The Free Speech Union

Submission to the

Scottish Parliament Justice Committee

on the

Hate Crime and Public Order (Scotland) Bill

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Free Speech Union

The Free Speech Union
is a non-partisan, mass-membership public interest body
that stands up for the speech rights of its members
and for freedom of speech around the world.

85 Gt. Portland St.
London W1W 7LT

FreeSpeechUnion.org

Justice Committee

Hate Crime and Public Order (Scotland) Bill

Submission from The Free Speech Union

1. We wish to comment on the proposed Hate Crime and Public Order (Scotland) Bill currently before the Parliament. While we entirely approve of one proposal within it, the rest of it gives us strong cause for concern. It seems to us to reflect an unhealthy attempt to curb inconvenient opinions by the imposition of draconian penalties.

2. Our comments appear seriatim below.

A. Blasphemy – Cl.16

3. We are wholly in agreement with the proposal in Cl.16 to abolish the crime of blasphemy. It is notable that in the last prosecution in 1843, the panel was a free-thinking Edinburgh bookseller convicted of nothing more than putting on sale such works as Diderot's *Thoughts on Religion*. He was solemnly told by the Lord Justice Clerk that "the publication of works, tending to vilify the Christian religion, is an offence in law; and it is no answer to say, that, in your opinion, the passages contained in these works are true, and that the Bible deserves the character ascribed to it." Quite apart from the fact that today such a law would stand no chance against Art. 10 of the European Convention on Human Rights, the criminalisation of attacks on a mere idea has no place in modern Scotland.

4. We are, however, concerned that having abolished blasphemy in Cl.16, the Bill then revives some of its objectionable features in Cl.3(2), the provision instituting the stirring-up of-

fence, which we will refer to below.

B. Aggravation by prejudice – Cls.1–2

5. Clauses 1 and 2 of the Bill seek to restate and extend the concept of aggravation of criminal liability by prejudice. They are, we note, mostly a consolidation measure. Existing piecemeal legislation already provides for an increase in sentence where a crime is committed and the accused is proven to have acted from malice and ill-will based on the victim's race, religion, sexual orientation, transgender identity or disability. All this is gathered together in Cls.1-2, which repeals and replaces the existing legislation.

6. There is nevertheless a small but significant extension of criminal liability. This consists in (a) in the addition of age to the characteristics covered, and (b) (as regards factors other than race or religion) the extension of aggravation to cases of persons associating with members of the relevant group, as well as members themselves.

7. Although Cl.2 covers crimes generally, we would observe that it carries important implications for freedom of speech, in that the crimes capable of being aggravated clearly include several offences that can be committed by mere speech or other communication. Obvious examples are breach of the peace, harassment, the "s.38 offence" of threatening or abusive behaviour under the Criminal Justice and Licensing (Scotland) Act 2010, and the notorious "grossly offensive communication" provision in s.127 of the Communications Act 2003, covering all material online.

8. We have strong objections to the principle of privileging particular groups for protection in this respect. Take, for example, the treatment of words apt to cause fear or alarm within the s.38 offence. As the law currently stands, the same words (for example, "watch out, we're coming for you. We know where you live…") uttered to a teenager because she is gay, or wears a hearing aid, attract a greater penalty than they would if they are due to her being teacher's pet, someone seen as a rich pan loaf from Bruntsfield, or for that matter a Hearts supporter, or the girlfriend of someone from a rival gang. This cannot be right. The effect on the victim, and for that matter Scots society, is the same whoever the victim is. Everyone in Scotland deserves the same protection from intimidation without any form of discrimination. As Humza Yousaf MSP himself, a leading proponent of the Bill, has said,

"We all have a responsibility to challenge prejudice in order to ensure Scotland is the inclusive and respectful society we want it to be." This means all prejudice, without privilege or exception for any group.

9. For this reason alone we oppose the extension to the classes so protected to cover age. Indeed, even assuming that aggravation by reference to protected groups is justified, we see no particular feature of age that justifies its inclusion. Whatever the position with regard to racial or religious prejudice, there is no indication that dislike of children or mistrust of old people seen as foolish or cantankerous is a social problem in Scotland that requires specific measures or stiffer sentences to combat it.

10. Although this is already a feature of the aggravated offences, we also regard as worrying the continued exclusion in Cl.1(2) of what would otherwise be a need under the common law of Scotland for corroboration in the proof of malice and ill-will. We are aware that this aspect of the law of evidence is a matter of hot debate in Scots law (witness the controversial abandonment of proposals to change it in the Criminal Justice (Scotland) Bill 2013). But cases of its exclusion remain exceptional, and we see a strong case for retaining it here. Perceptions of malice and ill-will towards a particular group can be deceptive, especially as regards speech, where much may turn on tone and nuance. If this is to have substantial effects on sentence, then this should not be done without the level of proof required elsewhere in Scots law.

