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# Hate Crime and Public Order (Scotland) Bill: Consideration prior to Stage 3

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This Scottish Government Bill seeks to modernise, consolidate and extend hate crime legislation. It is due to be debated at Stage 3 on 10 March 2021. The main issues considered at Stages 1 and 2 are outlined in this briefing.



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# Executive Summary

Hate crime legislation in Scotland currently comprises:

- statutory aggravations covering the hate crime characteristics of race, religion, disability, sexual orientation and transgender identity
- offences relating to stirring up racial hatred
- an offence of racially aggravated harassment.

Proposed changes in the Hate Crime and Public Order (Scotland) Bill include:

- changes to hate crime characteristics (e.g. amending the definition of transgender identity and adding age)
- replacing the existing statutory hate crime aggravations with ones covering the amended/expanded list of hate crime characteristics in the Bill
- setting out new offences relating to stirring up hatred that would apply to all the hate crime characteristics in the Bill (existing offences in this area apply to race only).

Much of the debate on the Bill has focused on how the proposed offences dealing with stirring up hatred might impact on freedom of expression. Relevant changes made to the Bill at Stage 2 included:

- amending the stirring up hatred offence applying to hate crime characteristics other than race, to require an intention to stir up hatred (a likelihood of hatred being stirred up would not be sufficient)
- removing proposed offences on the possession of inflammatory material.

There was also some strengthening, at Stage 2, of provisions in the Bill specifically seeking to protect freedom of expression in relation to religion. However, it was clear that there were still significant differences of view on what protections might be needed in relation to the other hate crime characteristics. Discussions on this continued between Stages 2 and 3, including at a round-table meeting of the Justice Committee involving stakeholders and the Cabinet Secretary for Justice.

Other significant areas of debate have included:

- whether sex should be added to the list of hate crime characteristics (the Bill does not do so but would allow the Scottish Government to add it at a later date by secondary legislation)
- whether the nature and extent of hate crime focused on race justifies having provisions in the Bill which differ from those applying to the other hate crime characteristics.

# Parliamentary scrutiny

The [Hate Crime and Public Order \(Scotland\) Bill](#) was introduced in April 2020 to modernise, consolidate and extend hate crime legislation. <sup>1</sup> It deals with the aggravation of more general offences by prejudice as well as specific hate crime offences.

The Parliament's Justice Committee was designated as lead committee for parliamentary consideration of the Bill. Its [Stage 1 report](#) was published on 10 December 2020. <sup>2</sup> In its report, the Justice Committee noted (para 388):

“ the strongly held views that have been expressed in relation to this Bill, particularly as regards the stirring up offences. We welcome the changes that the Cabinet Secretary has signalled he will make to this part of the Bill.”

With regard to the general principles of the Bill, the Stage 1 report said (para 390):

“ For some members of the Committee, support for this Bill will depend on whether the Scottish Government makes the further changes to the Bill needed to bring it into line with the recommendations we have agreed unanimously in this report. Subject to those amendments being made, the Committee recommends that the general principles of the Bill be approved.”

The Scottish Government provided a [written response](#) to the Stage 1 report on 14 December 2020. <sup>3</sup> It concluded by saying that (para 129):

“ The Scottish Government agrees with the overwhelming majority of the Committee's recommendations, and where we cannot immediately agree we are open to further consideration of these matters. I hope this response will enable members of the Committee to support the general principles of the Bill at stage 1.”

The Bill completed Stage 1 with the [Stage 1 debate](#) on 15 December, <sup>4</sup> following which the general principles of the Bill were agreed to (for 91, against 29, abstentions 1).

Stage 2 included consideration of amendments:

- requiring an intention to stir up hatred for the proposed offence applying to hate crime characteristics other than race
- expressly providing that an objective approach should be taken in applying the proposed stirring up offences (e.g. focusing on what a reasonable person would consider to be threatening or abusive rather than what a particular individual thought)
- removing proposed offences on the possession of inflammatory material
- bringing an existing offence on racially aggravated harassment into the Bill.

This was followed by publication of the [Bill as amended at Stage 2](#). <sup>5</sup> Stage 3 proceedings (final consideration) are scheduled to take place on 10 March 2021.

An earlier [SPICe briefing](#) provides additional information on the Bill as introduced. <sup>6</sup>

# Hate crime characteristics

## Overview

The Bill seeks to tackle crime involving hatred or prejudice towards people because of their race, religion, disability, sexual orientation, transgender identity, variations in sex characteristics or age (referred to in this briefing as 'hate crime characteristics').

It does this by setting out both statutory aggravations of more general offences, and specific stirring up hatred offences, covering the above hate crime characteristics. Most, but not all, of the characteristics are already covered by at least some hate crime legislation.

Relevant aggravations and offences (both current and as provided for in the Bill) are outlined later. This includes consideration of differences in the approach to some of the hate crime characteristics.

The rest of this part of the briefing focuses on the characteristics themselves. It highlights the main areas where:

- the Bill seeks to amend, or add to, existing hate crime characteristics
- the possibility of adding other characteristics has been considered during scrutiny of the Bill.

