HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

RESPONSE BY THE FACULTY OF ADVOCATES

1. The Faculty of Advocates, as the independent referral bar in Scotland, offers its comments in relation to the Hate Crime and Public Order (Scotland) Bill (the "Bill"). In submitting this response, the Faculty wishes to make it clear that it is not opposed to the principles behind the Bill nor to the idea that hate crime legislation ought to be contained within a single statute. The Faculty agrees with many of the proposals made by Lord Bracadale in his Independent Review of Hate Crime Legislation in Scotland. The Faculty does, however, have concerns regarding some potential unintended consequences of the legislation and particular aspects of it, as set out below.

Part 1

2. Part 1 of the Bill introduces new characteristics. The Faculty considers this part of the Bill to be uncontroversial. The way in which the proposed sections 1 and 2 are set out is in a manner which is similar to other recent statutes. The Faculty considers section 1 to be sufficiently clear in setting out the circumstances in which an offence will be aggravated by prejudice, and section 2 simply deals with the practicalities when it is proved that an offence is so aggravated. The style of this section is a familiar one, and the Faculty has no concerns with the way in which it or the remaining provisions of Part 1 are formulated.

Part 2

Section 3(1)& (2)

3. In relation to section 3(1), the Faculty notes the position of the Scottish Government that the draft provision will "largely replace similar existing offences which apply in relation to the stirring up of hatred against a group (of persons) defined by reference to race, colour, nationality, or ethnic or national origins." (Policy Memorandum paragraph 115). Those existing offences are said to be contained in sections 18 to 23 of the Public Order Act 1986 ("1986 Act").
4. The Faculty also notes, however, that Lord Bracadale in the 'Independent Review of Hate Crime Legislation in Scotland' ("The Bracadale Review") recommended the removal of 'insulting' from the provisions in relation to race. The Faculty respectfully agrees with that recommendation for

the reasons outlined in the Policy Memorandum.. In particular, the Faculty notes the stated position of Lord Bracadale quoted by the Scottish Government in paragraph 147 of the Memorandum:

> "Lord Bracadale noted the amendment that occurred to section 5 of the 1986 Act in 2013, where the term 'insulting' was removed from that offence with no notable impact on the ability to commence a prosecution, according to the Crown Prosecution Service."

5. The Faculty notes that the extension of 'stirring up of hatred offences' to other characteristics was also considered and supported by the Bracadale Review and respectfully agrees that, in principle, behaviour amounting to stirring up hatred which arises in relation to characteristics beyond race may reach a threshold of criminality.

6. The Faculty has reservations, however, concerning the formulation of the characteristic defined in section 3(3)(c) ("religion or, in the case of a social or cultural group, perceived religious affiliation"). That wording we consider to be vague and likely to create difficulty, not least in relation to questions of football and sectarianism.

7. In relation to the proposed statutory wording in relation to the new characteristics, section 3(2) differs from section 3(1) as a consequence of the omission of 'insulting'. As a result, an offence is only committed where the behaviour or material involved reaches a threshold of 'threatening or abusive'. The Faculty agrees with that approach, and with the analysis in the Policy Memorandum at paragraphs 135-139.

8. The Faculty considers that a consistent approach to these matters is desirable and consistency will be achieved if 'insulting' is deleted from section 3(1), as recommended by Lord Bracadale.

9. The Faculty has concerns as to the wording of sections 3(1)(b) and 3(2)(b) relating to the question of intent. As drafted, a crime is committed not simply where the Crown is able to demonstrate an intention to stir up hatred (which the Faculty supports) but also where, irrespective of intent, "it is likely that hatred will be stirred up."

10. The Faculty notes that the Policy Memorandum identifies this approach as having been borrowed

from the 1986 Act. Section 18(1) of the 1986 Act does contain a similar provision. It also contains section 18(5), however, which is in the following terms:

> "(5) A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting."

No such provision appears in the current draft Bill, and no explanation for that absence appears in the Policy Memorandum. The Faculty considers that, if an existing defence to a statutory offence is to be removed in what is stated to be consolidating legislation, the basis on which it is considered unnecessary or inappropriate should be set out.

11. The wider concern held by the Faculty under this heading is in the application of the draft provisions if passed into law. That is particularly so given: (a) the considerable expansion of the list of characteristics beyond matters of race; and (b) the breadth of the offence said to be committed where a person either (in relation to race) "behaves in a threatening, abusive or insulting manner" or "communicates threatening, abusive or insulting material to another person". In relation to non-race characteristics, the 'insult' provision is absent. The following general points, however, maintain.

12. First, section 3(6) states that 'behaviour' (bold emphasis added):

> "(a) **includes behaviour of any kind** and, in particular, things that the person says, or otherwise communicates, as well as things that the person does,
>
> (b) may consist of—
>
> (i) **a single act**, or
>
> (ii) a course of conduct."

The Faculty observes that the definition of behaviour is very broad, is non-exclusive and includes a single act.

13. Second, section 3(7) continues **(**bold emphasis added):

"For the purposes of subsections (1)(a)(ii) and (2)(a)(ii), the ways in which a person may communicate material to another person are by—

(a) displaying, publishing or distributing the material,

(b) giving, sending, showing or playing the material to another person,

(c) **making the material available to another person in any other way.**"

Again, that is drafted in very broad terms.

14. Third, section 13(2) defines 'material' as "… anything that is capable of being looked at, read, watched or listened to, either directly or after conversion from data stored in another form." The breadth of that definition will be obvious.

15. The result of the foregoing appears to be a position where an individual may be prosecuted and convicted of an offence of stirring up hatred in circumstances where there was no intent to do so but rather a single comment, picture, personal or political viewpoint is communicated to one or more people (for example in a WhatsApp group or similar) and such a communication is considered to be of material which is 'insulting' in relation to race or 'abusive' otherwise and 'it is likely that hatred will be stirred up.' The Faculty has concerns about the possible impact on freedom of expression arising from such a position. Those concerns are set out at paragraphs 21 to 31 below.

