

Hate Crime and Public Order (Scotland) Bill

Briefing for stage 3 on 10th March 2021

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The Equality Network works for equality for lesbian, gay, bisexual, and trans people, and for people who have a variation in sex characteristics / people who are intersex. The Scottish Trans Alliance works for equality for trans people.

We hope that this briefing will be of value to members of the Scottish Parliament. As has been highlighted in a number of forums since Lord Bracadale's inquiry first began in 2017, Scotland's existing law on hate crime is inconsistent across the various characteristics, is spread across a number of different pieces of legislation, and is in serious need of updating so that it remains fit for purpose. As we set out at the end of this briefing, passing this bill is very important for people in LGBTI communities to continue to believe that the Scottish Parliament, and Scotland as a whole, is a place where we are valued and where we can feel safe to live our authentic lives.

Amendments

Group 1: Characteristic of sex

We strongly support the introduction of better legislation for tackling women's experiences of sexism, misogyny, harassment and abuse. We are aware that there is a difference of views as to how best to accomplish this.

We are not experts in this field and we defer to the expertise of those who are. We therefore support the recent establishment of the Working Group on Misogyny and Criminal Justice chaired by Helena Kennedy QC, to investigate and determine the best way to legislate on this. We believe that this Working Group gives Scotland the opportunity to have world-leading legislative provision in this area.

We call on the next Scottish Government to facilitate the speedy work of that Working Group, and call on all parties to commit to rapid implementation of the recommendations once the Working Group reports.

We therefore urge members not to support this group of amendments, but instead to support the work of the Working Group, and rapid implementation of its recommendations.

Group 2: Threshold for, and operation of, offences relating to stirring up of hatred

We welcome the extension in the bill of the existing offence of stirring up racial hatred, to cover the other protected characteristics. We note that one of the primary motivations for updating of Scotland's hate crime laws, as expressed in Lord Bracadale's report and the policy memorandum that accompanied this bill, was that existing hate crime protections are inconsistent across the various characteristics. Part 2 of the bill, while not making everything identical for each characteristic, goes a long way towards bringing consistency in the approach to hate crime.

Amendments 6 to 10, 15 and 31 would delete Part 2 of the bill, removing the offence of stirring up hatred, as it applies to all the characteristics except race. This would directly undermine one of the main improvements provided by this bill, to those it is intended to protect.

We would not expect the stirring up hatred offence to be prosecuted often. But it is important that it is available when needed.

In England and Wales, there have been three prosecutions and convictions for the offence there of stirring up hatred on grounds of sexual orientation, in the past decade. In one case, leaflets were put through people's letterboxes in Derby. On one side, the leaflet had an image of a mannequin being hanged, and on the other side, the leaflet said that the only debate about homosexuality was how to carry out the execution, and called for the death penalty. This was clearly threatening, and intended to stir up hatred.

We should not assume that such a case could not happen in Scotland. And it could happen targeted at other protected characteristics such as transgender identity or religion. Part 2 of the bill is therefore vital and should remain in the bill.

We therefore strongly oppose amendments 6 to 10, 15 and 31, and urge members to vote against.

Group 3: Freedom of expression

We strongly support freedom of expression. The stirring up hatred offence is intended to deal with the kind of cases mentioned above, not to limit legitimate debate, or behaviour that is simply considered by many to be offensive or unpleasant.

The threshold of the stirring up hatred offence sets a high bar. It criminalises only behaviour that is objectively threatening or abusive, and is intended to stir up hatred. That is not a threat to free speech. However, we recognise that many wish to include in the bill a provision that reassures that the freedoms of expression provided by Scotland's democratic culture, and by the European Convention on Human Rights, are not affected by the bill.

Throughout the debate on this legislation it has been widely agreed that the most important element for the protection of freedom of expression is to get the threshold of the offence right. We believe that the bill as amended at stage 2 achieves this goal. Any freedom of expression provision is therefore primarily symbolic, and its purpose is to send the message that the Scottish Parliament supports free speech. It is because of this symbolism that it is very important that the messaging in the provision does not send any unintended messages that the Scottish Parliament explicitly endorses any form of speech that would undermine equality and dignity for any part of society.

We support amendment 1. This amendment adds reference to the European Convention right to freedom of expression. While Convention rights apply of course to all criminal cases, additional reassurance is provided by this amendment. Amendments 2 and 3 are alternatives to amendment 1, but in our view the direct reference to the Convention in amendment 1 is preferable.

We support amendment 11. This amendment was developed through extensive discussion at the Justice Committee, both at stage 2, and at an evidence session after stage 2. The amendment replaces the two freedom of expression sections currently in the bill with a section that applies to all the characteristics.

The amendment gives reassurance that legitimate comment, criticism and debate would not fall foul of the offence. That would include the examples that have been raised during debate on the bill, such as opposition to proposed reforms to gender recognition law.

Of course, if such comment was couched in objectively threatening or abusive terms, and it was done with the intention of stirring up hatred, it would still constitute the offence. The purpose of the freedom of expression provision is to provide reassurance, and to avoid self-censorship of legitimate free speech, not to carve a hole in the stirring up offence.