## Transgender identity

The Bill seeks to update the current definition of transgender identity used in hate crime legislation. Evidence to Justice Committee during Stage 1 scrutiny highlighted both support for and concerns about the proposed changes.

In part, concerns arose from the current debate over the definition of sex and women's rights. The Justice Committee's Stage 1 report (para 313) noted that:<sup>2</sup>

“ Some witnesses giving evidence to the Committee suggested that, because transgender identity is a protected characteristic under the Bill, campaigning that sex is immutable, could become caught by Scotland's new hate crime legislation. In their view, campaigning for a certain definition or understanding of what a woman is, or campaigning for particular women's rights to have a certain scope could run into problems under the Bill.”

Other witnesses, including the Cabinet Secretary for Justice, argued that the Bill would not affect debate in this way.

In its Stage 1 report, the Justice Committee accepted that the Bill is not meant to chill public debate in this area, whilst also highlighting that this must not be an unintended consequence. It considered this in the context of the proposed stirring up hatred offences, noting that the Scottish Government was planning to amend the Bill so that a crime is only committed where there is threatening or abusive behaviour which is intended to stir up

hatred. The Stage 1 report (para 320) went on to say that:<sup>2</sup>

“ Parliament will have to judge whether, in its view, these safeguards are sufficient to ensure that public and vigorous debate on matters such as gender recognition and women's rights can take place untouched by this Bill.”

During Stage 2 consideration on [2 February 2021](#),<sup>7</sup> Liam Kerr MSP lodged probing amendments which would have replaced the definition of transgender identity used in the Bill with a narrower one of 'gender reassignment'. He explained that (col 38):

“ I am probing the reason why the definition of 'transgender identity' in the Bill would not be aligned to the definition of 'gender reassignment' that is used in the Equality Act 2010. It seems to me that that would add clarity to the legislation, because it would point to a clear definition of whom the legislation is trying to protect.”

In response, the Cabinet Secretary for Justice said (col 39):<sup>7</sup>

“ The amendments in the group (...) would limit the protections provided in the Bill to male-to-female transgender people and female-to-male transgender people, excluding non-binary people and cross-dressers. I recognise that the term 'gender reassignment' is used in the Equality Act 2010, as Liam Kerr pointed out. However, it is important to note that the Act and the Bill serve very different purposes. In this instance, the amendments would have an adverse effect on the clear and inclusive definition that is currently used and proposed in the Bill for hate crime purposes.”

Relevant amendments were, after debate, withdrawn or not moved.

Protection for freedom of expression is considered later in this briefing.

## Variations in sex characteristics

The Bill seeks to replace the inclusion of 'intersexuality', as part of the definition of transgender identity in current hate crime legislation, with a separate definition of what it refers to as 'variations in sex characteristics'. The Bill's [Policy Memorandum](#) (para 204) explained that:<sup>8</sup>

“ it has become clear that there are concerns with listing 'intersexuality' as an aspect of transgender identity. Intersex and transgender identity are now widely understood to be two separate and distinct characteristics (intersex being a physical condition, or range of conditions, relating to biological characteristics, and transgender identity relating to a person's gender identity).”

The Justice Committee's Stage 1 report welcomed the separation of variations in sex characteristics and transgender identity, whilst noting that (para 330):<sup>2</sup>

“ The Committee has heard sharply contrasting views on whether variations in sex characteristics should be included in the Bill as a hate crime characteristic. This is an exceptionally sensitive matter, which Parliament will want to reflect on carefully as the Bill is debated further.”

There were different view on best terminology. Whether this is an area where hate crime

legislation should apply was also questioned in evidence. For example, it was argued that singling out a biological condition for hate crime protection might reinforce stigma and that what is really needed is better health (including mental health) support. On this issue, the Cabinet Secretary for Justice reflected that responding to hate crime in this area should be seen as something in addition to support for those dealing with relevant conditions.

Both issues (i.e. terminology and whether hate crime legislation should apply) were covered by Stage 2 amendments lodged by Liam Kerr MSP. He explained, during consideration of the amendments on [2 February 2021](#),<sup>7</sup> that he had lodged the amendments to further probe the Scottish Government's thinking in this area. Relevant amendments were, after debate, withdrawn or not moved.

## Age

Age is not one of the characteristics currently covered by hate crime legislation. The Bill seeks to add it.

Although much of the debate has focused on offending targeting older people, the provisions in the Bill are not limited to a particular age group. For example, they would also allow for the application of hate crime legislation where offending is motivated by prejudice towards younger people.

Differing views were expressed in Stage 1 evidence as to whether offending motivated by age hostility is a significant problem requiring age to be added to existing hate crime characteristics.

Stage 1 evidence also highlighted a distinction between offending motivated by hostility (or "malice and ill-will" in the language of the Bill) towards people of a particular age group and that which seeks to exploit perceived vulnerability. For example, the Justice Committee's Stage 1 report quoted evidence from the Crown Office & Procurator Fiscal Service (para 340):<sup>2</sup>

“ There is a distinction between offences which demonstrate hostility towards someone's age and offences where the accused has exploited someone because of their age and perceived associated vulnerability. The aggravation relating to age in the Bill captures the former but not the latter. Prosecutorial experience is that there are relatively few cases of age hostility.”