16. In light of the breadth of the definitions adopted in these sections and the absence of a requirement of intent, it would appear that the Bill could, for example, potentially criminalise a number of social media postings made on a daily basis. If it is anticipated that criminal proceedings will be raised in such cases, then a large number of prosecutions could result. If this is not anticipated, the Faculty would question the rationale for legislation which has no likelihood of being rigorously enforced.

17. The Faculty is also concerned about the effect of the legislation on the performing arts. This concern is particularly focused when the interaction of sections 3 and 4 is considered. If comedy performed, for example, at the Edinburgh Fringe offends the terms of the proposed Bill, the performer, presenter and director associated with that performance would be engaged in potentially criminal activity. This could be viewed as having a chilling effect on the freedom of

expression in this context. Further, given the differences between the proposed section 4 and the equivalent provisions of the 1986 Act (as amended), those appearing at what is advertised as the 'world's largest performing arts festival' in Edinburgh risk committing an offence performing a show in Scotland when the same show would not carry criminal sanction in England.

18. For the above reasons, the Faculty has serious concerns that the current approach to the laudable aim of tackling hate crime is undermined by the drafting of the Bill: a) in terms of the breadth of the definitions relied upon and the scope of behaviour and communication included; and b) the inclusion of sections 3(1)(b)(ii) and 3(2)(b)(ii). If those provisions are to remain, additional thought should be given to including an equivalent to section 18(5) of the 1986 Act.

19. Finally under this heading, the Faculty notes that a defence is proposed in section 3(4). To avail of that defence, a person charged must show that 'the behaviour or the communication of the material was, in the particular circumstances, reasonable. Further, section 3(5) provides that the behaviour will be 'reasonable' in this section if:

> '(a) evidence adduced is enough to raise an issue as to whether that is the case, and
> (b) the prosecution does not prove beyond reasonable doubt that it is not the case.'

20. The Faculty considers that in this particular statute, which impacts directly on the right to freedom of expression, it is inappropriate to place any evidential burden upon the accused. In circumstances where the statute seeks to restrict an individual's right to freedom of expression as set out immediately below, the Faculty considers that section 3 should include the word "unreasonably" after the words "the person" at sections 3(1)(a) and 3(2)(a). In that way it would be obvious that it was incumbent upon the Crown to prove beyond reasonable doubt that the behaviour or communication of the material was, in the particular circumstances, unreasonable.

Section 3(2) and Sections 11 & 12 - Freedom of Expression

21. The Scottish Government acknowledges the existence of concern about the impact on Article 10 of the European Convention on Human Rights ("ECHR") ("Article 10") which guarantees freedom of expression. The Faculty has reservations about the position of the Scottish Government that the proposed sections 11 and 12 meet those concerns.

22. The Faculty makes the following observations. The Human Rights Act 1998 incorporates Article 10 into domestic law. It is accordingly for the Government to justify any interference with freedom of expression under reference to Article 10(2). The Faculty cites the approach taken to Article 10 in Scots Law as set out by Lord Rodger in *BBC Petitioners (No3)* 2002 J.C. 27 at paragraphs 13 & 14. That case related to reporting restrictions under the Contempt of Court Act 1981, but the approach to Article 10 applies more generally, and is consistent with the jurisprudence of the European Court of Human Rights.

23. At paragraph 13 of *BBC Petitioners (No3),* his Lordship noted **(**bold emphasis added):

> 'As this court has recalled on a number of occasions, the 1981 Act was enacted to bring our law into line with the requirements of the European Convention and, in interpreting and applying its provisions, we must bear in mind not only the terms of the Convention but also the jurisprudence of the European Court of Human Rights. **A convenient summary of that Court's application of art 10(2) is to be found in their judgment in *Observer and Guardian v United Kingdom* at para 59: 'The Court's judgments relating to Article 10 —Starting with *Handyside*, concluding, most recently, with *Oberschlick* and including, amongst several others, *Sunday Time*s and *Lingens* —enounce the following major principles. (a) Freedom of expression constitutes one of the essential foundations of a democratic society; 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. Freedom of expression, as enshrined in Article 10, is subject to a number or exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.** (b) These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, *inter alia*, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog". **(c) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in**

assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.'

And again at paragraph 14:

'… **the court must consider not only whether such an order is 'necessary' but also what the appropriate scope of any order might be.'**

24. The correct approach for those restricting freedom of expression, therefore, is to start from the principle that Article 10 "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". In the context of a Bill such as this which will restrict freedom of expression, the Faculty would emphasise the centrality of that principle.

25. It will be obvious that many of the communications and much of the behaviour considered 'abusive' or 'insulting' in the Bill has the *prima facie* protection of Article 10. Article 10, however, is a qualified right. The terms of Article 10(2) make that clear. The application of that qualification will inevitably be fact dependant but the approach (as set out by Lord Rodger) is clear:

a) Is Article 10 engaged?
b) If so, what is the basis for the interference under Article 10(2)?
c) What is the 'legitimate aim' being pursued in restricting freedom of expression?
d) Does that pass the test of necessity?
e) Is the restriction proportionate to achieving the legitimate aim?

26. It is not possible to address each of the characteristics in detail in this response. Nevertheless, it may be of assistance to consider a few examples of situations where Article 10 has been held to have been breached.

27. Before turning to those examples, two additional points are noteworthy from the approach of the European Court of Human Rights. First, where the comments or behaviour involved are at a level which negate the fundamental values of the Convention, the protection of Article 10 is removed by Article 17 ECHR: *Seurot v France* (Application no. 57383/00) (Admissibility, 18th May 2004). One example arising from ethnic hate is *Ivanov v Russia* (Application no. 35222/04) (Admissibility, 20th February 2007) where the applicant published a series of anti-Semitic articles portraying Jews as the source of evil in Russia and calling for their social exclusion. The Court held that the protection of Article 10 was not available. A similar finding was made in *Norwood v United Kingdom* (Application no. 23131/03) (Admissibility, 16th November 2004) arising from a BNP poster representing the Twin Towers in flames and carrying the words 'Islam out of Britain – Protect the British People'. Second, the European Court of Human Rights has, additionally, given guidance on the competing rights which justify restriction on freedom of expression. (See *Erbakan v Turkey* (Application no. 59405/00) (6th July 2006) at paragraph 56).

