



# ScottishPEN

*defending the freedom of writers and readers*

## Response to the Justice Committee consultation on the Hate Crime and Public Order (Scotland) Bill

1. Scottish PEN is a centre of PEN International. We work to defend writers' freedom of expression and to promote literature in Scotland. Our response to the Hate Crime and Public Order (Scotland) Bill is therefore focused on the interests of writers, performers and publishers and the potential impact of this Bill on their right to free expression.
2. Scottish PEN recognises the serious harm which hate crime causes in our society, impacting on individuals' ability to walk their streets without fear, to live their lives according to their own beliefs and values free of harassment, and to express themselves fully, in their days or on the page. We also recognise the importance of protecting provocative forms of art and literature which communicates different social perspectives and challenges conventional outlooks on the world.
3. We believe a climate of uncertainty or fear about what writers can safely express should not be allowed to accumulate unnecessarily. An open culture of criticism, satire, parody and exploration of taboo subjects is important and progressive. We know from our report with colleagues at the University of Strathclyde, *Scottish Chilling*, that when writers feel their work and communication is being monitored by the state, they are more likely to refrain from writing about sensitive subjects or, in some cases, refrain from writing altogether.<sup>1</sup> Writers may overly restrict the scope of their work due to fear that their intentions will either be misconstrued or, even where their intention is clear, fears they will be held accountable for how their work is interpreted or misinterpreted by others after it is published or performed.

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<sup>1</sup> Accessible here: <https://scottishpen.org/scottish-chilling/>.

4. We welcome the principle of reconciling Scotland’s fragmented and inaccessible legislation on hate crimes into a single piece of legislation. This consolidation should increase the transparency of this area of law, allowing citizens to gain a better understanding of their rights, and the legal limits on free expression. In order for this transparency to be practical and effective, however, the Bill itself needs to be sufficiently clear and accessible. As the legislation stands, we believe there is scope for improvement, additional clarity, and an opportunity to allay the anxieties of people who are concerned this legislation may overreach and criminalise provocative or controversial forms of writing, performing and publishing.
5. Scottish PEN supports the model of aggravators set out in Part 1 of the Bill. This consolidation of the law will not introduce any new offences into the criminal law, but will instead allow existing common law and statutory crimes motivated by or expressing hatred to be properly identified in a clear and consistent way. Statutory aggravators allow us to properly describe and condemn behaviour directed towards individuals and groups based on their presumed characteristics and to monitor the prevalence of hate crime being prosecuted in Scotland – if not its real incidence in society. We also strongly support the abolition of the common law crime of blasphemy.
6. However, Part 2 of the Bill creates new criminal offences, and accordingly, has the potential to introduce new and serious restrictions on what people say in public, in print, on air, and on stage. As a consequence, the balance of this submission will focus on the new offences of (a) stirring up hatred, and (b) the possession of inflammatory material. We believe the legal thresholds being proposed in these new offences should be scrutinised carefully. We believe it is important for the Scottish Government and the Committee to consider and respond to the ways in which they could be applied in unforeseen ways in practice.
7. We agree with Lord Bracadale that the concept of “insulting” behaviour should be removed from the Bill and that the protected characteristic of “race, colour, nationality (including citizenship), or ethnic or national origins” should be treated in the same way as the other characteristics listed. Doing so would eliminate the unnecessary complexity this adds to the reform of this area of law, which has been largely justified by the logic of consolidation and the idea protected characteristics should be treated in a systematic way. We would also note that the definition of race used in this and other legislation in the field expresses a wider legislative understanding of the concept of “race” than many may realise, raising questions about whether the lower threshold of “insulting” words or speech is an appropriate basis for criminalisation.<sup>2</sup>

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<sup>2</sup> Section 1(2)(c): “race, colour, nationality (including citizenship), or ethnic or national origins.”