In its Stage 1 report, the Justice Committee asked the Scottish Government to set out its plans, outwith the current Bill, for dealing with the exploitation of people based on vulnerability. In the Scottish Government's written response to the Stage 1 report, the Cabinet Secretary for Justice stated (para 113):<sup>3</sup>

“ Having age as a characteristic within hate crime law and separately to seek to introduce at some future date new criminal law reforms in respect of vulnerability are of course not mutually exclusive as they would be seeking to achieve different policy intents. I very much consider this Bill is the place to add age as a characteristic into hate crime law and I am committed to explore whether changes in respect of vulnerability could be introduced in future legislation separate to hate crime law.”

During Stage 2 consideration on [2 February 2021](#),<sup>7</sup> Margaret Mitchell MSP (former Convener of the Justice Committee) lodged probing amendments which would have removed age from the list of hate crime characteristics. She reflected on the difference between offending motivated by age hostility and that seeking to exploit the perceived vulnerability of the victim; questioning the usefulness of reforms focused on the former. However, she explained that the purpose of lodging the amendments was to seek further information on what plans the Scottish Government had for tackling the exploitation of vulnerability. Relevant amendments were, after debate, withdrawn or not moved.

## Sex

Sex is not one of the characteristics currently covered by hate crime legislation. The Bill does not seek to add it, but would allow the Scottish Government to do so through the use of secondary legislation.

In outlining the Scottish Government's thinking, the Bill's Policy Memorandum highlighted the lack of support amongst some women's organisations for the use of a statutory hate crime aggravator to tackle misogyny. Those groups instead calling for a new offence of misogynistic harassment. The Policy Memorandum noted (para 240):<sup>8</sup>

“ Recognising that there is a clear need to tackle misogyny and gender based prejudice in Scotland, the Scottish Government is committed, in principle, to developing a standalone offence on misogynistic harassment and is establishing a Working Group to take this work forward. Provision is also included in this Bill for an enabling power to allow the characteristic of sex to be added to the hate crime legislative framework at a later date, after the Bill has passed if this is, for example, recommended by the Working Group.”

Differing views were expressed in Stage 1 evidence as to whether sex should be added to existing hate crime characteristics by the current Bill, rather than being left to a future decision. In its Stage 1 report, the Justice Committee noted (para 292):<sup>2</sup>

“ the strongly expressed views given to it on both sides of the argument as to whether sex should be included as a hate crime characteristic. Whilst the arguments are finely balanced, the Committee considers it might be wise to wait until the Working Group on Misogynistic Harassment has reported before Parliament considers legislating to add sex as a hate crime characteristic. The Committee calls on the Working Group to complete its work within a year.”

In relation to the potential use of secondary legislation to add sex to the other hate crime characteristics, the Stage 1 report said (para 306):

“ The Committee welcomes the recognition by the Cabinet Secretary that adding sex as a hate crime characteristic is a sensitive matter and would require the fullest possible parliamentary scrutiny. If the change is to be made by secondary legislation, the Bill should be amended to ensure this is done by a super-affirmative procedure.”

Information about the Working Group is available on the Scottish Government's website - [Misogyny and Criminal Justice in Scotland Working Group](#).<sup>9</sup> It is chaired by Baroness Helena Kennedy QC and is aiming to report its findings to the Scottish Government within

12 months.

Stage 2 amendments considered by the Justice Committee on [2 February 2021](#)<sup>7</sup> included one lodged by Johann Lamont MSP seeking to add sex as a hate crime characteristic for the purposes of the statutory aggravation provided for in the Bill. She withdrew the amendment following debate, noting that (col 36):

“ I propose that sex be included as a characteristic and that, if that would present problems for particular offences, the working group could address those problems. I accept that I have not persuaded all members of the Committee today, and I do not intend to press my amendments at this stage, although I expect that I will bring the matter back at stage 3.”

Other Stage 2 amendments included one, lodged by the Scottish Government, providing that the regulation making power to add sex as a hate crime characteristic would be subject to super-affirmative procedure. The amendment was agreed to.

## Other potential characteristics

The possibility of adding other hate crime characteristics was discussed during Stage 1 scrutiny of the Bill. These included:

- sectarianism
- Gypsy/Travellers
- asylum seekers and refugees
- homelessness.

The Justice Committee's Stage 1 report did not recommend amending the Bill to add new hate crime characteristics specifically covering the above areas.

In relation to sectarianism, it noted the assessment of various witnesses that "the current statutory aggravations in relation to race and religion are sufficient to address behaviours that are broadly understood to be sectarian in nature" (para 352).

With regard to Gypsy/Travellers, asylum seekers and refugees, the Stage 1 report noted evidence that they may be covered by the existing hate characteristic of race (which includes nationality and ethnic or national origins). However, it also sought reassurance from the Scottish Government that all of these groups could be adequately safeguarded from hate crimes under the current wording of the Bill. In its written response, the Cabinet Secretary for Justice stated that he could "provide reassurance to the Committee that these groups are covered within the Bill's definition of race" (para 108).