C. The stirring-up offences – Cl.3

11. The proposed extended collection of stirring-up offences, all to be grave crimes carrying a potential sentence of up to seven years (more than the maximum penalty for theft on indictment in the Sheriff Court), we regard as a grave threat to freedom of speech without any counterbalancing justification. Our reasons are these.

    (1) Before taking steps to extend restrictions on what people are allowed to say, one would expect a government to demand clear evidence of a pressing need for such restrictions. As far as we can see, there is no such thing here. Lord Bracadale himself admitted in the report on which this bill is based (see para 5.15 of that document) that most cases of non-racial stirring-up were probably offences already, for example under s.38 of the

CJLSA 2010. His answer to this point, that "the nature of the offence, which was directed against the group rather than individual members of it, called out for it to be more appropriately marked by a specific stirring up of hatred offence" and that therefore there was a "gap in the law", is to us incomprehensible. Similarly, while one might expect the Explanatory Memorandum to the Bill to provide evidence of a pressing problem of stirring up hatred in non-racial cases which needed to be addressed by the creation of a series of new and serious crimes, it does not do so (compare the inconsequential arguments at paras. 155–157).

(2) We note that in the consultation exercise the support for a general extension of stirring-up offences came overwhelmingly from organisations and pressure groups. Individual respondents by a large majority were opposed. (See para. 161 of the Explanatory Memorandum to the Bill).

(3) We are particularly concerned that all the proposed new stirring-up offences, dealing with age, disability, religion, sexual orientation, transgender and intersex identity, would depend not on an intent to stir up hatred, but merely on the likelihood of it. (This is in contrast to the position in England, where although likelihood suffices in the case of race, intent is required elsewhere, namely with religion and sexual orientation.) Our view is that this extension of criminal liability to unintended consequences is very difficult to justify.

    (a) On the assumption that there is a need to extend the stirring-up offences at all (an assumption that, as stated above, we regard as flawed), the justification for doing so lies in our view in the fact that freedom of speech may be abused for illegitimate ends. Where such deliberate abuse cannot be demonstrated this argument does not apply. We also regard it as inappropriate that an offence carrying a possible seven years' imprisonment should be able to be committed merely on account of the unintended effects of what a person says.

    (b) The argument from "parity" – that if a threat to persons possessing one protected characteristic gives rise to criminal liabil-

ity irrespective of intent, all others should be treated the same way – is equally flawed. The creation of new offences with no requirement to show intent should not be a matter of bureaucratic tidiness: it should only happen if a clear need in individual cases is shown. No such showing has been made in respect of speech with the effect, but not the intent, of stirring up hatred as regards such matters as religion or transgender status.

(c) The argument that prosecution would otherwise be made harder we do not see as a justification. Prosecution for speech crime should always be a matter for careful thought, and requiring a high degree of proof of intent is a good way to ensure this (as has happened in the case of English law). We would also add that the lower the requirement of intent, the greater the potential chilling effect in practice. It should not be made easy for police and prosecutors to silence those expressing awkward views with threats of prosecution on the lines of "It doesn't matter what you intended or what you think you meant: if we can show someone might be incited to hatred, you're guilty."

(d) We of course note the proposed defence of reasonableness in Cl.3(4), and are relieved that the burden on the accused is merely evidentiary, with the ultimate burden of proof on the prosecution. We nevertheless see this as an inadequate protection, for two reasons. One is that such an open-ended criterion is inappropriate to mark the boundaries of serious speech crime. It has to be remembered that if this legislation is enacted, most cases under it will be ultimately decided, not in the High Court after lengthy deliberation, but by busy Sheriffs and Sheriffs-depute, whose determination on matters of fact is likely to be hard in practice to appeal, and whose views may well differ considerably. This cannot be fair on the accused. The other reason is that bloggers and other publishers are unlikely to place much faith in it, and thus that in practice they are likely to play safe. It will thus have an untoward chilling effect on free and open speech

in Scotland.

(4) The new offences proposed are potentially extraordinarily wide. Take, for example, material likely to stir up hatred on the ground of disability, the latter being defined in Cl.14 as "physical or mental impairment of any kind" and including any "medical condition which has (or may have) a substantial or long-term effect, or is of a progressive nature". Alcoholism is a medical condition with substantial long-term effects. It is thought that in Scotland about 24% of the population drink at hazardous or harmful levels. A broadly similar percentage of the population is thought to have mild mental health issues, with anxiety and depression being the most common. If someone was called "mad", would a crime have been committed? Would it be a crime for someone to suggest that those with alcohol-related illnesses cost a great deal more to the NHS to treat than those without them, if those with alcohol issues felt that the statement was abusive and caused them hurt?