28. Against that background, the Faculty offers the following examples from the European Court of Human Rights:

    i. Incitement to violence or hostility will justify restriction under Article 10(2) (see: *Gunduz v Turkey* (Application no. 59745/00) (Admissibility, 13th November 2003). Equally, however, criticism of democracy, fierce criticism of secular and democratic principles and openly calling for the introduction of Sharia law (all leading to a conviction for inciting the population to hatred based on membership of a religion or denomination) was **not** sufficient to avoid a finding of Article 10 having been breached in a later case involving the same parties. The Court stressed that there was no explicit call to violence and accordingly the defence of Sharia law could not be regarded as hate speech (*Gunduz v Turkey* (Application no. 35071/97) (4th December 2003).

    ii. In relation to national identity, which in the draft Bill will be covered by the characteristic of race, we note *Dink v Turkey* (Applications no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) (14th September 2010) in which the publication of articles expressing views on the identity of Turkish citizens of Armenian origin led to a conviction for 'denigrating Turkish identity'. Mr Dink, the first applicant, was killed after the proceedings had been raised. The case

subsequently brought by his relatives, the remaining applicants, established that there had been a breach of Article 10 because there had been no pressing social need to find him guilty, and the articles had been written on issues of public concern commenting on issues concerning the Armenian minority. Such comment had not incited disrespect or hatred. Equally, however, where that becomes incitement to ethnic hatred, the interference with Article 10 will likely be justified. Again, of particular relevance will be the question of whether the comments contributed to any public debate on questions of public interest (*Atamanchuk v Russia* (Application no. 4493/11) (11th February 2020) (request for referral to the Grand Chamber pending).

iii. A decision of the Grand Chamber in *Perincek v Switzerland* (Application no. 27510/08) (15th October 2015) underlines that importance. A Turkish politician was convicted for expressing the view, in Switzerland, that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire in 1915 had not amounted to genocide. He was held to be acting with a racist and nationalistic motive. In finding that the conviction amounted to a breach of Article 10, the European Court of Human Rights sought to strike a balance between Articles 8 and 10 and concluded that it had not been necessary – and again the Faculty would note the test of necessity in Article 10 – to impose a criminal penalty to protect the rights of others. The Swiss courts were found to have censured the applicant for voicing an opinion. The interference, in the form of a criminal penalty, was disproportionate.

iv. It will also be relevant to consider the role played by an individual in the dissemination of comments or material. That again emphasises the need for tight definition within the Bill. By way of example, the Faculty notes *Jersild v Denmark* (Application no. 15890/89) (23rd September 1994) where a journalist made a programme containing abusive and derogatory remarks about immigrants. He was convicted of aiding and abetting the dissemination of racist remarks. The European Court of Human Rights found a breach of Article 10 because the applicant had been informing the public about a social issue.

In the present Bill, the Faculty has already noted concerns over the breadth of the conduct and the individuals covered by potential criminal charges.

v. In the context of displaying images or symbols with a controversial historical connotation the Faculty would note *Fáber v Hungary* (Application no. 40721/08) (24th July 2012) in which the applicant had been prosecuted and fined having displayed a flag 100m away from an anti-racism demonstration. The flag was associated with a period of history dominated by a totalitarian regime in Hungary and it was accepted that its use would cause unease and a sense of disrespect amongst past victims. Nevertheless, the non-violent behaviour led to a finding that there had been a violation of Article 10.

vi. Finally, homophobic hate speech has been regularly held to justify interference with Article 10 on the basis that it is necessary to protect the rights and reputations of others (*Vejdeland and Others v Sweden* (Application no. 1813/07) (9th February 2012).

29. The Faculty suggests that the foregoing examples make clear that legislation tackling hate crime requires to be necessary, proportionate, specific and carefully considered to avoid breaching Article 10 and the right to freedom of expression. Such legislation requires to reflect a range of complicated factors such as the role of individuals in any chain of communication, the existence and nature of a public debate on a matter of public interest, the contribution to political debate, the right to promote an alternative view of history or to call for radical change in society. All of that requires to be considered with a core commitment to protecting the right of all (within the necessary limits and restraints imposed by the legitimate aims pursued to protect society and others) to make comments which 'offend, shock and disturb'. It is because of those considerations that the Faculty has significant reservations about the proposed legislation. The Faculty re-iterates its support, in principle, for the extension of the characteristics in line with the recommendations of Lord Bracadale but, in practice, has concerns arising from the drafting of the Bill in terms of its breadth, and its restrictive effects on freedom of expression.

30. Specifically, in relation to sections 11 and 12 of the Bill, the Faculty is not clear why only two of the characteristics (sexual orientation and religion) have been selected for statutory protection. The Faculty is unaware of any basis for assuming that the right to freedom of expression relating

to one of the characteristics is less than any other (see *Vejdeland and Others v Sweden* (Application no. 1813/07) (9th February 2012).

31. The terms of sections 11 and 12 raise additional concerns. Both rely on the wording that "Behaviour or material is not to be taken as threatening or abusive **solely on the basis** that it involves …" (bold emphasis added), before going on in each case to narrate various factors. In the case of religion, that includes "discussion … of religion" and "proselytising". In the context of sexual orientation, that includes "discussion … of sexual conduct or practices". The current wording does not appear to afford any significant protection, in that it could be said that it creates the possibility that the activities listed may be relied upon as evidence of threatening or abusive behaviour.

Section 4

32. Section 4 is headed "Culpability where offence committed during public performance of play". Subsection (1) provides that section 4 applies where an offence under section 3 is committed during a public performance of a play by a person who is a performer in the play. It is therefore necessary to read section 4 in conjunction with section 3. Section 3 has the potential to be interpreted widely, as discussed above. Insofar as relevant, it provides as follows:

> "(1) A person commits an offence if-
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> (a) the person-
>
> (i) behaves in a threatening, abusive or insulting manner, or
>
> (ii) communicates threatening, abusive or insulting material to another person, and
>
> (b) either-
>
> (i) in doing so, the person intends to stir up hatred against a group of persons based on the group being defined by reference to race, colour, nationality (including citizenship), or national origins, or
>
> (ii) as a result, it is likely that hatred will be stirred up against such a group.
>
> (2) A person commits an offence if-
>
> (a) the person-
>
> (i) behaves in a threatening or abusive manner, or

(ii) communicates threatening or abusive material to another person, and

(b) either-

(i) in doing so, the person intends to stir up hatred against a group of persons based on the group being defined by reference to a characteristic mention in subsection (3), or

(ii) as a result, it is likely that hatred will be stirred up against such group.