On the issue of homelessness, the Stage 1 report quoted evidence from the Cabinet Secretary for Justice (para 356):<sup>2</sup>

“ Hate crime and the protected characteristics that we have are different to the societal or socio-economic factors that can change over time. You and I have people who are homeless come to us regularly. We do our best to get them a house and a secure tenancy so that they can move on from that homelessness status. I cannot do that with my race or religion. It is difficult to do with a disability and so on. Socio-economic factors will often change so they are different to the protected characteristics.”

The Stage 1 report went on to note that (para 357):

“ The Committee is inclined to agree with the Cabinet Secretary that, notwithstanding the undoubted seriousness of crimes committed against rough sleepers, hate crimes are better understood as offences of prejudice than as offences relating to vulnerability.”

# Aggravation of offences by prejudice

Statutory hate crime aggravations allow for an offence, which seeks to protect people generally, to be marked as a hate crime and potentially result in a higher sentence. This may occur where the offender demonstrates, or is motivated by, malice and ill-will towards a group of people covered by a hate crime characteristic.

Existing legislation provides for statutory aggravations covering the hate crime characteristics of race, religion, disability, sexual orientation and transgender identity.

Sections 1 and 2 of the Bill seek to replace the existing provisions with ones which are broadly similar in the way they seek to protect people from hate crime. The new statutory aggravations would cover the full list of hate crime characteristics provided for in the Bill (i.e. race, religion, disability, sexual orientation, transgender identity, variations in sex characteristics and age).

The Justice Committee expressed support for the continued use of the statutory aggravation model in prosecuting hate crime, stating in its Stage 1 report (para 214) that it agreed with: <sup>2</sup>

“ the overwhelming majority of the evidence we heard that it is appropriate and effective to tackle hate crime through an existing baseline offence and the application of a statutory aggravation.”

It may be noted that the use of a statutory aggravator has been the most common way of dealing with the prosecution of hate crime in Scotland. Relevant figures are set out in the SPICe briefing on the Bill as introduced (under the heading of [Hate Crime Statistics](#)). <sup>6</sup>

One of the possible areas for improving this part of the Bill, considered during Stage 1, was whether some of the language used might be brought up to date without unintentionally changing the scope of the law. The Bill was amended at Stage 2 so that reference to an offender who 'evinces' malice and ill-will towards the victim was changed to one who 'demonstrates' this.

# Stirring up hatred offences

## Overview

The Bill as introduced provided for offences of stirring up hatred (section 3) and possessing inflammatory material (section 5). As discussed later, offences of possessing inflammatory material were removed from the Bill at Stage 2.

The proposed stirring up hatred offences cover all of the hate crime characteristics in the Bill - race, religion, disability, sexual orientation, transgender identity, variations in sex characteristics and age. Existing offences in this area apply to race only.

The prosecution of stirring up racial hatred has been relatively rare when compared with the use of statutory hate crime aggravators. Relevant figures are set out in the SPICe briefing on the Bill as introduced (under the heading of [Hate Crime Statistics](#)).<sup>6</sup>

Much of the debate on the Bill has focused on how the proposed offences dealing with stirring up hatred might impact on freedom of expression, particularly with regard to some of the characteristics which are not currently covered by stirring up offences. (The Bill's provisions dealing with the aggravation of offences by prejudice did not give rise to similar concerns about freedom of expression. Reasons for this include the fact that those provisions do not seek to create new offences. Rather, they allow for the aggravation of existing offences which are not limited to instances of hate crime (e.g. assault and breach of the peace).) In its Stage 1 report, the Justice Committee noted that (para 54):<sup>2</sup>

“ Central to the Committee's scrutiny of this Bill is the need to balance the rights of individuals to be protected from being subjected to threatening or abusive behaviour and the rights of individuals, the press and religious groups to express themselves freely, without fear of investigation or criminality.”

It also noted that (para 44):

“ The Committee agrees that the right to freedom of speech includes the right to offend, shock or disturb. The Committee understands that this Bill is not intended to prohibit speech which others may find offensive, and neither is it intended to lead to any self-censorship. The Committee is anxious to ensure, however, that these are not unintended consequences of the Bill.”

In the Scottish Government's written response to the Stage 1 report, the Cabinet Secretary for Justice said (para 3):

“ I too believe people's right to offend, shock or disturb should not be infringed, and I am confident this Bill gets the balance right between protecting these vital freedoms and protecting people from hatred.”

Debate in this area led to some significant amendments at Stage 2 (discussed later).

The extent to which the provisions of the Bill may restrict freedom of expression depends on a number of factors:

- protection for freedom of expression provided for outwith the Bill - in particular article

## 10 of the European Convention on Human Rights

- provisions in the Bill expressly aimed at protecting freedom of expression
- the way in which the offences in the Bill are defined (e.g. whether the legal threshold for an offence of stirring up hatred requires that a person intends to stir up hatred).

In practice, there is also the possibility of freedom of expression being limited by a fear that something might lead to police investigation and possible prosecution even if, on the facts of the case, it is not criminalised by the Bill.

The protection of freedom of expression set out in article 10 of the [European Convention on Human Rights](#) applies irrespective of what is said in the Bill.<sup>10</sup> It states that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

As can be seen, the right is not absolute. It may be restricted by such laws as are necessary in a democratic society for a range of reasons, including protecting the rights of others.

