

AMENDMENTS ON FREEDOM OF EXPRESSION

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20 February 2021

The Issue

Our concern is whether the law will provide a clear point of reference on what it does not criminalise, for individuals and organisations who may be threatened with legal action, or fear such threats, and for those working in the criminal justice system under pressure to investigate complaints, most specifically in the context of the expression of views about the nature of sex and gender identity. We do not believe any of the options set out in the Scottish Government paper will achieve this.

We suggest here some principles to follow in constructing the freedom of expression provisions, as a contribution to the process now underway. We do not think there is time to resolve all the outstanding issues here in a way which will produce good law, but if the Parliament is determined to pass legislation without taking longer to get the protections here right, it needs at least to go further than a generic protection for “criticism or discussion”.

The offensive should not be criminal of itself

The stated intention here is not to criminalise speech purely for being offensive. From the Stage 1 Report (emphasis added):

The Law Society of Scotland cited with approval a dictum from Lord Justice Sedley that **“Freedom only to speak inoffensively is not worth having”**.... The Faculty of Advocates cited Lord Rodger who said that freedom of speech applies to “ ‘Information’ or ‘ideas ‘that... ‘offend, shock or disturb’ ”. ...The Cabinet Secretary ... added that “People should have the right to be **offensive** and to express controversial views”... 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.

Giving evidence to the Committee Becky Kaufman of the Scottish Trans Alliance explained, “I have been subject to a fair bit of debate that makes me extremely **uncomfortable** and which is often very **disrespectful** of my identity, yet I would not encourage that behaviour to be made criminal.”

The purpose of freedom of expression sections: drawing a clear line

Lord Bracadale told the Committee that freedom of expression provisions (emphasis added):

“should make clear where the line is drawn between offensive behaviour that has not been criminalised and the type of behaviour that is being criminalised.” and

Such amendments to the bill would be an expression of **the kind of line that we want to identify between “offensive behaviour” on one side and “threatening and abusive behaviour”** on the other, with whatever other threshold there is.

'Discussion or criticism' does not draw that line

All four government options limit the protection for characteristics other than religion to "discussion or criticism". Lord Bracadale recommended following the models in the Public Order Act 1986, which for religion includes not only "discussion or criticism", but also "antipathy, dislike, ridicule, insult" and for sexual orientation refers specifically to "discussion or criticism" of "sexual practices" and, in effect, same sex marriage. He told the Committee:

The formula that was used in the Public Order Act 1986 and in section 7 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 had more strength about it than the formula that is used in relation to religion in the bill.

"Criticism" does not draw a clear line between the offensive and the criminal, but **timidly describes a line falling far short of that boundary**. It fails to meet the rhetorical commitment to protecting speech that is offensive, shocking or disturbing.

It is unreasonable to expect people who feel their freedom of expression is under undue pressure to read into "criticism" the distinct and separate concepts in the longer list above, or protection for a variety of statements in particular areas which others find offensive, and more importantly to persuade other people to read those things into it. "Criticism" is not a synonym of "expressions of antipathy, dislike, ridicule or insult" or for being offensive, shocking, disturbing, disrespectful, discomforting or, quoting the Cabinet Secretary's letter, distasteful.

We agree with Lord Bracadale that a generic protection simply of "discussion or criticism" is too imprecise to be useful by itself. Further, that we might be at the point of contemplating the need for legislation in Scotland to make it clear that it will not be criminal *merely to discuss or criticise* matters related to any of the listed characteristics should give pause for thought.

The effect of Option 1

It is our understanding that in Option 1, for the non-religious characteristics, "discussion or criticism" will **specifically exclude** the longer list of terms only listed for religion, due to the legal principle of *expressio unius*.

All or some characteristics?

In his evidence to the Committee Lord Bracadale made clear that in recommending the models already contained in the Public Order Act and the closely related one in the OBFA, he had meant that these provisions should be used as models for provisions covering all the characteristics being added to stirring up.

I recommended that there should be freedom of expression clauses, and I would have expected them to extend across all protected characteristics, because I was trying to avoid any kind of hierarchy of protected characteristics.

From the Policy Memorandum to the Bill it is evident that the Scottish Government misread Bracadale's recommendation as narrowly referring only to the characteristics already in the 1986 Act. We believe that the ongoing anxiety around freedom of expression partly stems from this initial, and difficult to understand, failure to cover all characteristics, and the further failure to do so at Stage 2.

We agree with Lord Bracadale that the extension of stirring up should be accompanied by freedom of expression protection across all the new characteristics. We do not have a view in relation to race: in this case, where the provision has been in operation for decades, it ought to be possible to make a decision based on what experience says about the need.

General or specific?

The Bracadale Report recognised that there might need to be tailored protection for some or all characteristics, noting (emphasis added) **“Insofar as specific provisions are required to deal with how freedom of expression is to be safeguarded in relation to a particular characteristic, that can be done within the framework of a single piece of legislation without making the legislation itself unwieldy”**.