(3) The characteristics are-

(a) age,

(b) disability

(c) religion or, in the case of a social or cultural group, perceived religious affiliation,

(d) sexual orientation,

(e) transgender identity,

(f) variations in sex characteristics."

33. The Faculty considers that it is not clear why an individual might be considered to be likely to behave in an insulting manner to the persons referred to in section 3(1) and in such a way as warrants criminalisation, but might not be considered likely to behave towards the persons referred to in section 3(3) in such a way as to warrant criminalisation. The legal difference between abusive behaviour and insulting behaviour is not clear, most dictionary definitions appearing to include the use of one word as part of the definition of the other. For the reasons already given, the Faculty supports the views of Lord Bracadale that the reference to "insulting" should be removed.

34. Section 4 defines the circumstances in which a person or persons can commit an offence under section 3 during the performance of a play. Section 4(1)(a) makes it an offence under section 3 for the person who is a performer in the play. Section 4(1)(b) requires for the commission of the offence that it (i) involves consent or connivance on the part of the person who presents or directs the performance, or (ii) is attributable to neglect on the part of such a person. Section 4(2) makes it an offence for both the performer and the presenter or director. This could attach culpability to everyone from the person who directs and performs in a one man play to the directors and performers of major productions. It also makes culpable the person who "presents"

the play. The Faculty anticipates that this will cover those who produce the play and perhaps those who advertise it.

35. The Faculty considers it to be unclear as to whether this formula under the Bill extends art and part culpability to other performers who may not actually say the offending remark but play a crucial part in a play where other performers actually present the offending material. The Bill does not address this issue, unless section 4(2) is intended to limit the scope of art and part culpability. If this is the intention of section 4(2), it is suggested that the Bill should state this clearly.

36. "Play" is defined in section 18 of the Theatres Act 1968 as "(a) any dramatic piece, whether involving improvisation or not, which is given wholly or in part by one or more persons actually present and performing and in which the whole or a major proportion of what is being done by the person or persons performing, whether by way of speech, signing or action, involves the playing of a role; and (b) any ballet wholly or in part by one or more persons actually present and performing, whether or not it falls within paragraph (a) of this definition".

37. "Public performance" is defined in the same section to include "any performance in a public place within the meaning of the Public Order Act 1936, any performance which is not open for the public but which is promoted for private gain and any performance which the public or any section thereof are permitted to attend, whether on payment or otherwise".

38. The definition of "play" noted above would appear to cover a wide range of performances from the 'traditional' play, to dance and opera. It would also appear to cover stand-up comedy where the comedian plays a role such as Al Murray ('The Pub Landlord'), or Sacha Baron Cohen ('Ali G'). It would also presumably cover any stage performances in a 'sketch show' format

39. The extension of the foregoing provisions to plays and performances is of a far-reaching and perhaps unintentional scope. Sections 3(1)(b)(ii) and 3(2)(b)(ii) do not require there to be any intention on the part of the performer, director or presenter to stir up hatred, simply that as a result of the play it is likely that hatred will be stirred up.

40. Both traditional and more modern plays tackle controversial and often highly emotive subjects. The Bill as presently drafted appears to the Faculty to have the potential to 'catch' a play in which

a person with a particular characteristic is portrayed in a positive way, but the nature of the play requires to refer to abusive or insulting material and the result is it stirs up hatred against that group.

41. The Faculty considers it to be likely that there are many plays which call for threatening, abusive or insulting material to form part of the performance in some way. Plays are often intended to open debate on various subjects and sometimes deal with sensitive and controversial subjects. If that it is done with the intention of stirring up hatred, a wish to legislate against it is understandable. The Faculty has concerns, however, that the section as presently drafted is overbroad.

42. The Faculty recognises that a defence is available under subsections (4) and (5). The Faculty is concerned, however, as to the doubt to which this defence may give rise in terms of those performing, presenting and directing a play knowing when the behaviour or communication of the material is, in particular circumstances, 'reasonable'. The Faculty suggests that such doubt may have a stifling effect on dramatic plays presented in public, on the basis that performers, directors and presenters otherwise wishing to become involved in them may not do so for fear of committing a criminal offence.

43. There appears to be no discussion of this section in the Policy Memorandum at all. Legislation similar to this already exists in section 20 and section 29D of the 1986 Act. However, there are potentially important differences between that Act and the present Bill. Section 20 of the 1986 Act, as amended by the Broadcasting Act 1990, which relates to stirring up racial hatred, provides as follows:-

> "(1) If a public performance of a play is given which involves the use of threatening, abusive or insulting words or behaviour, any person who presents or directs the performance is guilty of an offence if—
>
> (a) he intends thereby to stir up racial hatred, or
>
> (b) having regard to all the circumstances (and, in particular, taking the performance as a whole) racial hatred is likely to be stirred up thereby.
>
> (2) If a person presenting or directing the performance is not shown to have intended to stir up racial hatred, it is a defence for him to prove—

(a) that he did not know and had no reason to suspect that the performance would involve the use of the offending words or behaviour, or

(b) that he did not know and had no reason to suspect that the offending words or behaviour were threatening, abusive or insulting, or

(c) that he did not know and had no reason to suspect that the circumstances in which the performance would be given would be such that racial hatred would be likely to be stirred up.

(3) This section does not apply to a performance given solely or primarily for one or more of the following purposes—

(a) rehearsal,

(b) making a recording of the performance, or

(c) enabling the performance to be included in a programme service**;**

but if it is proved that the performance was attended by persons other than those directly connected with the giving of the performance or the doing in relation to it of the things mentioned in paragraph (b) or (c), the performance shall, unless the contrary is shown, be taken not to have been given solely or primarily for the purposes mentioned above.