Provisions in the Bill expressly aimed at protecting freedom of expression, as well as the way in which the offences themselves are defined, are discussed below.

## Express provisions on freedom of expression

Two academics at the University of Glasgow were commissioned to provide the Justice Committee with a [report](#) outlining the approach to hate crime legislation in a range of other countries.<sup>11</sup> It indicated that (p 17):

“ Express protections for freedom of expression were relatively rare in the jurisdictions we reviewed, although the perceived need for such provisions is not a free-standing question and may differ depending on the breadth of the underlying offence.”

Of the jurisdictions that were reviewed, provisions seeking to protect freedom of expression were found in hate crime legislation in Canada as well as in England and Wales.

The Bill (sections 11 and 12) contains express provisions seeking to protect freedom of expression in relation to religion and sexual orientation. It does not include similar provisions relating to any of the other hate crime characteristics. In comparing the

provisions of the Bill as introduced with hate crime legislation relating to religion and sexual orientation in England, the above academic report noted that (p 18):<sup>11</sup>

“ The English offences concerning the stirring up of religious hatred and hatred on the grounds of sexual orientation include provisions protecting freedom of expression. While the present Bill does likewise (sections 11 and 12), different formulations are used. The English proviso regarding religious hatred expressly protects 'discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse', in contrast to the Bill's reference to 'discussion or criticism'. The English proviso regarding hatred on the grounds of sexual orientation is broadly similar to the Bill but with the addition of express protection for 'any discussion or criticism of marriage which concerns the sex of the parties to marriage'.”

Issues considered during Stage 1 scrutiny of the Bill included:

- whether the provisions on religion and sexual orientation needed strengthening
- whether similar provisions seeking to protect freedom of expression relating to some of the other hate crime characteristics should be added
- whether freedom of expression provisions relating to particular hate crime characteristics should be replaced or supplemented by more general provisions covering all characteristics.

The discussions sparked by the Bill suggest potential advantages and disadvantages of: (a) approaches which seek to protect freedom of expression in relation to specific characteristics; and (b) approaches which take a more general approach to multiple characteristics. For example:

- more focused provisions might be seen as providing greater public reassurance that debate relating to existing areas of public disagreement will not be unduly restricted (e.g. on religious beliefs or gender recognition)
- more general provisions might be seen as taking a more even-handed approach, which does not suggest a hierarchy of protection against hate crime and is less likely to leave potentially vulnerable groups feeling that behaviour, which is not criminal but is offensive, is being encouraged.

In its Stage 1 report, the Justice Committee referred to the need to strengthen the proposed protections in the Bill on freedom of expression. The Scottish Government's written response to that report said that it would seek to amend the Bill at Stage 2 to:

- strengthen the existing provision in the Bill relating to religion
- add specific protection for freedom of expression in relation to both transgender identity and age.

It also said that the Scottish Government would further consider whether there was a need to strengthen the existing provision on sexual orientation.

The Justice Committee's consideration of Stage 2 amendments began at its [meeting on 2 February 2021](#).<sup>7</sup> The first amendment to be debated (lodged by Liam McArthur MSP) sought to add a more general provision aimed at protecting freedom of expression in relation to all of the hate crime characteristics covered by the Bill. Although the

amendment was withdrawn after debate, the Cabinet Secretary for Justice indicated that the addition of a more general provision on freedom of expression now formed part of the Scottish Government's thinking.

The Cabinet Secretary also noted a lack of consensus on how to best protect freedom of expression, stating that (col 5):

“ Following discussions in recent days that have involved all of us who have lodged amendments on freedom of expression, I think that it is right that we should take time between stages 2 and 3 to reflect on the amendments and see whether we can develop a collaborative approach that produces a set of provisions that will command support across the board.”

In light of this, the Scottish Government withdrew proposed Stage 2 amendments seeking to add specific protection for freedom of expression in relation to both transgender identity and age.

There was support amongst Justice Committee members for seeking greater consensus on how to protect freedom of expression, including the possibility of adding a more general provision on the matter. And, various other amendments in this area lodged by members were also withdrawn (or not moved). However, there were also concerns. For example, the Convener commented that (col 14): <sup>7</sup>

“ If the challenge is to combat the problems of vagueness and over-breadth in criminal law, having a generic free speech provision, rather than a series of specific and carefully worded provisions, might not be the solution that some people seem to think that it is.”

Members also highlighted a need for transparency in any discussions on how protection of freedom of expression might be strengthened at Stage 3.

Unlike some other areas, there was more agreement on the desirability of Scottish Government amendments seeking to strengthen the existing freedom of expression provisions on religion. These included adding reference to "expressions of antipathy, dislike, ridicule or insult". Relevant amendments were agreed at Stage 2.

Consideration, between Stages 2 and 3, in relation to freedom of expression protections included a round-table discussion at a [meeting of the Justice Committee on 22 February 2021](#). <sup>12</sup> In addition to members of the Committee, it involved the Cabinet Secretary for Justice and representatives of various stakeholder groups.

