

# Hate Crime and Public Order (Scotland) Bill

## Briefing for stage 2

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The Equality Network and Scottish Trans Alliance hope that this briefing will be of value to members of the Justice Committee. We have focussed on amendments that have a particular effect on the way the bill deals with hate crime affecting LGBTI people (ie, the protected characteristics of sexual orientation, transgender identity, and variations in sex characteristics). For that reason, we have only commented on some of the amendment groups, in the order in which they will be debated.

### **Freedom of expression**

We strongly support the principle of amendment **103**. We think that the right approach to ensuring freedom of expression in the bill is a general freedom of expression provision that covers the stirring up hatred offence generally, rather than singling out certain protected characteristics. That would avoid creating a situation, as the bill currently does (and as the government's freedom of expression amendments do), where some protected characteristics, including sexual orientation and transgender identity, are singled out as being more acceptable to criticise.

Regardless of the strict legal meanings of the legislation, the words used in this bill will have a profound effect on both potential perpetrators of hate crime and on potential victims. Singling out some groups for specific freedom of expression provisions will be interpreted by some as indicating that it is more acceptable to behave badly towards those groups. This will have a chilling effect on the confidence of LGBTI people in the Scottish Parliament's intention to protect them from hate. It could also embolden potential perpetrators by reinforcing the idea that LGBTI people are less valuable.

However, we think that amendment 103 does not quite work, as currently worded. Subsection (1) would apply to the whole Act, including

the statutory aggravation, the consolidated version of section 50A, and the stirring up hatred offences. It would prevent any of the hate crime provisions in this bill from being applied to anything that could be claimed to be “criticism” related to a protected characteristic. That would be the case even if the criticism was expressed in a criminal way, for example abusively and with the intention of stirring up hatred, or in the form of racist abuse in the street, or as graffiti vandalism. The provision needs to be worded along the lines of “...solely because it involves or includes discussion or criticism...”.

We would welcome further consideration of an amendment like amendment 103, at stage 3. And for those reasons, we do not think that the government’s amendments **65** (age) and **82** (transgender identity) are a satisfactory solution.

Even worse is the “laundry list” approach taken by existing section 12 and amendments 81 and 82B.

In our view, the existing section 12 is seriously flawed. Firstly, it could be interpreted by some as giving a green light to conversion therapy (“urging of persons to refrain from or modify sexual conduct or practices”). We think that language needs to be removed. We also think that the “laundry list” approach to freedom of expression is the wrong approach, as it singles out particular subjects for discussion or criticism.

The approach is flawed in part because it is impossible for a single piece of legislation to comprehensively list all things that are not criminal. Trying to do so is contradictory to the general concept that the criminal law is designed to articulate what behaviour is not allowed in our society.

Out of necessity, hate crime legislation challenges behaviours that are hurtful and distressing to the communities it is intended to protect. Frequently, “laundry lists” of protected speech are used to undermine the impact of the laws. We do not want to see this bill undermined in that way.

Whatever the formal legal effect, the impression given is that discussion or criticism of the subjects in the “laundry list” is approved of, and so it is likely to be encouraged. That could increase discrimination, and could cause people to fall foul of other law. For example, if someone thought that section 12 gave them the green light to criticise a work colleague’s same-sex relationship or to urge them to end the relationship, an

employment tribunal case could result, and find unlawful sexual orientation harassment in breach of the Equality Act.

Amendment **117** would take the same approach to sexual orientation as amendments 65 and 82 take to age and transgender identity. While that would be a significant improvement on the existing section 12, because it would remove the “laundry list”, including removing the language related to conversion therapy, as noted above we think the best approach would be a general freedom of expression provision somewhat similar to amendment 103.

We strongly oppose amendment **81**, and ask members to reject it. It would add to the “laundry list” in section 12, and suffers from all the same disadvantages of encouraging discrimination and potential breaches of the Equality Act provisions on harassment.

For the same reasons, we strongly oppose amendment **82B**, and ask members to reject it. Again, this introduces a “laundry list”, and whatever the legal effect, the impression given is that such discussion or criticism is approved of, and so it is likely to be encouraged. That could increase discrimination, and could cause people to fall foul of other law such as the Equality Act. For example, if someone thought that amendment 82B (paragraph (e)) gave them the green light to deliberately use the wrong pronouns for a work colleague, an employment tribunal case could result, and find unlawful gender reassignment harassment.

We disagree with amendment **112**, and ask members to reject it. The amendment would mean that any behaviour that could be described as advocating for women’s rights could never constitute the stirring up hatred offence, even if it was framed in threatening or abusive terms, and was intended to stir up hatred. We believe that a general freedom of expression provision covering matters such as criticism of public policy (and perhaps advocating of rights generally) would be a guarantee of continued freedom of expression.

