



glasgow bar association  
established 1959

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## **INTRODUCTION**

### **RESPONSE BY THE GLASGOW BAR ASSOCIATION**

### **TO THE SCOTTISH GOVERNMENT'S CONSULTATION**

### **HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL**

The Executive Committee of the Glasgow Bar Association (GBA) welcomes this opportunity to respond to this consultation on behalf of its members. The GBA is the largest association of Solicitors in Scotland, representing Solicitors in the West of Scotland and acting on behalf of our clients throughout Scotland. Glasgow Sheriff Court is the busiest Court in Scotland. It has also been billed as the busiest Court in Europe. Glasgow has the highest population pro rata of the most socially deprived and vulnerable members of Scottish society within its jurisdiction.

#### **The Aims and Objectives of the Glasgow Bar Association are: -**

1. To promote, represent and protect the rights and interests of its Members in the practice of law; and by extension those of its members' clients and therefore the wider public including the most vulnerable members of society.
2. To promote access to legal services and to justice.

3. To consider and, if necessary, formulate proposals and initiate action for law reform.
4. To consider and monitor proposals made by other bodies for law reform and draft legislation and to make comments, recommendations and representations thereon to the appropriate quarters.
5. To arrange conferences and lectures and otherwise to provide opportunities for its Members and others to study and keep up to date with current and proposed law practice and procedures.

We believe that the mark of a civilised society is how it treats its most vulnerable members of society. An independent legal profession must have the ability to challenge the machine of government, uphold the rule of law and safeguard civil liberties and human rights.

Finally, we would welcome any visit by an MSP to Glasgow Sheriff Court to illustrate the commendable work done by our members in representing our clients, who we believe are always at the centre of the work we do for them.

**The following represents the views of the Glasgow Bar Association to the questions set out in the consultation invitation:**

1. On balance we agree that the Bill is justified on the basis that there is an identifiable gap in present legislation in that it only provides protection in relation to the stirring up of racial hatred and not other protected characteristics. It seems sensible and equitable that stirring up offences should apply to all protected characteristics.
2. We agree that there is merit in consolidating existing hate laws into one piece of legislation. If drafted with clarity and consistency, then consolidation of the existing disparate legislation provides an opportunity to modernise and rationalise our approach to hate crime. Further consolidation of existing legislation is a rational and logical step in helping the public and legal practitioners access and understand the relevant law.
3. We are in agreement with Lord Bracadale's recommendation that statutory aggravations should continue to be the core feature of how hate crimes are prosecuted in Scotland. There is no need for a series of stand-alone offences as the statutory aggravations provide a simple,

consistent and effective way of marking the hate crime aspect of any offence. It allows for existing baseline offences and statutory aggravations reflecting identity hostility. In doing so it provides relevant information for sentencing purposes and indeed imposes on the sentencer an obligation to take the aggravation into account in determining the appropriate sentence and to specifically state the impact of the aggravation on sentencing. It therefore allows for the recording and tracking of patterns of offending and for trends to be identified and monitored.

4. We are neutral about the need for a new statutory aggravation on age hostility. The age of a victim of an offence like fraud or an assault, where it is an aggravating factor adding to vulnerability, is already taken into account in sentencing. We do, however understand that a new statutory aggravation will maintain consistency in the treatment of all protected characteristics and acknowledge public concern about crimes against those considered among the most vulnerable in society.
5. We agree with Lord Bracadale's recommendation that it is not necessary to extend the religious aggravation to capture religious or other beliefs held by individuals rather than as a group and present common law powers are sufficient.
6. We note that the current law only deals with the stirring up of racial hatred and agree with Lord Bracadale's conclusion that there is a gap in the legislation and that it should be an offence to stir up hatred in relation to the groups based on each of the protected characteristics. Lord Bracadale recognised that almost every case which could be prosecuted as a stirring up offence could also be prosecuted using a baseline offence and an aggravation. Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 can be used to prosecute threatening or abusive behaviour and an aggravation could mark the hate aspect. We are however, persuaded by Lord Bracadale's argument that depending on the facts and circumstances of the particular case there is merit in having the option of proceeding by way of a charge of stirring up hatred.
7. We disagree with the Scottish Government's plans to retain the threshold of 'threatening abusive or insulting' behaviour in relation to the stirring up of racial hatred. In our view Lord Bracadale is correct in concluding that 'insulting' should be removed. Threatening or

abusive should adequately cover all aspects of the ‘stirring’ behaviour that the legislation seeks to target and the inclusion of ‘insulting’ risks confusion and an unacceptable potential lowering of the prosecution threshold. It would also provide consistency of approach in setting the threshold for all protected characteristics. We also have concerns about the use of the ‘likelihood’ test formula used in the proposed legislation. It seems that an intention to stir up hatred is not necessary but a likelihood that it does so will suffice. While we understand the argument that this wider test may be more flexible in practice, we would prefer to retain the additional caveat – ‘having regard to all the circumstances’ recommended by Lord Bracadale.

8. Lord Bracadale recognised the danger that this type of legislation could lead to genuine and legitimate criticism being construed as stirring hatred. It is essential that people are able to engage in debate on controversial subjects without the fear of criminal prosecution. The freedom of expression provision does not cover all listed protected characteristics but instead focuses on freedom of expression in relation to religion and sexual orientation. While we agree that these are the two areas that may most obviously require that protection it seems to us that there may be scope for providing similar protection in other emerging areas of public debate relating to protected characteristics. We do recognise that Section 3 (4) provides a defence that the behaviour or communication was, in the particular circumstances, reasonable and that subsection (5) goes on to set out that if the defence adduce evidence sufficient to raise an issue as to whether the behaviour or communication was reasonable then it is for the prosecution to prove beyond reasonable doubt that it is not. These provisions seem to provide scope for a robust exchange of views and accommodate reasonable debate, but the main concern lies in the practical interpretation of the legislation by the police and the Crown in deciding when to charge and prosecute. It will be essential that detailed and robust guidance be set out for both the police and those at COPFS who will decide on prosecutions to ensure that freedom of expression is protected and there is not a drift to prosecution without considering all the facts and circumstances in the context of the aims of the legislation.
9. We do not agree with the Scottish Government view that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated behaviour should not be repealed. It seems to us

that such an approach is inconsistent with the consolidation objective and with centring statutory aggravations as the core feature of how hate crimes are prosecuted in Scotland. The removal of the standalone offence in no way represents a downgrade in the recognition of this type of offending. It will still be recognised in the same way as all other protected characteristics and offending frequency and patterns can be accurately recorded.

10. We agree with the plans for the abolition of the offence of blasphemy as there seems little purpose in retaining an offence that has not been prosecuted in the last 175 years.

This concludes the submissions of the Executive Committee of the Glasgow Bar Association and we welcome any opportunity to discuss this further.