

Removing “abusive” is necessary to protect free speech in Scotland and would be in alignment with the reasonable threshold applied in English law.

Free speech protections

25. European Council Resolution 1510 on freedom of expression and respect for religious beliefs, states:

“The progress of society and the development of every individual depend on the possibility of receiving and imparting information and ideas. This freedom is not only applicable to expressions that are favourably received or regarded as inoffensive but also to those that may shock, offend or disturb the state or any sector of the population, in accordance with Article 10 of the European Convention on Human Rights.”

26. Any ‘protection of freedom of expression’ provision should reflect this. The protections offered in the Bill fail to do so. A free speech protection that only protects polite discussion or criticism offers no meaningful protection at all.
27. The protection of freedom of expression sections are substantially weaker than the much more robust equivalent in England and Wales. The Racial and Religious Hatred Act 2006 explicitly says the law doesn’t restrict “discussion, criticism or expressions of

³ <https://www.fpchurch.org.uk/publications/the-free-presbyterian-magazine/1998-to-2003/march-1999/article-heaven-provoking-legislation-199/>

⁴ <https://www.fpchurch.org.uk/about-us/what-we-contend-for/distinctions-between-male-and-female/distinct-clothing-for-men-and-women/>

⁵ <http://www.thechristadelphians.org.uk/booklets/the-bible-and-medicine/>

⁶ <http://www.al-mawrid.org/index.php/questions/view/lesbianism>

antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents”.⁷

28. In Scotland, by contrast, complainants will be likely to argue that speech they dislike is “abusive” and not ‘solely’ a discussion or critique of religion. **If stirring up offences are introduced the protection clause must be strengthened to avoid seriously chilling freedom of expression.**

Alternatives to legislation to challenge hate speech and intolerance

29. Promoting societal harmony and ensuring that existing legislation is properly enforced must be the priority, rather than introducing new measures that will merely make it harder to express unpopular viewpoints and reinforce divisions.
30. Instead of putting free expression in jeopardy through the creation of ‘stirring up hate’ offenses and other aspects of this Bill that would criminalise speech, we propose further alternative measures to support Scotland’s goal of protecting people from hate crime and building a more tolerant and inclusive society for all.
31. First, the Scottish education system should be one where children from a diverse range of backgrounds are educated together. At present, Scotland’s schools are often divided along sectarian lines, with parents’ religious backgrounds frequently determining what school their child attends. All of Scotland’s schools should be equally welcoming and inclusive of all children, regardless of their family’s religion, beliefs, culture or ethnicity. Reforms to create one secular school system are an essential step in eliminating sectarianism and fostering cohesion, understanding and tolerance between communities.
32. Scotland’s schools could also place more emphasis on citizenship education, based on shared values including democracy, the rule of law, individual liberty and tolerance. Citizenship education should also aim to foster intercultural understanding, equality, kindness, and other personal characteristics and interpersonal skills to prepare young people for life in 21st century Scotland.
33. Finally, many organisations that promote intolerance and hatred, especially towards LGBT+ people, are registered charities (see paragraphs 20-23). Because charities must provide a public benefit and not cause harm, charities that promote messages contrary to the public benefit should lose their charitable status and be de-registered. This would help ensure organisations promoting hate do not gain access to tax exemptions, gift aid and other benefits given to charities, and disincentivise organisations seeking charitable status from promoting hate.

⁷ Racial and Religious Hatred Act 2006, 29J Protection of freedom of expression

“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.”

Repeal of blasphemy

34. **We very much welcome the proposal to abolish of the common law offence of blasphemy.** Religious ideas should not enjoy privileged legal protection. The fact that these laws are seldom used only serve to highlight their inapplicability and provides no justification for keeping these archaic offences in statute.
35. Around the world blasphemy laws continue to be used to target religious and political minorities. The existence of Scotland's blasphemy laws seriously undermines its ability to speak out against human rights abuses under the guise of blasphemy and heresy elsewhere in the world.
36. It would be deeply regrettable if this advancement for human rights is fundamentally undermined by the introduction of vague 'stirring up' of hatred offences without much more robust freedom of expression protections.