(4) For the purposes of this section—

(a) a person shall not be treated as presenting a performance of a play by reason only of his taking part in it as a performer,

(b) a person taking part as a performer in a performance directed by another shall be treated as a person who directed the performance if without reasonable excuse he performs otherwise than in accordance with that person's direction, and

(c) a person shall be taken to have directed a performance of a play given under his direction notwithstanding that he was not present during the performance;

and a person shall not be treated as aiding or abetting the commission of an offence under this section by reason only of his taking part in a performance as a performer.

(5) In this section "play" and "public performance" have the same meaning as in the Theatres Act 1968.

(6) The following provisions of the Theatres Act 1968 apply in relation to an offence under this section as they apply to an offence under section 2 of that Act —

section 9 (script as evidence of what was performed),

section 10 (power to make copies of script),

section 15 (powers of entry and inspection)."

Section 29D makes similar provision in respect of religion and sexual orientation.

44. The Faculty notes that there is no explanation as to why, in the proposed section, the decision has been taken to target the performer primarily rather than the director. Equally there is no explanation as to why the various defences set out in section 20(2) and the exclusions set out in section 20(3) of the 1986 Act are not part of the proposed section of the Bill.

Section 5

45. Section 5 relates to the possession of material. Points similar to those made regarding section 3 above are relevant here. The criticisms of section 3 apply also to section 5. In particular, with regards to the statutory defence at subsections (4) and (5), the Faculty considers that it should be made clear in the Bill that the Crown must prove the possession of the material to be unreasonable. It is inappropriate to impose any evidential burden upon the accused.

Section 6: Powers of Entry etc. with warrant

46. A warrant is "an authorisation issued by a court to a person which entitles him to do or require others to do, things which but for the warrant he would have no right to do, or which they would not be legally required to do or consent to his doing" (Renton & Brown § 5-01).

47. Section 6 of the Bill provides for powers of entry and associated powers to be conferred upon a constable or member of police staff (both defined at subsection (4) under reference to other statutes) by a sheriff or justice of the peace. By subsection (1), a sheriff or justice may grant a warrant to enter premises if satisfied that there are reasonable grounds for suspecting that an offence under section 3 or section 5 has been, or is being, committed, or that there is evidence of the commission of an offence under those sections at premises specified in the warrant.

48. The powers to be conferred under such a warrant are set out at subsection (2). They are: (a) entry onto premises, by force if necessary; (b) search of premises and any person found there; (c) seizure and detention of material found on the premises or on the person of anyone on the premises, if the authorised searcher has reasonable grounds for suspecting that it may provide evidence of commission of a crime under section 3 or section 5.

49. Section 6(3) provides that the authorised searcher may 'require' that material capable of being viewed, etc., after conversion from data stored in another form, should be converted into such a form as to enable it to be taken away, or produced in a form capable of being taken away, and from which it can readily be converted. The same power is already conferred by other provisions providing for statutory warrants: for example, section 46 (3) of the Firearms Act 1968.

50. The Faculty has reservations about the proposed terms of this section. These reservations concern: (i) the scope for oppression in the section, including by way of malicious or misguided complaint; and (ii) whether the powers to be created by the section are proportionate to the matters which they bear to be intended to address.

51. In order to explain these reservations, brief reference requires to be made to the new statutory offences to which they relate, being found in the Bill at proposed sections 3 and 5. These are dealt with in detail above; in short, they are found in Part 2 of the Bill under the rubric 'Offences Relating to Stirring up Hatred'.

52. Section 3 of the proposed Act creates the offence of behaving in a threatening, etc., manner, or communicating threatening, etc., material to another, with the intention of stirring up hatred against a specified group within society, or where the likely result of such actions is that hatred will be stirred up.

53. Section 5 creates the offence of possession of 'inflammatory' material, and by subsection (1) criminalises possession of such material with a view to communicating it to another or others, so as to 'stir up' hatred against a specified group defined along racial lines, or where it is likely that communication of such material would result in hatred being stirred up. Subsection (2) replicates these provisions, and applies them to specified groups — there are six listed characteristics.

54. Sections 3 and 5 criminalise actions by 'persons'. It is clear that this includes legal persons such as limited companies and institutions. Section 9 provides for the culpability of individuals where offences are committed by an organisation.

55. There are provisions for interpreting Part 2 of the Bill at section 13. Section 13(3) provides that reference to an offence under particular sections include attempts to commit that offence, and also, under subsection (3)(b), the aiding, abetting, counselling, procuring or inciting the commission of such offences; and, under subsection (3)(c), conspiring to commit them. While these provisions place into the Bill concepts familiar to the common law such as 'attempt' and 'concert', the same suite of actions is to be found in other legislation e.g. the Female Genital Mutilation (Protection and Guidance) (Scotland) Act 2005, section 5B(7)(b); the Prisoners and Criminal Proceedings (Scotland) Act 1993 Schedule 1 paragraph 7(4) (under exception of 'inciting'); the Criminal Procedure (Scotland) Act 1995, section 210A(10)(d); and the Assaults on Emergency Workers (Offences) Act 2018, section 2(10). The suite of actions has often been inserted into existing statutes by subsequent, recent legislation.

56. The offences to be created do not seek to criminalise 'hatred' itself. Scots law, in common with all other mature systems of law, penalises not thought, but action. Section 6 of the present Bill would confer powers of entry and search to recover material, communication of which is 'likely' to stir up hatred against a specified group. Hence, possession of such material is capable of criminalising a person, irrespective of whether that person intends to stir up hatred or not. These proposed provisions call for close scrutiny. Other statutes conferring powers of search are discussed below.

57. In the present Bill there is no statutory definition of the word 'hatred', nor of the expression 'stir up'. A court might consider that these are familiar terms and that it can proceed to interpret the statutory provisions guided by their ordinary meanings.

58. The Faculty is concerned, however, at the scope created by the Bill for extensive disruption to life and livelihood, and to the legitimate operations of businesses and institutions, by malicious complaint, generating the grant of a warrant under which electronic devices can be seized and retained for prolonged periods.

