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1. Introduction

This paper sets out Humanist Society Scotland’s position on the introduced Hate Crime and Public Order (Scotland) Bill.¹ The organisation supports a society free from violence and criminality motivated by prejudice. Any changes passed by the bill must continue to respect the right for citizens to have freedom of expression where it is not threatening in nature.

This paper takes a step by step look at each section of the Bill and provides a commentary from the Society’s point of view of the bill.

2. Summary

Humanist Society Scotland welcome the introduction of the bill but highlight a number of concerns around the impact of the current drafting on free expression and freedom of religion/belief as laid out in the European Convention on Human Rights.

Humanist Society Scotland have engaged with the Scottish Government throughout the review of Hate Crime legislation starting initially with the Lord Bracadale review².

¹ [Scottish Parliament \(2020\) Hate Crime Bill](#)

² [Bracadale \(2018\)](#)

The Society reiterates the point it has made throughout this process. Any reforms to hate crime legislation need to be mindful not to create a situation that unwittingly creates an inability to have free expression and debate, which in some cases will include controversial topics.

- Humanist Society Scotland are **very supportive** of the measure to repeal the common law offence of blasphemy having campaigned for its repeal for many years.
- Humanist Society Scotland **support** the rationalisation of statutory aggravators and does believe these are a proportionate way to tackle hate crime in society.
- Humanist Society Scotland believes the current aggravator as drafted on religion **needs to be expanded** to cover individuals' beliefs.
- Humanist Society Scotland **oppose** the introduction of new stirring up offences as they are currently drafted. We highlighted in our Government consultation submission that changes in this area needed to be backed up with evidence that supports a need for them. We do not see any sufficient evidence to support the claim that the new stirring up offences close a gap in the law that cannot be tackled with existing offences and those proposed in the first part of this bill.
- Humanist Society Scotland are **concerned** that the current 'free expression' defence is narrower than exists on stirring-up in England and Wales. We believe that should the stirring up offences become law, it is **vital** that the defence is widened to that which exists in the Public Order Act in England and Wales. Without such a defence we are concerned that, as drafted, the bill has the potential to impact negatively on individuals' Article rights.
- Humanist Society Scotland believes that there is strong evidence that **restorative justice** programs have success in tackling repeat offending on hate crime. We believe that the government should set out alongside the bill provisions as to how they will extend the use of such programs that have been proven to help reduce instances of hate crime.

3. Consolidation of Existing Hate Crime Framework

Humanist Society Scotland agrees with the general principle of the bill which will consolidate and bring together a wide range of hate crime legislation into one **single act**.

4. Part One: Aggravations by Prejudice

Humanist Society Scotland believe that it is important that hate crime legislation **does not add “additional criminal offences.”** Instead we would prefer to see prejudice taken into account where it has played an aggravating factor in a preexisting criminal act.

The bill as set out in part one ensures that any prosecution is for an offence that would always be considered an offence whether prejudice played a part or not. The aggravation factor is an additional consideration rather than a new offence. **We are supportive of this approach as it balances the need to protect freedom of expression and the ability to tackle prejudice-motivated criminal acts.** This is important in ensuring that resources can be properly targeted to tackling the causes of hate crime.

We do however have serious concerns around the breadth of hate crime aggravation with regard to religious identity in this section, which is outlined in relation to part three of the bill.

4.1 Threshold

We agree with the government decision not to take up Lord Bracadale’s recommendation to change the threshold from ‘envicing malice and ill-will’ to ‘demonstrating hostility’. We believe that while Lord Bracadale’s intention is to clarify language, in reality this change would have reset the threshold to one which is lower than that which currently exists.

While it is appreciated that the threshold requires evidence that such “hostility” is held by the perpetrator, it is quite arguable that hostile views can be held without meaning malice or ill-will. This is a particular challenge with regard to any relationship to faith or belief, which fundamentally individuals have many disagreements with others on - often on an amicable basis. It is important at this point to note that while most of the covered protected characteristics are uncontrolled by the individual – race, disability, sexual orientation – religion (including non-religious) is both something that is changeable and something that is within the free will of the individual.

An individual could quite easily be described, or even describe themselves, as being 'hostile' (the Cambridge University Dictionary defines hostile as disagreeing/unfriendly) to some philosophical concepts at the core of a religious or non-religious philosophy. For example an atheist may be considered 'hostile' to the idea of an afterlife, whereas a Christian could be considered 'hostile' to the idea of reincarnation. However, just because these individuals reject, philosophically, core tenets of another faith or belief position, this does not quite meet the test of 'malice' towards individuals who follow such a philosophical idea.