In advance of the meeting, the Scottish Government produced [draft freedom of expression provisions](#) for the purposes of discussion. <sup>13</sup> In addition, the Justice Committee issued a [call for views](#). <sup>14</sup> The latter produced a large response despite a short timescale in which to do so. Responses to the call for views are available on the Committee's [web page for the Bill](#), <sup>15</sup> under the heading 'Stage 3'.

Discussion at the round-table meeting highlighted continuing differences of view amongst stakeholders in relation to what the Bill should say about freedom of expression. In particular, on whether there is a need to single out certain issues when seeking to protect freedom of expression (e.g. aspects of the current debate on gender recognition).

Following the meeting, the Cabinet Secretary for Justice [wrote to the Justice Committee](#) <sup>16</sup> outlining the Scottish Government's plans for further amending the Bill to protect freedom of expression.

In concluding the round-table discussion on 22 February, both the Cabinet Secretary for Justice and the Committee's Convener highlighted the importance of the wording of the offences themselves (amended at Stage 2) in protecting freedom of expression. For example, the Convener said (col 29-30): <sup>12</sup>

“ The way in which the scope of those offences has been narrowed and sharpened will do much more to protect and reassure than any formulation of words about freedom of expression, which is not to say that such a formulation of a freedom of expression provision in the Bill is unimportant. I do not think that; it is very important. However, although I said that today's conversation would be focused on the four options that the Cabinet Secretary put on the table, those are options to be inserted into a Bill that now looks very different indeed from the one that was introduced to Parliament a year or so ago.”

The wording of the stirring up offences is considered next.

## Stirring up hatred

The following focuses on the way in which the Bill seeks to create new offences of stirring up hatred in relation to the hate crime characteristics of religion, disability, sexual orientation, transgender identity, variations in sex characteristics and age. The provisions of the Bill on stirring up racial hatred are discussed under the heading of [Different Approach to Race](#).

In relation to the characteristics other than race, section 3(2) of the Bill [as introduced](#) provided that it would be an offence if:

- a person - (i) behaves in a threatening or abusive manner, or (ii) communicates threatening or abusive material to another person; and
- either - (i) the person intends to stir up hatred against a group of persons defined by reference to one of the characteristics, or (ii) it is likely that hatred will be stirred up against such a group.

During Stage 1 scrutiny of the Bill, the Scottish Government indicated that it would seek to amend the offence at Stage 2 to require an intention to stir up hatred (i.e. a likelihood of hatred being stirred up would not be sufficient for an offence). In general, evidence received by the Justice Committee welcomed this, although some also emphasised the need for further changes to better protect freedom of expression. The Justice Committee's Stage 1 report (para 70) noted that: <sup>2</sup>

“ Written evidence submitted to the Committee contained serious and widespread criticism of the scope of the new stirring up offences. As such, the Committee welcomes the Cabinet Secretary's proposal that the Bill be amended at stage 2 to make the stirring-up offences (other than as regards race) intent only.”

Relevant amendments were considered at the Justice Committee's [meeting on 9 February](#)

2021.<sup>17</sup> The Cabinet Secretary for Justice noted that the expansion of stirring up hatred offences to characteristics other than race had (col 7-8):

“ caused concern about the inadvertent impact that such offences could have on people's right to freely discuss controversial ideas.”

He went on to say that the amendments that he was now putting forward fulfilled the commitment he had made to require an intention to stir up hatred for those offences. The amendments were agreed to.

Another issue highlighted during Stage 1 consideration was whether references in the proposed offence to behaviour or material being 'abusive' would be interpreted objectively or subjectively:

- objectively - would a reasonable person consider it to be abusive
- subjectively - did a particular individual consider it to be abusive.

It was generally agreed that an objective interpretation would be appropriate. However, views of witnesses differed as to whether this was wholly clear from the terms of the Bill. In its Stage 1 report, the Justice Committee said that (para 105):<sup>2</sup>

“ it is important that the Bill makes it clear that, for the test of 'abusive' to be met, the Crown would be required to show that a reasonable person would consider the behaviour to be abusive.”

In the Scottish Government's written response to the stage 1 report, the Cabinet Secretary for Justice said (para 14):<sup>3</sup>

“ I can confirm the policy intent is for the court to reach an objective analysis as to whether behaviour is abusive (or threatening) and I can also confirm the test, as provided for in the Bill as it currently stands, is an objective test.”

Nevertheless, the Cabinet Secretary was persuaded to bring forward amendments at Stage 2 expressly stating that an objective approach should be taken - in relation to the interpretation of 'threatening' as well as 'abusive'. Relevant amendments were agreed to. Similar Stage 2 amendments expressly stating that an objective approach should be taken to the separate offence of stirring up racial hatred were also agreed to.

As a result of the amendments discussed above, section 3(2) of the Bill now provides for an offence where:

- a person - (i) behaves in a manner that a reasonable person would consider to be threatening or abusive, or (ii) communicates to another person material that a reasonable person would consider to be threatening or abusive; and
- the person intends to stir up hatred against a group of persons defined by reference to one of the characteristics.