59. As at the time of this response to the Bill, the expression 'hatred' may be deployed in contexts and in situations in which it has not hitherto been applied. The development of social media has been identified as having fostered a climate of denunciation of persons on the basis of views attributed to them, or which it is inferred that they espouse. Denunciation is then made on the basis that a person's words demonstrate 'hatred'—often for the categories of persons set out in the Bill, rather than their reflecting a difference of view. The effect of such polarisation can be to restrict public debate; to restrict legitimate investigation of social evils, and indeed, of crime; and by extension, to pose a danger to the public.

60. There is scope for concern that the terms of the proposed section 6 of the Bill risk augmenting the effect of factors active in society with the tendency to stifle or suppress free and lively debate. Given the broad terms in which the Bill is framed, and the absence of statutory definition of the key phrases 'hatred' and 'stirring up', the Faculty considers that there is scope for unfounded complaints (whether made sincerely, or not) to the police against persons or institutions, a potential consequence of which would be the invasion of privacy and domestic life, the seizure of telephones and computers, and the prolongation of disruption caused to people, businesses and institutions. The Faculty is concerned that the invasion of privacy, the interruption of domestic life, and the operation of institutions or businesses which might be caused by the enactment of this section of the Act, is disproportionate to any benefit which might flow therefrom in terms of addressing the evils in society which is sought to be addressed. This is particularly so as it would appear that, in relation to activities which would be capable of being found at the more serious end of the spectrum of offending created by the Bill, appropriate powers of entry and search might be found in existing statutes, such as those dealing with terrorist offences; and at common law.

61. The concept of 'hate' in contemporary society is contentious, and used in political discussion in a manner which lies outwith the Dictionary definition. There is a widespread, legitimate concern that allegations that acts or words are expressions of 'hate' are used to forestall, or to 'shut down', discussion of matters which are the subject of legitimate debate; and to establish the parameters of that debate in terms which might be thought to suit a particular side in any such debate. The Faculty is concerned that these issues are not currently adequately reflected in the Bill.

<u>Protections against oppression in the granting and execution of warrants</u>

62. Scots law countenances examination of private papers under warrant with reluctance. The opinion of Lord Ardmillan in *Nelson v. Black and Morrison* (1866) 4 M. 328, at page 332, summarises the concerns raised by such applications:

> "… a general warrant for a sweeping and indefinite search in the dwelling house of a person not put under charge, for written documents in regard to which there is this particularity, that they must be read before it can be seen what they instruct, is a very strong and startling procedure; and if granted at all, such a warrant should have been accompanied by some security against oppression, and against violation of private conscience."

63. These concerns apply in relation to the present Bill in that the terms upon which a warrant is sought are potentially sweeping and general — directed at matters such as "… likel[ihood] that, if … communicated, hatred would be stirred up …"; that the warrant would be directed against a person not under charge, but rather, on the basis of information received, to recover material to be the foundation of a charge; and that it would be necessary to read through material in order to determine whether or not it fell within the statutory criteria, thus potentially involving the scrutiny of private or confidential documents. Where such investigation of private papers is carried out, there is a clear risk of oppression. The security against oppression which Lord Ardmillan identified was the attendance of someone who in today's practice would be a Commissioner ("… the personal attendance of the sheriff, or some person of discretion and authority, to superintend the search, and to inspect and select the documents …").

64. In considering the scope of this section of the present Bill, it will be borne in mind that the stage at which section 6 contemplates applications for warrant is the evidence-gathering stage: before any charge has been brought. The existing safeguards against oppression should therefore be considered.

65. At common law and at statute, Scots law considers that security against oppression comes from the independent role of the judicial officer who requires to consider the position before granting or refusing a warrant:

> "Although the accused is not present nor legally represented at the hearing where the magistrate grants the warrant to examine or to search, the interposition of an independent judicial officer affords the basis for a fair reconciliation of the interests of the public in the suppression of crime and of the individual, who is entitled not to have the liberty of his person or his premises unduly jeopardised … The hearing before the magistrate is by no means a formality, and he must be satisfied that the circumstances justify the taking of this unusual course …" (*Hay v. H.M. Advocate*, 1968 J.C. 40, *per* Lord Justice General (Clyde) at page 46).

66. In *Birse v. MacNeill* 2000 J.C. 503, those observations, made in relation to a warrant at common law, were quoted and held applicable to statutory warrants as well. The court emphasised at paragraph 10 the role of judicial officer considering the application for a warrant and the protection which this affords to the public:

> "We think it right, however, to indicate that, in our view, the whole point of the procedure for the grant of a warrant in terms of sec 23(3) [of the Misuse of Drugs Act 1971] is indeed to interpose an independent judicial figure who actually considers the circumstances and decides whether to grant the warrant."

67. The criterion on which a warrant is to be granted is:

> "… no higher than the justice's satisfaction that there is reasonable ground for suspecting and, consistent with the frequent need for expedition, hearsay (and indeed hearsay of hearsay) may be enough to supply the justice with the necessary information." (*Stewart v. Procurator Fiscal, Glasgow* [2015] HCJAC 13 at paragraph 12)

68. The terms of section 6 of the proposed Act empower service of a warrant for search upon a person who may have no intention either of stirring up hatred, or of communicating material capable of stirring up hatred: section 3 penalises behaviour likely to stir up hatred; section 5, the possession of material which, were it to be communicated, is likely to stir up hatred. The offence lies in the behaviour, and in the mere possession of material, irrespective of intention. *Birse v. MacNeill* contains a reassertion of the principle that an application for a warrant should never be regarded as being no more than a formality. But were it to be a matter of law that a justice could authorise a warrant in terms of section 6 of the Bill — with the inevitable potential for upset,

anxiety, distress, intrusion of privacy and possibly of home life; and possibly expense, in instructing legal representation — then the provisions of the Bill could have a chilling effect on intellectual inquiry and discourse in Scotland. The terms of the Bill may render persons less likely to participate in discussion of matters important to society, if they feel that such participation may render them liable to have their homes, businesses or institutions invaded, under lawful warrant. The Faculty considers that this possible consequence ought to be taken into account in considering whether the provisions of this section and of the present Bill at large are proportionate to the evil which they bear to address.