We therefore believe that the existing threshold of malice and ill-will should be maintained.

Paragraphs 80 and 81 of the bill's policy memorandum provides commitment that the government will draft guidance on the thresholds. **We welcome this commitment and ask that it clearly set out that philosophical, religious, and belief debate and discussion is healthy and welcome in society and not within the purview of the definition of 'malice and ill will' of the act.**

4.2 Restorative Justice

At the current time those convicted of particular aggravations set out in this bill often face longer prison sentences to account for these factors.

Humanists promote rational evidence-based policymaking and, in line with significant evidence, we favour programs that achieve results by reducing reoffending rates.

For example research by Dr Mark Walter of the University of Sussex (a specialist in Hate Crime criminology) has found in case studies that community led mediation restorative practice has led to positive results in terms of both the victim by "directly improving their emotional wellbeing" as well as supporting reduced reoffending rates.

³

We believe that better targeting of proven reform programs, such as diversion and restorative justice programs that focus on reducing the prejudice felt by these individuals, as part of sentencing would better **achieve the aims of reducing hate crimes**, rather than simply additional time in prison which - at least on short sentences - has shown to be ineffective at reducing reoffending.

³ Mark Walters (2014): Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms

5. Part Two: Stirring Up Hatred

Humanist Society Scotland do not agree with the addition of new offences relating to stirring up hatred.

We previously highlighted our agreement that aggravations are a useful tool to tackle hate crime because they don't create new criminal behaviour in themselves. It is our view that the current draft bill has the potential to criminalise new behaviours that were not previously considered as such under existing legislation.

The Government has provided little in the way of evidence that there is a significant gap in the law that requires for a new "stirring up" offence to be introduced for other characteristics beyond race, which is already covered. Bracadale sets out in his review that "every case which could be prosecuted as a stirring up offence could also be prosecuted using a baseline offence and an aggravation."⁴ **There is no evidence-led explanation in the bill's accompanying documents which sets out why new stirring up offences are needed, rather than relying on the baseline offence and statutory aggravation.** Any new legislative restrictions on individual's rights must be balanced with what is proportionate.

In our response to the Government's consultation we highlighted that a full analysis of the current section 18 to 23 of the Public Order Act 1986, how they are used and how often they are used before proceeding to create new offences was required. No detail in this regard has been laid alongside the bill. It is concerning that new stirring up offences are being proposed without full consideration of the use and impact of the existing stirring up offences in relation to race. This analysis would have helped both the government and now Parliamentarians to assess whether such stirring up offences are indeed required, or if the behaviour they aim to address can already be restricted under existing law.

Humanist Society Scotland are concerned that the current bill's approach will end up mirroring the stirring up of religious hatred offences contained in the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. This Act was repealed for a number of reasons, but partially because new behaviours were being criminalised that were not previously crimes. We believe the draft bill's proposals on stirring up replicates this fault.

5.1 *Threshold*

⁴ Bracadale (2018) p60

Should Parliament proceed with the introduction of new stirring up offences we would also highlight further concerns that should be addressed. **We believe that if introduced, such offences should at least be required to have a threshold of ‘intention to stir up hatred’.** The Scottish Government’s policy memorandum⁵ at paragraph 140 rejects this approach for the bill saying:

The Scottish Government accepts that to confine a stirring up offence to an intention to stir up hatred would be prohibitively restrictive in practice as in real-life cases it may often be very difficult to prove beyond reasonable doubt what the accused’s intent was, even where it is very clear that their behaviour would be likely to result in hatred being stirred up.

It is of significant concern that the main motivating factor here appears to be making it as easy as possible to secure conviction for a new offence. We do not believe it is at all unreasonable to expect an act to reach this threshold of proof to secure a conviction. Indeed if stirring up offences are to be introduced, we believe that this would be an important safeguard in the balance between individual free expression and the intended aims of the bill.

If such new offences were to be enacted in the bill the threshold should be high to ensure that Article 10 rights under ECHR are not unfairly and manifestly affected. We believe that only subsection (i) “intention to stir up” should be included. Sub-section (ii) “Likely to be stirred up” is too open ended. The example cases cited by Bracadale in his report would easily be covered by subsection (i) and therefore including a further wide-reaching, undefined, and open to interpretation section (ii) is unnecessary and could have unintended consequences.