Singling out some of the characteristics only, as the government's withdrawn stage 2 amendments did, sends a strong message that those characteristics, and the people who have them, are more worthy of criticism. If the purpose of the freedom of expression provision is to give reassurance that the new stirring up hatred offence will not curtail legitimate free speech about the characteristics, it should cover all of the new characteristics that are being added to the offence. Freedom of expression is a general right applying to all subjects.

Amendment 11 applies in the same way to all the characteristics added by the bill to the stirring up hatred offence, except religion. The special provision for religion was supported by all of the religion and belief representatives at the Justice Committee's session on this amendment. In contrast, the representatives from the other characteristics all opposed such special provision for their characteristics.

Amendment 11 would replace section 12 of the bill, which singles out sexual orientation. We welcome this, as section 12 is very problematic. It runs the risk of increasing discrimination, and could cause people to fall foul of other law. For example, if someone thought that section 12 of the bill gave them the green light to repeatedly criticise a work colleague's same-sex relationship or urge them to end the relationship, an employment tribunal case could result, and find unlawful sexual orientation harassment in breach of the Equality Act.

Similarly, section 12(2)(b) of the bill has been widely read as giving encouragement to conversion therapy. Conversion therapy (the attempt to change a person's sexual orientation or gender identity) is condemned internationally, and, we think, by the large majority in this Parliament and in the country.

We therefore support amendment 11 (and accompanying amendments 13, 14, 16, 17, 19, 20 and 21) **and we urge members to support these.**

We disagree with the amendments that have been proposed to amendment 11 (amendments 11B to 11G) **and we ask members not to support them.** This is for the following reasons.

Amendment 11G would be unnecessary if amendment 1 is agreed, because amendment 1 explicitly refers to the application of the Convention right of free expression to the expression of information or ideas that offend, shock or disturb. That is a more expansive provision than amendment 11G, which only covers offensive discussion or criticism.

We oppose amendment 11B. Amendment 11 already covers all discussion or criticism of any matters relating to any of the characteristics. Amendment 11B seeks to add into the bill an unnecessary “laundry list” of matters relating specifically to transgender identity. This includes propositions that fundamentally undermine trans people’s long-established Convention right to be legally recognised in their transitioned gender. Gender recognition has enabled trans women to be legally recognised as women for all purposes since 2004, and that recognition has been in place for much longer in many areas (eg, obtaining a new passport, driving licence, medical records, etc).

People should be free to discuss or criticise this fundamental human right, without being criminalised (unless it is done in an objectively threatening or abusive way, and intended to stir up hatred). Amendment 11 already provides this reassurance. But to add into legislation a list of “approved” statements that include attacks on the fundamental rights of one group of people is entirely wrong. It says that trans people’s rights are open season for attack, and it would completely undermine the message that the bill otherwise provides, that people with the characteristic are valued as part of Scottish society.

In addition, expression of views listed in amendment 11B could constitute a civil wrong under the Equality Act 2010. For example, repeatedly asserting to a trans woman work colleague that they are not a woman would constitute unlawful harassment under the Equality Act. It is important that the freedom of expression provision in this bill does not inadvertently give people the impression that such unlawful acts now have impunity.

We oppose amendment 11C. Amendment 11 already covers discussion or criticism of all matters relating to the characteristics, and those matters obviously include related beliefs or practices. Because of its placement after line 17 of amendment 11, amendment 11C would also explicitly approve “expressions of antipathy, dislike, ridicule or insult” towards beliefs and practices related to all of the characteristics.

People with these characteristics, for example trans people and disabled people, are already frequently subjected to antipathy, dislike, ridicule or insult because of their characteristic, something that is inherent to their identity.

Antipathy, dislike, ridicule or insult is directed at people with these characteristics often on a daily basis, and has a devastating impact on people’s lives, for example making them fear to step outside their home. It would be entirely wrong to place a provision in the bill that could encourage that behaviour. To do that would undermine the whole purpose of the bill, which is to provide some protection to people who are subject to such behaviours. It could also encourage breaches of the Equality Act provisions on unlawful harassment.

In addition, for people with these characteristics it is easy to visualise circumstances where ridicule or insult could become threatening or abusive, and such a provision risks blurring the line between what is criminal and what is not to a degree that seriously undermines the application of the stirring up offence to those characteristics.

We oppose amendment 11D. This is a very wide blanket provision that would apply to the whole Act, including the statutory aggravation in part 1, and the offence of racially aggravated harassment in part 1A. It is completely unnecessary, because the bill specifies things that a person should not do – the bill does not require anyone to profess anything, or to use any language. The amendment could also inadvertently encourage breaches of the Equality Act, by signalling for example that a person is free not to treat LGBT work colleagues with dignity and respect, if they do not believe that LGBT people deserve dignity and respect.

We oppose amendment 11E. There has been lengthy debate on the freedom of expression provision in this bill, both at the Justice Committee and more widely. Amendment 11 was developed through this debate. We do not see any value in a secondary legislation power to change amendment 11 in future. It would be wrong to give the

government the power to do that via a procedure that would involve far less public and parliamentary debate than there has been for this bill.