Other amendments considered at Stage 2 included ones lodged by Liam Kerr MSP seeking to:

- remove the offence of stirring up hatred - the change proposed in this amendment would also have applied to the separate offence dealing with racial hatred

- reduce the scope of the offence so that it would apply to threatening behaviour or material only (removing references to 'abusive')
- add an exception for behaviour which takes place within a private dwelling.

The proposed amendments were not agreed to by the Justice Committee.

In relation to the possibility of a private dwelling exception, the Justice Committee's Stage 1 report had expressed concerns about the potential for prosecuting people over things said in private. However, it did not support an absolute defence (para 121):<sup>2</sup>

“ The Committee believes that there should not be an absolute defence against prosecution based on whether someone was inside a dwelling or not when it comes to words expressed, behaviour or the display of written material. However, care also needs to be taken that people are not investigated for, charged with, or prosecuted for, offences based on their personal views, however abhorrent others may consider them to be, if the expression of those views took place in a private space, such as their own house, and there was no public element.”

Whilst accepting that care should be taken in any investigation of a person for potentially committing a stirring up hatred offence, the Scottish Government's written response to the Stage 1 report reiterated its opposition to a general exception for behaviour in a private place.

At the Justice Committee's meeting on 9 February 2021, Liam Kerr argued that (col 18):<sup>17</sup>

“ The Government has been forced to make concessions throughout the process because the Bill as introduced failed to protect our right to freedom of speech. No concession has yet been made on the lack of a private dwelling exemption, but one needs to be made, because prosecuting people for stirring up hatred over a private conversation in their own home is a violation of privacy.”

In responding, the Cabinet Secretary said that he had given the possibility of a private dwelling exception serious consideration but that the proposed amendment was flawed. He suggested that (col 27):

“ You should ask those who have been victims of hate crime, assaulted due to the colour of their skin or their religion, or beaten up because they are gay whether they are comforted by the fact that the individual who stirred up hatred against them cannot be prosecuted because they did so in their own home. I think that they would receive no comfort from that whatsoever.”

As already noted, the proposed amendment was not agreed to.

## Public performance of a play

Under section 3 of the Bill, a person performing in a play may be found guilty of stirring up hatred under the same tests applying to other areas of activity.

Section 4 of the Bill as introduced set out additional provisions on stirring up of hatred during the public performance of a play. They dealt with circumstances in which the

criminal liability of a performer might be extended to a person who presents or directs a performance.

The provisions of section 4 were criticised during Stage 1 consideration, with some questioning why special rules for plays were needed. In its Stage 1 report, the Justice Committee noted (para 136):<sup>2</sup>

“ the strongly held views from the majority of witnesses that gave evidence to the Committee that section 4 of the Bill on culpability where an offence is committed during the public performance of a play was problematic and should be removed. We welcome, therefore, the Cabinet Secretary's commitment to lodge an amendment at stage 2 to remove this section. Had he not done so, we would have recommended its removal.”

A Scottish Government amendment to remove section 4 of the Bill was considered at the Justice Committee's [meeting on 9 February 2021](#).<sup>17</sup> The Cabinet Secretary for Justice noted that (col 13):

“ Having listened carefully to the evidence during the scrutiny of the Bill, I decided that the provision does not serve a useful purpose in singling out directors and presenters of plays in a way that is not done for other similar categories.”

He went on to say that he was satisfied that general criminal law rules dealing with situations where, for example, a person assists in the committing of an offence by another could be applied appropriately to allow the prosecution of those involved in offences of stirring up hatred.

The amendment removing section 4 was agreed to by the Justice Committee.

## Possessing inflammatory material

An existing offence of possessing racially inflammatory material is set out in section 23 of the Public Order Act 1986. The Bill [as introduced](#) sought to partly replace this with a similar offence on race. It did not seek to wholly repeal section 23 of the 1986 Act- instead leaving an amended offence dealing with matters covered by the reservation on broadcasting to the UK Parliament.

The Bill as introduced also sought to extend protection (in devolved areas) to the other hate crime characteristics covered by the Bill.

The proposed offences (in relation to race as well as the other hate crime characteristics) were removed at Stage 2, through an amendment lodged by Liam Kerr MSP deleting section 5 of the Bill, along with a series of consequential amendments lodged by the Scottish Government.

Schedule 2 of the Bill [as amended at Stage 2](#) still seeks to restrict the existing offence of possessing racially inflammatory material, set out in section 23 of the 1986 Act, to matters covered by the reservation on broadcasting.

In relation to the now deleted section 5 of the Bill, the Cabinet Secretary for Justice noted concerns about the provisions and concluded that such an offence was no longer needed.

He stated in the Scottish Government's written response to the Stage 1 report (para 38) that:<sup>3</sup>

“ The concerns that have been expressed have led me to re-assess the value of section 5. I have taken the view that the conduct which is criminalised by section 5 of the Bill can be covered to a significant extent by application of the general criminal law in relation to attempts to commit offences combined with the specific offences in section 3 of the Bill.”

## Police powers

Section 6 of the Bill deals with the circumstances under which a sheriff, or justice of the peace, may grant a warrant allowing the police to enter and search premises in connection with a suspected offence of stirring up hatred.