5.2 Protection of Freedom of Expression

The bill does include provisions for freedom of expression. We have set out that we believe that the new stirring up offences has the potential to impact Article 10 rights, and as such a statement of protection of freedom of expression is welcome. However we reiterate our earlier statement, there appears to be little evidence as to what additional need there is for a new offence and what the government feels is not covered by current law. Indeed all the evidence laid forward by Lord Bracadale suggests that existing legislation is able to cover the offending behaviour that the government intends to address through this bill.

The right to express dissent from religion, including criticising, ridiculing, or parodying religious beliefs, is a central tenet of both the right to freedom of

⁵ [Scottish Parliament \(2020\) Hate Crime Bill](#)

religion or belief and the right to freedom of expression. This is laid out in Articles 18 and 19 of the Universal Declaration of Human Rights, Articles 9 and 10 of the European Convention on Human Rights, and the International Covenant on Civil and Political Rights.

Each of the rights contained under these articles contains limitations when there is a genuine societal need to restrict expression. However, offence against religious sentiment does not feature in any of these restrictions. In fact, in 2011, the UN Human Rights Council issued General Comment 34 on the International Covenant on Civil and Political Rights⁶ stating that ‘prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant.’ This principle applies to all forms of expression, including statements which are critical or disrespectful of religion.

Furthermore, it is generally accepted that forbidding dissenting speech against religion promotes religious intolerance rather than protecting adherents. The UN’s Special Rapporteur on Freedom of Religion or Belief, Dr Ahmed Shaheed, made this case strongly in his report to the UN General Assembly in 2017⁷ on the elimination of all forms of religious intolerance.

The Special Rapporteur notes that when governments restrict freedom of expression on the grounds of “insult to religion”, any peaceful expression of political or religious views is subject to potential prohibition.

There is a duty upon the Scottish Parliament to protect freedom of expression and freedom of religion and belief. In *Handyside v. the United Kingdom* in 1976, the European Court of Human Rights determined that:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society.

Moreover, the right to hold, not hold, and change religion or belief, as well as the public manifestation of those beliefs, must be considered. It is certainly the case that many religion or belief groups consider proselytising, attempting to convert, and publicly proclaiming their own beliefs to be the only true beliefs, to be part of their

⁶ [UN Human Rights Council \(2011\)](#)

⁷ [Shaheed \(2017\)](#)

right to manifest their beliefs, which is rightly protected by this bill and should not be curtailed by the interference of the state.

By their very nature, such manifestations of religion or belief are critical of or deny the legitimacy of other religions or beliefs and therefore can, and often are, deemed offensive or insulting by those who do not share those beliefs. But this does not mean that there is a legal duty to limit such manifestations.

The European Court of Human Rights has made this clear in the case of Ibragim Ibragimov and Others v. Russia where it stated:

the Court further reiterates that religious groups cannot reasonably expect to be exempt from all criticism; they must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. The same principle applies to non-religious ideologies, including atheism and agnosticism.

All religion and belief groups should be able to promote their beliefs and criticise others as long as they do not incite violence. The European Court of Human Rights has consistently dismissed complaints brought under Article 9 from persons who believe that their religious beliefs have been offended (see Church of Scientology and Others v. Sweden, and Choudhury v. the United Kingdom).

The right to freedom of thought, conscience, religion, and belief guaranteed by Article 9 does not bring with it any right to bring proceedings against those who, by authorship or publication, merely insult one's sensitivities. This is illustrated by the two cases cited above, one related to negative comments published by a professor of theology in a Swedish newspaper about the Church of Scientology and the other was the refusal to bring criminal proceedings against Salman Rushdie in relation to the publication of The Satanic Verses. In both cases it is clear that unless the insult caused by publishing or advertising these materials in some way prevented the offended from being able to worship, interference by a public authority or law enforcement is not lawfully required.

This principle can be applied to the hate crime bill presented: unless the offending expression interferes or prevents a religious adherent from being able to continue to hold or practise their beliefs, there is a duty not to interfere with an individual's right to freedom of belief.

We note that the section on religious freedom of expression is significantly narrower than that which is provided under the The Racial and Religious Hatred Act 2006 which applies to England and Wales in this area.

The current bill before Parliament in relation to freedom of expression on religion states:

‘Behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes—

(a) discussion or criticism of—

(i) religion, whether religions generally or a particular religion,

(ii) religious beliefs or practices,

(b) proselytising, or

(c) urging of persons to cease practising their religions.