The same assumption must underpin his recommendation of both on Sections 29J and 29JA of the Public Order Act 1986 as two distinct models. In referring to 29JA as a potential model, Bracadale specifically recognises that for some characteristics it may be necessary to anticipate specific flashpoints. We invite the committee to reject the dismissive language of “laundry lists” as a rhetorical device which deters engagement with the substance of the argument for making specific provision in any particular case.

We agree with Lord Bracadale that what is needed for each characteristic needs to be properly considered in its own right, even if there is some common core of wording that could apply in all cases.

The Scottish Government has introduced instead, only at the start of Stage 2, and with no warning, a wholly new principle which contradicts the basis on which the Bill was presented and examined throughout at Stage 1. This is that all characteristics should have absolutely identical freedom of expression provision (except possibly religion) *as a matter of principle*. We think this is misconceived. It has been introduced late into the process as an oversimplistic interpretation about what it means to have “no hierarchy” of characteristics, without any underpinning substantial analysis or explanation of why Bracadale’s more nuanced thinking has now been rejected, and with no consultation.

The Scottish Government has not recognised that it would be possible to include provision for all the new characteristics, without treating most or all identically, and therefore does not explain why that approach has been rejected.

The coverage of the disclaimer

It would be better to be clear that the activities listed should not be taken not only as not “threatening or abusive” but also as **not “stirring up hatred”**, as it is specifically the concept of “hate” that is most often invoked against individuals in the discussion of sex and gender identity. Regardless of whether it is regarded as *legally* necessary, the law should make it clear that the “hatred” threshold specifically is not passed by activities listed *of themselves*. There is a precedent for this formula in the Section 29JA of the 1986 Act.

Coverage for beliefs and practices

Issues related to “beliefs” and “practices” are not uniquely relevant to religion.

It is differences of *belief* (about the nature of gender identity, its significance relative to sex, how many sexes there are, whether a human being can literally change sex, what defines being a woman or a man etc, whether a person can literally be “born in the wrong body”, and so on) that are generating much of the deep disagreement in relation to transgender identity.

The explicit ability to reject beliefs needs to be as included, as in this particular context rejection of certain beliefs is regarded by some as intrinsically hateful.

In the case of transgender identity, but potentially in other areas too, **propositions for law and policy based on particular beliefs** are often more directly the focus of disagreement than the core beliefs themselves. So in any generic provision it would be desirable for that “beliefs and propositions for law and policy based on particular beliefs” to be within scope of coverage.

The concept of “practices” is already recognised in the 1986 Act, and in Section 12 of the Bill as introduced, as relevant to sexual orientation.

Beliefs, propositions based on beliefs and practices could all prove relevant to the other characteristics in ways the legislative process has not had time to explore.

Not favouring certain beliefs

It is not obvious from first principles why a person’s deeply-held beliefs about the nature of gender identity should be less open to “antipathy, dislike, ridicule or insult” than a person’s deeply-held beliefs in the existence of an immortal soul, and their ability to be reunited after death with those they have loved. To the extent that other characteristics raise general questions about beliefs, the starting point should be that the same general protection for freedom of expression as for religious beliefs should apply: the burden of proof should be on those who would wish their beliefs to enjoy more protection than religious ones to explain why they should.¹

Following Lord Bracadale’s recommendation discussed above, and reflecting the consensus the Cabinet Secretary reported at Stage 2 had been reached for religion, **we support the longer formula protection for freedom of expression in relation to religion only offered in Option 1, and believe that should be used as a general template for beliefs applying across all the characteristics.**

Providing examples

Based on the general formula used in S29JA of the 1986 Act, **the Bill should put beyond doubt that certain types of statements, controversial in the context of transgender identity, are not intended of themselves to be criminalised by the Act.** Despite some comments at Stage 2, legislation can be drafted to include non-exhaustive lists of examples. We can provide examples where that has been done, if needed. If the parliament does not do this, it will have ignored the large amount of evidence provided to it of the scale of accusations of hatred and abuse here, and the low threshold often applied in making these. This could be done on the model of a free-standing section, a sub-section specific to transgender identity, or the inclusion of these statements in a list of statements which are described in general terms as not being threatening or abusive, or intended to stir up hatred, in relation to any characteristic.

We are concerned the government paper implies that what counts as “abuse towards trans people” will be unambiguous, and over-relies on the planned “reasonable person” test to prevent chilling effects. We also note that in rejecting a “fear and alarm” test, Tim Hopkins of the Equality Network argued that it ought not to be assumed that “abusive” will have the same meaning here as under s38 of the Criminal Justice and Licensing (Scotland) Act 2010, and that the sort of behaviour which might be constructed as abusive in context of stirring up hatred is potentially different. We agree.

¹ None of us hold a religious belief: we take this view as a point of principle.

Amendment 82A put forward a list for discussion.