69. The Faculty is therefore concerned that the power to grant a warrant, on identifying reasonable grounds for suspicion, provides insufficient protection against oppression, where the conduct so criminalised is framed in such broad terms.

70. The terms of other statutes under which warrants may be granted are considered below. They tend to deal with material which is readily capable of being understood as being contrary to the law in place. But the criminalisation of materials which the present Bill would create is concerned with matters which may require much by way of interpretation, on the part not only of the court but of the haver, the law-abiding member of the public who would require to scrutinise hitherto unobjectionable material, in his or her possession, in order to consider whether its possession constitutes a breach of the criminal law. Reference is made to the observations of Lord Ardmillan in *Nelson v. Black and Morrison, cit. sup.* and quoted at paragraph 66 above. The possession of drugs or associated paraphernalia; of unlicensed firearms or ammunition; of illegally caught fish, or illegal tackle; of knives packaged for sale in a manner suggesting their suitability for combat: all these are readily identifiable as lying within the scope of the relevant statute, under which powers are granted under warrant for entry and search to discover them. The capacity of a document for stirring up hatred against a specified group will not necessarily be so readily identifiable. For example, material held by a person or organisation, relating to a territory, the borders of which territory are disputed by nations adjoining it, may be capable of stirring up hatred against persons associated with one of those nations, falling within subsection (3)(c) (religion or, in the case of a social or cultural group, perceived religious affiliation). Discussion of that matter will be legitimate; but the terms in which that discussion are couched, or even the language of that discussion, may be likely to stir up hatred in terms of section 5(2)(b)(ii). A person conducting a search under warrant might be quite unable to detect such nuances on initial reading. It is foreseeable that it would be necessary to investigate the matter by removal of devices on which

such material might be held; which would be the occasion of inconvenience and disruption, possibly for prolonged periods.

71. The court in *Birse v. MacNeill* also laid emphasis on the reluctance of the court to 'go behind' an *ex facie* valid warrant. The appeal court has elsewhere declined to accept that it has a jurisdiction to review the granting of warrants. In *Stewart v. Harvie* 2016 S.C.C.R. 1, a bill of suspension was taken on the point that the information provided to the justice by the officer applying for a warrant had not provided a comprehensive position such that a proper consideration of all the information could inform the decision whether to grant a warrant; and that the decision to grant the warrant had been based on an incomplete understanding of the evidence. The court refused to pass the bill, finding that Scottish practice does not, and ought not, to provide for the 'second guessing' of a decision by a justice or sheriff to grant a search warrant (in this instance, again, under section 23 (3) of the Misuse of Drugs Act 1971). The statutory scheme confers the decision as to whether to grant a warrant upon the justice of the peace or sheriff hearing the application, and with it the jurisdiction to consider whether the statutory criteria for granting the warrant had been met — which was no higher than satisfaction that there were reasonable grounds for suspicion. Furthermore, this was consistent with the frequent need for expedition in the granting of warrants.

72. In order to consider why the proposed term under consideration poses a risk to freedom of speech and debate, the Faculty considers that it is necessary to contrast the objects of search under the present Bill, with the objects of search in comparable provisions conferring powers of search under statutory warrant. Put shortly, identification of evidence relating to offences created by these statutes is an obvious matter; identification of what may be evidence in relation to sections 3 and 5 of the proposed Act is likely to demand a degree of interpretation of material, on the part of the searching person, given the subjective terms in which the sections are expressed: the likelihood that by communication of material to a person, hatred against a group of persons will be stirred up; whether or not material has the quality of being 'threatening', 'abusive', or 'insulting': all these matters are subjective, and call for a degree of interpretation on the part of the searcher: interpretation, in the first instance, considerably greater than that required to assess, say, whether a knife for sale is packaged and marketed in such a way as to bring it within the terms of the Knives Act 1997. There is scope for concern that persons carrying out searches, being called upon to conduct potentially difficult tasks of interpretation, will seize all material which they come across. In contemporary terms this is likely to mean the seizure of mobile

phones and computers; and the probability of the considerable disruption which will be occasioned by the seizure of such items raises issues around the rights to privacy, to property and to home life enjoyed by citizens in terms of the ECHR and the common law; and the matter of the proportionality of actions authorised by warrant.

Examples of statutory powers of search

73. The Public Order Act 1936 enacted a prohibition on paramilitary organisations. By section 2, a person taking part in the control or management of a paramilitary association, in the organization or training of its members or adherents, committed an offence. Subsection (5) enacted the power to grant warrant to search premises and to search them or persons there reasonably suspected of participation in the offence. The identification of evidence of such by a constable searching under this statute is likely to be straightforward.

74. The Salmon and Freshwater Fisheries Act 1961 confers upon a sheriff or justice of the peace the power to grant warrant to water bailiffs, constables or other authorised persons to enter premises etc, if necessary by force, and to search them and persons present, and to stop and search vehicles, where there are reasonable grounds for suspecting that evidence of the commission of an offence will be found. Evidence of activities prohibited by the Act — illegally caught fish, illegal and other fishing gear — is readily identifiable.

75. The Firearms Act 1968 confers at section 46 the power to enter premises, if necessary by force, and search them and persons found there, and to seize and detain items reasonably to be suspected of being evidence of an offence under the Act, or constituting a danger to public safety or peace. The Act deals with the possession and licensing of firearms and ammunition. It is likely to be the case that items and documents identified during search are more readily identifiable as potential evidence of offending in terms of that Act, than documents recovered under search in terms of the present Bill.

76. Section 46 (3) of the Firearms Act 1968 confers power replicated in the present Bill (at section 6 (3)) to require material stored in electronic form to be produced in a form which allows it to be removed from the premises. Given the material with which the Firearms Act 1968 is concerned, it is more likely that such material will be discrete, and limited in scope, than material potentially relevant under the Bill—which is more likely to involve extensive messaging and e-mail records.

For that reason, recoveries from searches taking place under warrant granted by section 6 of the present Bill will conceivably involve the devices upon which records are stored, thus enhancing the disruption to the life, and possibly the business, and other legitimate activities, of the haver.