The RRHA 2006 act states:

‘Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.’

We note in the policy memorandum that there is no consideration of this wider scope for the Scottish bill. Should stirring up offences be accepted by the Parliament, we would advocate that the provision in the RRHA 2006 be repeated in this act by widening the current freedom of expression section, to ensure that Article rights are not impacted.

Part Three: Further Provisions

The current law covering hate crime defines ‘religious groups’ as ‘a group of persons defined by reference to religious belief or lack of religious belief’. Therefore, although those with ‘lack of religious belief’ are covered, the definition does not cover hatred motivated by the holding of non-religious worldviews, such as humanism. This is at odds with human rights and equality law which positively include humanist beliefs.

Human Rights and Equality law is very clear in its definition of ‘Religion’ as including philosophical beliefs and those with no religious belief. However, as currently drafted, the bill uses a narrow interpretation that excludes philosophical beliefs and those with no religious belief. Lord Bracadale’s conclusion on this matter is ultimately

flawed by his narrow interpretation of this protected characteristic. He states in his final report⁸:

In my view, a consistent approach across the protected characteristics is highly desirable. This allows for a clear understanding of what is meant by hate crime. At its core is the concept of a shared protected characteristic. It would require strong arguments to depart from that principle.

We agree with the above statement insofar as it understands equality protected characteristics (it should be noted this above conclusion is also a necessary rejection of sectarianism and political identity being added as a protected characteristic). However, the argument fails on the basis that it assumes 'Religion' as a protected characteristic applies only to 'defined religious groups'. This is an incorrect definition or understanding. Article 9 of the European Convention on Human Rights as implemented by the Human Rights 1998 Act states:

"Article 9: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching practice and observance."

We draw attention to "either alone" as clearly marking that any definition of religion in law cannot legitimately be limited to a 'religious group' as this would make it incompatible with the Human Rights Act 1998.

The Equality and Human Rights Commission guidance on Article 9 also clearly sets out that this article protects a wide range of non-religious beliefs too, including Humanism.

Equality Law too currently defines religion as including belief, subject to clear and understandable definitions. Equally the current bill leads to Scotland being non-compliant with the Framework Convention for the Protection of National Minorities 1995⁹, which requires signatories to:

Take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity

⁸ Bracadale (2018) p27

⁹ [Council of Europe \(1995\)](#)

The framework requires an individual's religious identity to be protected - not that of a group as is the current definition in the bill. In addition protecting 'belief' as well as 'religion' is clearly a requirement after the concerning gap in the law highlighted by Ahmed V HM Advocate [2016]. By limiting the definition in its proposed manner this crime was not considered a Hate Crime. The foreword by Cabinet Secretaries Campbell and Yousaf¹⁰ are clear in the opening section of their earlier consultation:

having clear legislation about hate crime sends a strong message. It makes it clear to victims, to communities and to wider society that certain criminal behaviour is not acceptable in society.

Despite this strong statement of intentions, failure to act to fill the gap in the law clearly shown by the Ahmed V HM Advocate [2016] case is extremely worrying. The message instead that will be sent from Parliament to the public is there are two tiers of beliefs. Those that are respected in law and as such should be covered by Hate Crime aggravations, and others that are not.

Glover¹¹ backs this interpretation setting out in his conclusion:

State protection for individuals expressing their personal religious beliefs should be founded on that very basis [individual acts of expression]. On the specific problems of religious prejudice, this protection would be significantly more effective than that currently afforded by the state's well-intentioned but ultimately flawed policy decision to categorise individual religious practitioners as part of some wider religious, social or cultural group to which victims such as Asad Shah simply did not fit.

On extending to include beliefs, Bracadale states¹²:

"While in principle I consider that hostility towards members of a group based on non-theistic beliefs could give rise to hate crime, there was no evidence before the review to suggest that such an extension was required."