In its Stage 1 report, the Justice Committee said that it (para 161):<sup>2</sup>

“ believes that police powers to enter and search a person's premises or dwelling through a warrant are required, but must be clear, tightly defined and afford the necessary protections. The Committee calls on the Cabinet Secretary to reflect on the evidence we heard that further clarity would be helpful. The Committee also supports the call for consideration to be given to attaching a time limit on any warrants provided for in this Bill as is the case with some warrants issued for other purposes.”

Changes made at Stage 2 included ones set out in:

- amendments lodged by Liz Smith MSP providing that the powers granted under a warrant must be exercised by a police officer (in legal terminology a police constable) - the provisions of the Bill as introduced would also have allowed civilian members of police staff to do so
- a Scottish Government amendment adding a 28-day time limit to warrants granted under the section.

# Different approach to race

## Stirring up hatred

As already noted, there are differences in the way in which the Bill deals with stirring up racial hatred compared with the approach to the other hate crime characteristics.

In relation to race, section 3(1) of the Bill as amended at stage 2 provides for an offence where:

- a person - (i) behaves in a manner that a reasonable person would consider to be threatening, abusive, or insulting, or (ii) communicates to another person material that a reasonable person would consider to be threatening, abusive or insulting; and
- either - (i) the person intends to stir up hatred against a group of persons defined by reference to race, or (ii) a reasonable person would consider it likely to result in hatred being stirred up against such a group.

The above reflects changes made at Stage 2 expressly providing that an objective approach should be taken in applying the provisions (through reference to the 'reasonable person'). Similar changes were made at Stage 2 in relation to the stirring up offence applying to the other hate crime characteristics.

The offence dealing with race is wider in scope than that applying to the other hate crime characteristics:

- it covers insulting behaviour or material whilst the other offence does not - this difference existed in the provisions of the Bill as introduced
- it allows for a conviction based on a likelihood of hatred being stirred up without proof of intent to do so - the Bill as introduced allowed for this in relation to the other offence but was amended at Stage 2 to require intent.

With regard to the inclusion of 'insulting' for the racial hatred offence, the Justice Committee's Stage 1 report said (para 94):<sup>2</sup>

“ The Committee has heard strongly expressed views on both sides of the debate on whether the word 'insulting' should be removed from section 3(1)(a) of the Bill. At present, racial hatred will be provided for differently in the Bill compared with offences committed regarding the other protected characteristics. The Committee considers that crimes based on racial prejudice are abhorrent. Individual Members of the Committee are persuaded differently by the evidence heard on whether 'insulting' should be retained or removed.”

More generally, it noted that (para 267):

“ The Committee is of the view that there is a strong case to be made for treating race differently in relation to offences of stirring up racial hatred provided for at section 3(1)(b). The historic nature of racial hate crime and the relative volume of offences is justification for this approach.”

Dean Lockhart MSP lodged amendments at Stage 2 seeking to remove references to

'insulting' from the stirring up racial hatred offence. Relevant amendments were not agreed to.

## Racially aggravated harassment

Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 sets out an offence which may be used to prosecute:

- a racially aggravated course of conduct - where this amounts to harassment of a person and is intended to amount to harassment or occurs in circumstances where it would appear to a reasonable person that it would amount to harassment
- individual racially aggravated acts - which cause, or are intended to cause, a person alarm or distress.

Equivalent offences do not currently exist in relation to any other hate crime characteristics.

The Bill as introduced did nothing to change the above.

Evidence received by the Justice Committee at Stage 1 included arguments for:

- simply repealing section 50A of the 1995 Act
- repealing section 50A of the 1995 Act and replacing it with an equivalent offence in the Bill (to provide greater consolidation of the law in this area)
- creating similar offences covering other hate crime characteristics.

The approach outlined in the second bullet is taken in the Bill as amended at stage 2.

The Justice Committee's Stage 1 report had stated that (para 268):<sup>2</sup>

“ In the Committee's view, the offence in section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 should be consolidated into this Bill.”

In response, the Cabinet Secretary for Justice undertook to do so. At the Justice Committee's [meeting on 9 February 2021](#),<sup>17</sup> he said that (col 6):

“ As I listened to the Justice Committee's scrutiny of the Bill at stage 1, I took cognisance of the calls to consolidate the offence of racially aggravated harassment into the Bill. Doing so will maintain the distinct approach for race and ensure that all hate crime legislation can be found in one place.”

Relevant amendments were agreed to at Stage 2.

## Hate crime data

One of the other issues considered during scrutiny at stages 1 and 2 was how the collection of data on the nature and extent of hate crime might be improved. In its Stage 1 report, the Justice Committee noted (para 386):<sup>2</sup>

“ the evidence from some of our witnesses that more could be done to improve how hate crime offences are recorded and monitored.”

A Stage 2 amendment lodged by the Scottish Government added a statutory requirement for Police Scotland to publish an annual report detailing instances of hate crime reported to the police. The provision stipulates various ways in which relevant data should be broken down.

Stage 2 amendments lodged by Dean Lockhart MSP sought to provide for greater disaggregation of conviction data. Following debate, his amendments were withdrawn/not moved. However, he accepted an offer to work with the Scottish Government on the issue in advance of Stage 3.

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