8. Behaving in a “threatening or abusive manner” which would “cause the reasonable person to suffer fear or alarm” is already a criminal offence in Scotland.<sup>3</sup> To secure a conviction, however, the crown must demonstrate that the accused either intended to cause fear or alarm, or was reckless about the impact of their behaviour.<sup>4</sup> The new stirring up offence proposed in the Bill – to some extent – echoes this structure. Like others, however, we are concerned about the *mens rea* requirements for the new offences of stirring up hatred and possession of inflammatory material. As the Bill stands, prosecutors will be required only to show that hatred is “likely to be stirred up” by the “threatening or abusive behaviour”, regardless of any intention to do so on the part of the accused. Possession of “threatening or abusive” materials, similarly, is criminalised where either intention to stir up hatred, or hatred is “likely” to be stirred up if the material were communicated.
9. We believe there is a strong argument for restricting the new offences to situations where actual intention to stir up hatred can be proven. We recognise that the Bill’s approach to *mens rea* is not original. This aspect of the Bill is lifted from the Public Order Act 1986’s provisions on stirring up of racial hatred – which can be proven where there is “threatening, abusive or insulting” behaviour which is either intended to stir up hatred or where racial hatred was “likely to be stirred up in all the circumstances.” However, the fact that comparative language has been used in legislation before does not mean these proposals can or should escape scrutiny from first principles. There are reasonable grounds to question whether extending this approach to all of the protected characteristics is proportionate. The Bill’s new stirring up offence is wider than English and Welsh law in two important and potentially problematic respects. Firstly, the parallel offences of stirring up hatred on the grounds of religion or sexual orientation under the 1986 Public Order Act can only be committed by “threatening” behaviour rather than “abusive” behaviour envisaged by this Bill. This wider definition will clearly bring additional forms of potentially “abusive” writing and performance into the ambit of the Scottish offence. Secondly, English prosecutors must prove the defendant intended to stir up hatred on religious or sexual orientation grounds to secure a conviction.<sup>5</sup> If passed, Scottish prosecutors will not, if they can persuade the court hatred is “likely” to be stirred up the accused’s threatening or abusive behaviour or communications.
10. While the English and Welsh legislation does include a “possession of inflammatory material” offence,<sup>6</sup> in its application to sexual orientation and religion, the crime is limited to possession of

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<sup>3</sup> Section 38, Criminal Justice and Licensing (Scotland) Act 2010.

<sup>4</sup> Section 38(1)(c).

<sup>5</sup> Public Order Act 1986, section 29H.

<sup>6</sup> Public Order Act 1986, section 29G.

“threatening” rather than “abusive” material, and requires prosecutors to show the intention to stir up hatred, rather than being prosecutable if the material is “likely to stir up hatred”, whatever the accused person intended. In terms of possession of racially inflammatory material, this extends to “threatening, abusive or insulting material”, but also requires proof of intention to stir up racial hatred. On every point of comparison, the Scottish proposals embody lower legal thresholds for prosecution. This represents a substantial expansion in the criminal law. Restricting the offences to situations where intention to stir up hatred can be proven beyond a reasonable doubt would significantly allay anxieties about the reach of this legislation.

11. The Scottish Government has argued that restricting the new offences in this way 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.”<sup>7</sup> We do not find this objection compelling. In Scots law, the accused person’s intentions are objectively inferred, based on analysis of their behaviour and what this suggests about their mindset.<sup>8</sup> The criminal law does not make windows into the accused person’s soul. Suspects and people accused of committing criminal offences have a right to silence, and accordingly, often give the investigating authorities and the court little or no explanation of their behaviour. The court’s responsibility is to reach an informed judgement on the evidence about the accused person’s intentions based on what they did, said or published. In ordinary circumstances, our courts do this day and daily. Several of the best known criminal offences in Scots law are crimes of intention only, including the common law crimes of assault, theft and fraud. The idea limiting the new offences in this important way would render them functionally inoperable is unpersuasive.
12. Sections 3(4) and 5(4) of the Bill introduce a “reasonableness” defence to charges of stirring up hatred or possessing inflammatory materials. We recognise that a defence of reasonableness is already used in respect of other statutory offences in Scotland without further elaboration or definition, leaving it to the courts to assess what constitutes reasonable behaviour on a case-by-case basis.<sup>9</sup> Given concerns about the scope of these new offences, however, Scottish PEN believe the Bill should give clearer guidance on factors which must be taken into account by the court – and earlier in the process, by police officers and procurators fiscal investigating complaints – in assessing whether the complained of conduct is reasonable.

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<sup>7</sup> Scottish Government (2019) *Policy Memorandum*, para 140.

<sup>8</sup> *Cawthorne v HM Advocate* 1968 SLT 330.