However this fails to accept the widespread violence, persecution and discrimination that 'apostates' or those who leave a religious group can suffer. There are no official statistics on this matter. However there is a growing community of individuals who have faced such persecution. In 2015 the BBC interviewed¹³ some individuals faced with anti-apostasy threats and violence:

¹⁰ [Scottish Government \(2018\)](#) p1

¹¹ Philip Glover (2017), Juridical Review, Statutory aggravation by religious prejudice in Scotland: correcting the "Lord Advocate's lacuna"

¹² Bracadale (2018) p27-28

¹³ [The ex-Muslim Britons who are persecuted for being atheists \(2018\) BBC](#)

Ayisha (not her real name) from Lancashire was just 14 when she began to question Islam after reading the Koran. She started rebelling over wearing the hijab, but eventually decided she wasn't a Muslim and the situation at home rapidly got worse. My dad threatened to kill me by getting a knife and holding it against my neck and saying: 'We might as well do it if you're going to bring this much shame to the family.'

This is not restricted to one faith group. Those who leave Jehovah's Witnesses, Hasidic Jewish groups, Christian Scientist, and Seventh Day Adventists have also reported being pursued by family or sect members who seek to damage the lives of those who leave. These types of events are not uncommon but are often unheard of by society. Indeed the Faith to Faithless charity was set up to provide support to individuals who either felt themselves alone, or were facing harassment after leaving a closed religious community.

The Bill should ensure that statutory aggravation under religion also includes individuals' beliefs to ensure the matter of anti-apostate violence is taken seriously. These crimes are clearly motivated by religious prejudice and must be considered as such by the law. It should also be recognised that those targeted for 'anti-apostasy' are not necessarily non-religious.

Part Four: Abolition of Blasphemy

Humanist Society Scotland welcomes the introduction of a bill to the Scottish Parliament that will finally repeal the common law offence of blasphemy. The Society has campaigned for a number of years on this issue alongside our international partners as part of the global campaign to end all blasphemy laws around the world. Taking this step is an important one and adds Scotland's voice to the growing community of nations who have recently repealed blasphemy laws in order to add further pressure on the remaining nations who prosecute 'blasphemy'.

Blasphemy is fundamentally a principle and law that breaches the founding principles of Human Rights frameworks. There should be no restriction on an individual's ability to criticise, object or question religious teaching or doctrines. This falls outside of accepted norms of allowing free debate and discussion on matters of religion and belief.

Other European nations have taken this step and are quickly leaving Scotland behind as one of the last remaining jurisdictions in Europe to have a blasphemy law in place. England & Wales did so in 2008, Iceland and Norway in 2015, Malta in

2016 and Denmark in 2017. The Irish public voted by a landslide in a 2018 referendum to scrap their blasphemy law.

Across the world today people still face live and restrictive blasphemy laws. These are not only used to restrict offence to a deity (in the traditional definition of Blasphemy) but also to threaten political campaigners in a variety of progressive movements including women's rights, challenging ethnic discrimination, and ending legal restrictions on homosexuality.

Campaigners such as the Humanists International (of which Humanist Society Scotland is a member) report that the existence of dead letter blasphemy laws in Europe makes it more difficult to argue for the repeal of active blasphemy laws at the United Nations and other international bodies. States that actively abuse Human Rights through blasphemy laws take cover in pointing out in international forums that Western nations have blasphemy laws of their own as if to undermine the plea with regard to Human Rights.

As a Parliament that has a strong record in highlighting and calling out Human Rights abuses abroad this move to scrap blasphemy in Scotland would be celebrated and lauded around the world. To us it would seem a small and insignificant move, but to others it offers hope and knowledge that we will stand by them and support the end of blasphemy laws, not just in Scotland, but around the world.

The assumption that ECHR trumps any successful blasphemy prosecution is itself not understood in case law. For example *Wingrove Vs UK* [1996] the European Court of Human Rights decided that even within a Human Rights framework, the state was within its rights to restrict blasphemous content within its allowed margin of appreciation. Additionally the same finding was made in *E.S. v. Austria* [2018] where the margin of appreciation was allowed and therefore a blasphemy prosecution upheld.

There is precedence for out of use common law offences to be scrapped by the Scottish Parliament. In 2009 the Scottish Parliament passed a law which scrapped the common law offence against sodomy. Sodomy laws were historically used to persecute homosexuals in Scotland. In 2009 the sodomy laws had not been used for some time but the Parliament decided it was right to scrap the law nonetheless. This was partially to close the possibility of future prosecutions, and partly to send a message to other states around the world who actively persecuted LGBT people.

About Us

Humanist Society Scotland is a charity with over 15,000 members across the country. We provided services such as humanist ceremonies, volunteer projects helping the vulnerable and campaign on issues of importance to those who share a humanist outlook on life. We are part of a global movement of humanists across the world being the full Scottish member of Humanists International and the European Humanist Federation.

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