



Hate Crime and Public Order (Scotland) Bill:
Freedom of Expression Amendments
Response from the Scottish Council of Jewish Communities

The Scottish Council of Jewish Communities (SCoJeC) is the representative body of all the Jewish communities in Scotland. SCoJeC advances public understanding about the Jewish religion, culture and community, by providing information and assistance to educational, health, and welfare organisations, representing the Jewish community in Scotland to Government and other statutory and official bodies, and liaising with Ministers, MSPs, Churches, Trades Unions, and others on matters affecting the Jewish community. SCoJeC also provides a support network for the smaller communities and for individuals and families who live outwith any Jewish community or are not connected with any Jewish communities, and assists organisations within the Scottish Jewish community to comply with various regulatory requirements. SCoJeC also promotes dialogue and understanding between the Jewish community and other communities in Scotland, and works in partnership with other organisations and stakeholders to promote equality, good relations, and understanding among community groups.

In preparing this response we have consulted as widely as possible given the very short timescale, among members of the Scottish Jewish community.

Our very strong preference is for option (3), which treats all of the protected characteristics equally.

As recognised by the European Convention of Human Rights, freedom of expression is not an absolute right but must be qualified “as necessary in a democratic society” for, amongst other things, “the protection of the reputation or rights of others”. Proportionality is the key, and legislation should give guidance on how to achieve a proportionate balance. There is a clear distinction between rational and robust argument and criticism on the one hand, and rabble-rousing and provocative abuse on the other. Context, demeanour, vocabulary, and previous conduct all contribute to making that judgement – as is already the case in assessing whether otherwise criminal behaviour is aggravated by hatred. As the Minister has stated, “criticism, including very robust criticism, is in itself not a matter for prosecution”. We are strongly of the opinion that wide-ranging rational discussion, robust criticism, and humour should not be put at risk by measures to ensure the wellbeing of people with protected characteristics.

We are, however, concerned by some of these proposed amendments. Everyone in Scotland should have the right to be, and to feel safe as they go about their daily lives.

There must not be any hierarchy of equality. As we stated in our original evidence¹ to the Committee, we were disappointed that the opportunity had not been taken to provide equal protection in the Bill for all protected characteristics, and we are further disappointed that three of the four amendment options proposed by the Scottish Government in relation to freedom of expression would worsen that inequality of protection.

It is known that hate crime of all kinds is under-reported, in some cases because people fear they will not be believed, in others because they do not think that the police will follow up reports (unfortunately often because of previous negative experience), because victims fear further victimisation if it becomes known that they have reported the attacker to the police, because incidents have become so frequent that they feel reporting would take up too much of their time, or even because incidents are so 'routine' that some people have come to regard them as part of 'normal' life. The introduction of an amendment providing for different levels of protection for some protected characteristics would only exacerbate this issue. Enshrining discrimination between protected characteristics in the primary legislation would lead people targeted on account of their religion or affiliation or perceived affiliation with a religious group to believe that they are less worthy of protection than others, and that it is not worth reporting incidents because they think that fewer resources will be devoted to investigating reports than would be the case with other protected characteristics.

In particular, options (1) and (2) raise the bar for the protection of "religion, lack of religion or, in the case of a social or cultural group, perceived religious affiliation". In relation to other protected characteristics, only "discussion or criticism" cannot be the sole basis for demonstrating "threatening, abusive or insulting" behaviour or material. In the case of religion, this is widened so that "expressions of antipathy, dislike, ridicule or insult" are also excluded from being the sole basis to evidence such behaviours. There are no valid grounds for this distinction; expressing "antipathy, dislike, ridicule or insult" towards transgender identity, particular racial groups, or disability, for example, is no more heinous, and no more hurtful to the people concerned, than expressing the same views towards religion, religious beliefs and practices (including not holding religious beliefs and practices). And there is no intrinsic difference between "urging of persons to cease practising their religions" and urging of persons to cease expressing or "practising" their sexual orientation. Protection against the former is no less important than protection against the latter.

Similarly, but in reverse, "race, colour, nationality (including citizenship), or ethnic or national origins" is no more worthy than any other protected characteristic of the additional protections that would be provided by lowering the bar in options (2) and (4). Permitting "discussion or criticism" as the sole basis for demonstrating "threatening, abusive or insulting" behaviour or material" for just one protected characteristic is inequitable.

Taken together (option 2), the effect of these two exceptions would be to create a hierarchy of protection with "race, colour, nationality (including citizenship), or ethnic or national origins" at the top, and "religion, lack of religion or, in the case of a social or cultural group, perceived religious affiliation" at the bottom.

¹ https://www.scojec.org/consultations/2020/20vii_hate_crime_bill.pdf

Any of options (1), (2), and (4) would also perpetuate the anomaly that Jews and Sikhs are protected as racial groups under the *Mandla* ruling², while other religions are not.

Our very strong preference is, therefore, for option (3), which treats all of the protected characteristics equally. The test, which the Minister has confirmed³ will be an objective test, is equal for all groups. “Discussion or criticism”, it reasonably proposes, should not be the sole basis for regarding behaviour or material as “threatening, abusive or insulting”, and it makes no exception in either direction for any group.

Hatred and discrimination are, sadly, everyday issues for many people in Scotland. Their impact on individuals and communities is long-lasting, and extends well beyond any individual incident affecting others who share the same protected characteristic – whatever that characteristic may be. That is why this legislation matters.

Enabling people to feel safe, and reducing their fear of becoming the next victim of a hate incident, is at least as important as Police Scotland’s objective of “Keeping People Safe”, and effective hate crime legislation is, therefore, important not only in terms of prosecution and punishment, but also serves the demonstrative purpose of enabling society to signal its abhorrence of prejudice and hatred against identifiable groups. The introduction into this Bill of new measures that differentiate between groups, creating a new hierarchy of (lack of) protection would only signal that prejudice and hatred against some groups is less abhorrent than against others.

All groups in society must be able to feel safe as they go about their daily business. To facilitate that, legislation must not legitimise a view that some groups are more worthy of protection, and others less. “Protected characteristics” are not abstract notions. They translate into real people – real individuals, real families, and real communities, all of whom share the same right live their lives in the knowledge and security that each of them is worthy of – and has – equal protection before the law.

² *Mandla v Dowell Lee* [1983] 2 AC 548 HL
http://www.hrcr.org/safrica/equality/Mandla_DowellLee.htm

³ Minister’s response to the Justice Committee Stage 1 report, para 14
https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20201214_Hate_Crime_Bill_SGResponse.pdf