<sup>9</sup> In, to give two recent examples, sections 38 and 39 of the Criminal Justice and Licensing (Scotland) Act 2010 and section 6 of the Domestic Abuse (Scotland) Act 2018.

13. We therefore recommend the Bill should be amended to give clearer but non-exhaustive guidance on factors which must be taken into account in assessing whether or not the defence of reasonableness applies. We do not believe this can be achieved by the introduction of additional free expression clauses into the Bill. Section 11 and 12 of the Bill introduce specific savings clauses in respect of religion and sexual orientation. These savings provisions are essentially subject-specific, dealing with specific religious and social controversies.

14. While Scottish PEN welcomes the additional clarity these provisions introduce into the interpretation of the concept of “threatening or abusive” behaviour in the Bill, and would support the introduction of additional safeguards in respect of other areas of legitimate controversy in our society, we believe it is important that the Bill takes explicit account of the artistic, academic, comic and journalistic *context* in which potentially complained of behaviours or communications may arise, making clear that these contexts weigh in favour of the defence of reasonableness applying to the behaviour, communication or possession of potentially inflammatory materials. Accordingly, we recommend that a clause should be introduced to the Bill along the following lines:

*“In determining whether the behaviour, communication, or possession of the material is reasonable under sections 3 and 5, the court must have due regard to the literary, artistic, journalistic, comic, or scholarly character of the behaviour, communication or possession, if any.”*

15. The introduction of this clause into the Bill would not mean that behaviour or communications falling within one of these categories would automatically be permissible, or that individuals accused of attempting to stir up hatred would be able to hide behind academic, artistic, comic or journalistic justifications for their actions. Like the existing free expression clauses written into sections 11 and 12 of the Bill by the Scottish Government, adopting a clause of this kind would communicate to the courts the vital importance Parliament places on free expression and free inquiry, and inform courts’ judgements about whether the behaviour challenged in a criminal case could be characterised as “reasonable.” The introduction of a new clause of this kind would not restrict the generality of the defence of reasonableness to charges under sections 3 and 5. As a result, the Scottish Government may argue its inclusion is unnecessary. However, the presence of such clear and explicit safeguards on the face of the Bill would significantly allay artistic, journalist and scholarly anxieties that these new offences could be applied to provocative but nonetheless legitimate forms of writing, expression or research.

16. The final part of our submission focuses on the additional provisions in the Bill in respect of theatre performances. Section 4 of the Bill introduces additional provisions on culpability where the

offence of stirring up hatred under section 3 is “committed during public performance of play.” In essence, this provision provides that someone who “presents or directs” a theatrical production in which one or more of the performers stirs up hatred may be found guilty of the offence alongside the actors or performers whose words or behaviour form the basis of the charge. To establish the director’s culpability under section 4, however, it must be shown they either “consented” to or “connived” in the stirring up of hatred, or alternatively, that the stirring up of hatred during the show is “attributable to their neglect.”<sup>10</sup>

17. The general principle of art and part guilt in Scots law holds that all persons who aid or abet the commission of a crime are as guilty as the principle offender. In simple terms, the getaway driver is as guilty in law as the bank-robber who brandishes the firearm. Section 293 of the Criminal Procedure (Scotland) Act 1995 provides that anyone:

“who aids, abets, counsels, procures or incites any other person to commit an offence against the provisions of any enactment shall be guilty of an offence and shall be liable on conviction, unless the enactment otherwise requires, to the same punishment as might be imposed on conviction of the first-mentioned offence.”<sup>11</sup>

If this Bill is enacted, this art and part rule would apply to the new statutory offence of “stirring up hatred” under section 3. As a result, it is not clear why section 4 of the Bill is thought desirable or necessary, or the real-life scenarios in which the Scottish Government envisage a “negligent” director could or should be prosecuted under this provision. Significantly, the Scottish Government does not appear to have set out its rationale for section 4 in the Policy Memorandum accompanying the Bill.<sup>12</sup>

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<sup>10</sup> Section 4(b)(i) and (ii).

<sup>11</sup> Criminal Procedure (Scotland) Act 1995, section 293(2).

<sup>12</sup> Scottish Government (2019) *Policy Memorandum* accessible here: <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/policy-memorandum-hate-crime-and-public-order-scotland-bill.pdf>.