### **Characteristic of transgender identity**

We strongly disagree with the amendments in this group, and ask members to reject them. By replacing “transgender identity” with “gender reassignment”, amendments **104**, **107**, **109** and **113** would change the terminology that has been in use for 10 years under the existing statutory aggravation legislation. That existing legislation uses the term

“transgender identity”, and the police and other parts of the criminal justice system, and LGBTI people, are very familiar with that and what it means. To use “gender reassignment” in this bill would also be incompatible with the use of “gender reassignment” in the Equality Act 2010, which has a different definition of “gender reassignment”, has different scope, and is for different purposes (and is civil, not criminal law).

Amendment **114** would remove protection for crimes targeted at non-binary people and cross-dressing people. This would remove the protection for those people that has been in place for 10 years in existing hate crime law. It could also create a loophole which would undermine the protection for trans women and trans men also. A person accused of a transgender identity aggravated hate crime could say, “My motivation was that I disliked that person because I thought they were a cross-dresser. I did not know they were a trans woman [or trans man].” If the court accepted that that was their motive, amendment 114 would mean that the statutory aggravation could no longer be applied.

### **Characteristic of variations in sex characteristics**

We strongly disagree with the amendments in this group, and ask members to reject them.

Amendments **105** and **115** would remove protection for intersex people / people with a variation in sex characteristics (VSC) that has been in place under the existing statutory aggravation legislation for 10 years (as “intersexuality”, in section 2(8)(a) of the Offences (Aggravation by Prejudice) (Scotland) Act 2009).

Amendments **106**, **108**, **111** and **116** would change the language from “variations in sex characteristics” to “differences in sex development”, something that groups run by people with VSCs have told us that they oppose. For example, Icon UK told the Committee in stage 1 written evidence that research in Australia found that only 3% of people with intersex traits used terminology like DSD, and mostly only in medical settings. A similar view was expressed in written evidence from Klinefelter’s Syndrome Association UK, and from the Adult Support Co-ordinator at the CAH Support Group.

(Amendment 110 is moot if the Committee agrees to amendment 19 to remove section 5 of the bill).

## **Disaggregation of data relating to hate crime**

We strongly support government amendment **99**. We would like the detail of what disaggregated data is required to be collected to be considered further at stage 3. We are concerned that some of the specific data that must be collected under the amendment as it stands might not be fully fit for purpose. In addition, we would like to see a requirement to publish data by police division, to provide information on the extent of hate crime in different parts of Scotland.

## **Threshold for, and operation of, offences relating to stirring up of hatred**

We ask members to support the government amendments in this group, which would ensure that an objective definition is applied for elements of this offence, including for the meaning of the term “abusive”.

We ask members to reject amendments **39A, 9, 40A, 10, 18, 25** and **27**, which would remove “abusive” from the stirring up hatred offence, for protected characteristics other than race. Government amendments in this group will ensure that “abusive” is interpreted objectively.

Hate crime legislation is intended to combat the genuine harm caused to affected communities by the behaviours covered in the law. Restricting the coverage of the offence only to behaviour that is threatening would narrow the scope to exclude behaviours that cause as much or more harm than directly threatening behaviour.

As we noted in oral evidence, the kind of grossly abusive graphic material produced about Jewish people by the Nazis illustrates that the intentional stirring up of hatred can be done by material that is not in itself explicitly threatening.

It is easy to visualise scenarios of abusive behaviour intended to stir up hatred that a competent defence lawyer could argue do not constitute a direct threat. Yet abusive behaviour of this sort can stir up hatred just as much as direct threats.

We ask members to reject amendment **17**, which would delete the stirring up hatred offence entirely.

## **Stirring up hatred offence: characteristics**

We strongly oppose amendments **14**, **15** and **16**, and ask members to reject them. These amendments would remove the characteristics of sexual orientation, transgender identity, and variations in sex characteristics from the stirring up hatred offence. All protected characteristics should be afforded the protection of this provision.

The bill as it stands rightly extends protection against stirring up hatred to all groups covered by the statutory aggravation in section 1. This approach is consistent with the principle that Scotland is a diverse society in which all people are protected under the law. Amendments **14**, **15** and **16** would be a stark statement that the Parliament believes that LGBTI people are less valuable than the other people covered by this bill. This would represent a reversal of many decades of progress in Scotland.

## **Characteristic of sexual orientation**

We strongly disagree with the amendments in this group (**90**, **91**, **99B** and **99C**), and we ask members to reject them. The existing language in the bill, “persons of a different sex”, is consistent with other Scottish legislation over the past decade, including the equal marriage legislation (Marriage and Civil Partnership (Scotland) Act 2014) and equal civil partnership legislation (Civil Partnership (Scotland) Act 2020). Changing the language to “opposite sex” would be inconsistent with all other recent Scottish legislation.

It is likely also to mean that the statutory aggravation could not be applied where a sexual orientation hate crime was committed against a person because they are in a relationship with a non-binary person (that is, because their partner is presumed to be neither of the same sex nor of the opposite sex as them, but of a different sex). It is important to bear in mind that what matters for the application of the statutory aggravation is the motivation of the attacker, and what the attacker presumes the sexual orientation of the victim is. The actual identity or legal sex of the victim or their partner is not relevant.