We oppose amendment 11F, for the same reasons as amendment 11C above. Amendment 1 already covers information and ideas that offend, shock or disturb. As explained above, we consider that writing into the bill approval of “antipathy, dislike, ridicule and insult” of people with characteristics such as disability, sexual orientation or transgender identity, or people who have a variation in sex characteristics/people who are intersex, is completely inappropriate.

Group 4: Characteristic of sexual orientation

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 “persons of the other 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 other sex to 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.

Non-binary people are explicitly included in the transgender identity characteristic in the bill, and it is consistent, and important, that their relationships are also included in the sexual orientation characteristic.

We therefore strongly disagree with the amendments in this group (35, 36, 39 & 40), and we ask members to vote against them.

Group 5: Characteristic of transgender identity

Amendments 37 and 41 would remove protection for crimes targeted at cross-dressing people. This would remove the protection for those people that has been in place for 10 years in existing hate crime law. The bill should not be removing established protections. The amendments 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 use the excuse, “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 37 would mean that the statutory aggravation could no longer be applied.

We therefore strongly oppose amendments 37 and 41, and urge members to vote against them.

Group 6: Reports relating to hate crime

Behaviour motivated by hatred towards various historically marginalised groups not only harms those groups but tears at the fabric of Scottish society as a whole. The part of that behaviour which rises to the level of criminality represents only the tip of the iceberg of harmful behaviour. In order to improve the lives and experiences of those affected by hate crime, interventions must be created that address this underlying behaviour. To effectively develop these interventions, the Scottish Government and relevant stakeholders need as much information as possible on the hate crimes reported to the police and on prosecutions and case outcomes.

This set of amendments set reasonable expectations on Police Scotland and the Scottish Government to collect and disseminate the relevant data.

We welcome the amendments in this group (12, 23, 24, 25, 27, 28 and 29) and urge members to support them.

Group 7: Characteristic of age

With regard to amendment 42, while we agree that it will be very important for the Scottish Government to raise awareness of the new stirring up

hatred offence, this is needed for all the protected characteristics, not just for age. We would like to see the government commit to doing that. Because amendment 42 covers only one of the six characteristics, age, it would not be effective in ensuring that.

Debate on the bill

LGBT people repeatedly tell us that hate crime is one of their biggest concerns. In our 2017 survey of over 1300 LGBT people, we found that **60% of LGB people, and 80% of trans people, had personally experienced hate crime**. Nine in ten of those had experienced more than one hate crime, and shockingly, 30% had experienced more than ten incidents. The most common incidents included threatening and abusive behaviour, physical assault, and sexual assault.

But hate crime is not about statistics, it is about people: the people who have been historically harmed by hatred directed at them for nothing more than being who they are. Equality Network and Scottish Trans Alliance regularly engage with LGBTI people across Scotland who tell us disturbing stories of their experiences of hate.

Here are some examples from our most recent report on the experiences of LGBTI people in rural Scotland:

I have been surrounded and spat upon, then knocked to the ground.

Bisexual Man, 65-74, Clackmannanshire

Another person reported experiencing ... ***Homophobic bullying at school. Kicked, punched, spat on, [and] pushed. [It] drove me to attempt suicide.***

Gay Man, 16-24, West Dunbartonshire

A trans woman reported ... ***Rampant harassment, windows being smashed in – one attack in particular was so close to causing me serious harm since someone threw half a breezeblock through the living room window and I was sitting right under the window doing some reading. If I hadn't had the gut feeling to move quickly it would have hit me. I've been dead-named and misgendered often and targeted by transphobics far too often.***

Trans Woman, 35-44, Aberdeenshire

Another trans woman ... ***Had eggs thrown at me from a passing car & been hit with a full beer can while at a train station. [I was] Threatened with a lock knife.***

Trans Woman, 55-64, West Dunbartonshire

We strongly urge MSPs to remember that these are the people for whom this bill is most important. They are not a philosophical concept; they are real and these kinds of things hurt them deeply.

Crown Office statistics show that 1486 crimes aggravated by sexual orientation prejudice, and 41 aggravated by transgender identity prejudice, were reported to procurators fiscal in 2019-20. The numbers have been rising. These crimes cover the whole range of offences, from threatening or abusive behaviour (for example physically threatening someone in the street), through to the most serious crimes. Scottish Government homicide statistics show there have been seven homophobic homicides in the past decade.

We also know from our survey work that the majority of hate crimes are not at present reported to the police. **71% of LGBT people told us they did not report the hate crime they experienced to the police**, even if they had experienced multiple incidents.

As noted above, which stage 3 amendments are agreed is crucial to ensuring that the benefit of this bill is not undermined for LGBTI people.

With the right stage 3 amendments, this bill will be a significant step forward. It will underpin work to better deal with hate crime and to encourage reporting. And, again with the right stage 3 amendments, the bill will reaffirm that all sections of society deserve to be treated with respect and are valued as part of society.

We therefore urge members to vote for amendments that reaffirm this and do not undermine it, and then to support the passing of the bill as amended.