(5) Any extension of stirring-up offences to speech merely likely to lead to hatred will inevitably have a chilling effect on what people feel safe in saying, especially online in blogs and social media, and lead to a degree of self-censorship. In the nature of things popular discussion of this kind involves strong views and strong propensities to take offence. Faced with a report from an alleged victim who takes exception to what has been said, members of Police Scotland – stretched at the best of times – simply do not have the time to make measured judgments of what is or is not appropriate. Instead, they will in practice (one suspects) have a word with the publisher, mention that an offence may have been committed – however innocent his or her intent – and ask them to take the material down. Anyone choosing to argue the toss will be reminded that they face arrest, with a possible search of their house and seizure of computers or other material in it. Faced with this, most will play safe. This large extension of self-censorship we see as very worrying.

(6) As the Committee will be aware, the proposed stirring-up offence as drafted would be far more extensive than that obtaining in England. This again we see as potentially problematic. Neither the Internet nor

the book and magazine trade stops at the Tweed. Are we now to see bloggers publishing in England material entirely lawful there threatened with being made the subject of a complaint in the Glasgow Sheriff Court on account of their readership in Scotland? Again, we see it as conceivable that English publishers of books and magazines may be unwilling to deal with potential buyers or subscribers in Scotland if they know that they or their Scottish distributors may fall foul of the vastly more draconian provisions in that jurisdiction by reason of distribution there.

D. The possession offence – Cl.5(2)

12. It is proposed that there should be an offence – again punishable with seven years' imprisonment – of possession with a view to communication to anyone else of any material likely, if communicated, to cause hatred in respect of any of the protected characteristics. This proposed possession offence, which directly impinges on freedom to speak and to receive and discuss ideas, is incredibly wide, and objectionable on a number of grounds:

    (1) First, possession remains criminal even if with a view to entirely private communication. It seems to follow that a wife who downloads objectionable material about, say, transgender people onto the family laptop with a view to sharing it with her husband on his return from shopping potentially becomes liable by so doing to up to seven years' imprisonment. This cannot be right. We note that the equivalent English provisions refer to communication to the public, or a section of the public.

    (2) As drafted, the offence under Cl.5 covers material likely to give rise to hatred if communicated to anyone at all, apparently without reference to the person to whom communication is in fact intended. So in our above example, the wife's action remains criminal despite the fact that the material would in fact have had no effect whatever on the husband and no communication to anyone else was intended. Again, this contrasts with the English legislation, which specifically requires regard to be had to the actual communication envisaged.

    (3) We equally think that in this respect the reasonableness defence is a wholly inadequate protection. This is partly for the reasons stated above

in connection with the stirring-up offence, but the point goes further. People should be allowed to make up their own mind on matters covered by this legislation, and for that purpose to discuss it with others, without having the additional difficulty of only being allowed to do so in so far as it is reasonable.

E. The freedom of speech protections – Cls.11, 12

13. We note, with some satisfaction, that in two cases a freedom of speech defence of sorts is to be provided. With religion, behaviour is not to be taken to be threatening or abusive solely because it involves or includes discussion or criticism of religion, religious beliefs or practices, or proselytising, or encouraging persons to cease practising their religion (Cl.11). So too with sexual orientation: behaviour is not to be criminalised solely because it involves discussion or criticism of sexual practices or the urging of people to alter or abstain from them (Cl.12). Our view, however, is that even assuming, contrary to our argument above, there is a case for regulation of speech in these areas, these protections are far too narrow. Our reasons are these:

    (1) The protection is limited to religion and sexual orientation. We see no reason why discussion of all the protected characteristics should not be put on a similar footing. Take, for example, a hard-hitting but reasoned article suggesting that there is nothing wrong with the practice of "dead-naming" a person who has undergone gender reassignment. Members of the Committee may well disagree with such sentiments, but we see no reason why such an article should be any more potentially criminal than its equivalent on the subject of Islam or homosexuality.

    (2) We are worried by the effect of the word "solely", which very considerably constricts the defence. Of course sober academic discussion of these matters must be allowed; but in the nature of things popular argument is rather different. Suppose, for example, that a trenchant critic of Islam refers to the morals of the prophet Muhammad in highly vituperative terms and suggests that modern-day Muslims engage in disgusting practices as a result. Alternatively, suppose a commentator suggests (as well-known atheist Richard Dawkins did in 2013) that a well-respected Islam-

ic journalist is both stupid and incompetent if he is credulous and naive enough enough to believe that the prophet flew to heaven on a horse with wings. Yet again, imagine a Muslim critic of Christianity who argues that the failure of leaders of that religion to put adequate restraints on women or on the practice of gay sex causes the behaviour of Christians and their society to be an abomination. In all these cases it is arguable that there would be no defence, since what was said strictly went beyond, and therefore did not consist solely in, discussing the merits of the relevant religion, sexual practice, etc. Such statements may be fantastic and may well offend many. But in our view they should be outside the purview of the criminal law.

Summary

14. In short, our view is that, apart from the proposal for the abolition of blasphemy, no remotely convincing case has been made for the severe restrictions proposed by this bill on the freedom of the people of Scotland to discuss and deliberate matters of importance to Scottish society generally. We would urge the Committee to think again.

The Free Speech Union
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