82B As an amendment to amendment 82, line 6, at end insert—

- <() Behaviour or material is not to be taken to be threatening or abusive or as stirring up hatred solely on the basis that it involves or includes—
- (a) discussion, criticism or rejection of any concepts or beliefs relating to transgender identity,
 - (b) questioning whether any person should undergo, or should have undergone, a process of gender reassignment,
 - (c) stating that sex is an immutable biological characteristic,
 - (d) stating that there are only two sexes,
 - (e) the use of—
 - (i) “woman” or “man” and equivalent terms,
 - (ii) third person pronounsin a way other than that which a person prefers, or
 - (f) reference to any past name used by a person.>

Its contents were strongly condemned by some people as unacceptable. We think that should be treated as evidence of the need for something on these lines, unless MSPs are willing to say that any of the things on this list should *of themselves* be open to construction as criminally abusive. The Cabinet Secretary’s most recent letter suggests saying sex is immutable should not be criminal in itself. We do not think this goes far enough, in content or form.

Amending provision

It would make sense to include **a power to make further, more detailed provision as needed**, providing further examples of what statements are not intended to be *of themselves* taken to be abusive and/or intended to stir up hatred, in relation to any characteristic, which can be used as and when there is evidence it is needed.

Confronting the reality of protecting offensive speech

The events around the beginning of Stage 2 have left us concerned that that there is a gap between the commitment to protecting offensive speech in theory and willingness by MSPs to risk criticism for being as specific as is necessary to do that effectively.

The debate about protecting offensive speech has been conducted in the Parliament so far in carefully inoffensive abstract terms. The only opportunity to explore where the line might fall in depth for any characteristic at Stage 2 was rejected.

We would have expected to have established more clearly by this stage in the process where the line is expected to be drawn between what was criminally abusive and what was merely offensive *in itself*, in relation to transgender identity. There is now little time and opportunity left to do that.

The only remaining option to prompt direct engagement with this appears to be include here a series of statements which we understand some people will find offensive, but which others would regard as points it is important they can freely assert. We would like to the Committee to consider as part of the current process whether it is its intention that *just making* any of the statements below could be enough *in itself* to pass the criminal threshold for abuse and so be enough to trigger an investigation into whether a person intended to stir up hatred.

Women have sex-based rights, Only women can get pregnant, A lesbian cannot have a penis,
The census should collect data on biological sex, No-one is “cis”, Transmen are not
men/Transmen are female/Transmen are women who identify as men, People who describe

themselves as non-binary are still either male or female, Social contagion explains the recent rapid rise in the number of young people coming out as trans, We should not encourage young people with gender dysphoria to make irreversible changes to their bodies, Cross dressing is a type of sexual fetish

The question is not whether MSPs would agree with or encourage any of these, but only whether their intention is to make any of these criminally abusive statements *in their own right*. This needs to be made clear at this level of detail ahead of Stage 3. Otherwise people for whom the freedom to make these statements matters will be significantly hampered in engaging with MSPs at the Bill's next and final stage.

Process

The significance of the issues raised by freedom of expression have been obvious throughout this process. Yet, the first detailed, substantive discussion about how such protection should be included in the Bill is taking place in the interval between the end of Stage 2 and Stage 3, as part of an extraordinary process, with those outside government's immediate circle having had three working days to consider the government's paper, which gives no guidance about the government's preferred option, and introduces a new principle which contradicts Bracadale and the contents of Bill as introduced and understood until 2 February.

Conclusion

It is our strong view that a general provision covering only "discussion or criticism" cannot provide the secure and clear point of reference that experience already shows is needed for transgender identity; and which further careful exploration might show is needed for others. It is therefore too weak to do the work required here to prevent chilling effects. The line between the criminal and the offensive has to be asserted more clearly. There is not time to do the work required on that properly across all the characteristics, although for transgender identity there are obvious potential flashpoints the Parliament should anticipate.

If the Parliament is nevertheless determined to legislate in this area using only a general provision, we suggest that that ought to be as close as possible to what is already proposed for religion, follow 29JA in referring to "stirring up hatred", acknowledge the potential relevance of beliefs and practices for characteristics other than religion, and include provision to make more specific provision at a later date.

Veteran Spanish feminist Lidia Falcón, President of the Spanish Feminist Party, once imprisoned by Franco, was summoned to attend the Prosecutor's Office for Hate Crime and Discrimination in Madrid in December 2020, on her 80th birthday, for an interview, after she made a statement about plans to reform gender recognition law. She was subject to a complaint of hate crime by the Trans Platform Federation. The President of the TPF said "the repeated denial of the identity of trans people constitutes a hate crime". After a two month investigation, on 15 February the Prosecutor dropped charges, declaring that her statements had been an entirely legitimate intervention in a political debate. (Source: <https://www.actuall.com/familia/la-fiscalia-archiva-la-denuncia-por-transfobia-contra-la-feminista-lidia-falcon/>).

We invite the Committee to take active steps to prevent cases like Ms Falcón's occurring in Scotland.