77. Warrants for search may be granted in terms of section 23 of the Misuse of Drugs Act 1971. Again, it is submitted that controlled drugs and drugs paraphernalia, packaging materials and scales, are immediately identifiable as the items for the recovery of which, if found, the search warrant was granted. In circumstances where a warrant is granted for the search of commercial premises, where it is suspected that drugs offences are being perpetrated through or under cover of an ostensibly legitimate business (*vid., e.g.* the circumstances set forth in *Grant v. H.M. Advocate* 2006 J.C. 205) then it is more likely that business records can be readily copied; and in any event, the extent of the disruption caused by their recovery would be proportionate to the seriousness of the crime under investigation.

78. The Knives Act 1997 confers a power upon a sheriff or justice to grant a warrant for search where there are reasonable grounds for suspecting that evidence relating to an offence under sections 1 or 2 might be recovered. Section 1 relates to the unlawful marketing of knives — where they are marketed in such a way as to present them as suitable for combat, or to encourage violent behaviour involving their use as a weapon. Subsection (3) provides that indication or suggestion of suitability for combat may be found in the nomenclature of the item, or by description or name applied to the knife or found on any packaging or advertisement.

79. By section 2 of the same Act, a person is guilty of an offence by publishing any written, pictorial or other material in connection with the marketing of any knife, where that material indicates or suggests that the knife is suitable for combat, or is otherwise likely to stimulate the use of the knife as a weapon. Again, these aspects of appearance, and content of material, will be more readily apparent on search, than will the capacity of material which has the potential to be identified as falling within the ambit of sections 3 and 5 of the present Bill.

80. The Terrorism Act 2000 provides at section 42 for the granting of a warrant for search of premises where there are reasonable grounds for suspecting that a person reasonably suspected of falling within one of the categories set out in section 40 is to be found there.

81. Terrorism legislation generally is considered so sensitive, in the extent to which it must balance the concerns of maintenance of the public peace and the extension of the powers of the state, with those of individual liberty, that an Independent Reviewer of Terrorism Legislation is appointed to keep its scope under review. The relevant considerations were outlined by the then Home Secretary, Rt. Hon. Sajid Javid M.P., on the occasion of the appointment of the current reviewer, 20th May 2019:

> "… with the threat from terrorism continuing to evolve and diversify, it is vital that we have robust oversight to ensure our counter-terrorism laws are fair, robust and proportionate."

82. The Customs and Excise Management Act 1979 provides at section 118C for a sheriff or justice, if satisfied that there are reasonable grounds for suspecting that a fraud offence of a serious nature is being or is about to be committed on premises, to issue a warrant for entry and search, and removal of documents. While this provision may well be thought to be capable of causing extensive disruption to the operation of a business, it must be borne in mind that the same legislation provides that the revenue traders with whom it is concerned owe *inter alia* duties to keep records (section 118A), and to furnish information and produce records (section 118B); so that proper operation of the statutory scheme involves a measure of anticipation that in the ordinary course of legitimate business it would be necessary to surrender documentation for examination.

83. Comparison may be made with the statutory provisions in Scots law for the control of indecent images. The Civic Government (Scotland) Act 1982 ("the 1982 Act") deals with offences arising out of the making of, or possession of, indecent images, at sections 51 to 52C. These provisions include a definition of the nature of 'extreme pornography', and provide for penalties: up to ten years' imprisonment, on conviction on indictment. The making of indecent images, photographs or pseudo-photographs, and the possession of such, may be seen as analogous to the possession of 'inflammatory material' in terms of the present Bill: in neither case do the terms of the charge require that the person charged personally commit a harmful act. Yet the 1982 Act carries with it no statutory power of search, even though, considered in terms of the range of sentences available, the offences which it constitutes are deemed to be more serious than those to be constituted by the present Bill: the penalties on conviction on indictment in relation to sections 3

and 5 of the Bill are seven years' imprisonment, as opposed to the ten years which could be imposed for breach of section 52 of the 1982 Act (indecent images of children).

84. In these circumstances, the Faculty considers that due to the broad nature of the proposed offences in sections 3 and 5 the power of search in section 6 has the capability of causing significant difficulties for persons suspected though not charged with such offences as referred to above at paragraph 58.

85. Finally under this heading, the Faculty comments that section 6 of the proposed Act fails to specify a time period within which the search must take place from the date of issue of the warrant. This is not a necessary requirement but one that is included in other sections of this type (see, for example, section 23(3) of the Misuse of Drugs Act 1971). It also fails to provide that the search must take place at a reasonable hour unless to do so would frustrate the purpose of the search. In the event a power of search is to be included in the Act, the Faculty suggests that these matters are given consideration.

Section 7

Recording conviction for offence under section 3 or 5

86. Section 7 of the proposed Act would provide that on conviction of an offence under section 3 or 5, the court would require to specify the characteristic(s) to which the offence relates. The Faculty considers that there is nothing new or controversial in the steps that are specified and the approach of this section is already adopted in existing hate crime legislation as well as in relation to aggravations found within non hate crime legislation.

Section 8

Forfeiture and disposal of material to which offence relates

87. Section 8 of the proposed Act would authorise on conviction the forfeiture and disposal of any material to which offences under section 3 or 5 relate. 'Material' is broadly defined in section 13(2) as "anything that is capable of being looked at, read, watched or listened to, either directly or after conversion from data stored in another form".

88. The Faculty considers that there is nothing controversial in the wording of this section and the effect is similar to that provided for in relation to firearms and ammunition under section 52 of the Firearms Act 1968.

Section 9

Individual culpability where organisation commits offence

89. Section 9 provides for individual culpability where an offence under section 3 or 5 is committed by a relevant organisation and the commission of the offence involves the consent or connivance or neglect on the part of a responsible individual. Again, the Faculty considers that there is nothing controversial in this provision and it is notable that there are already over four hundred United Kingdom statutes that allow for individuals to be prosecuted because they have participated in criminal offending by an organisation through their consent, connivance or neglect. A similarly worded section can be found in section 57 of the Sexual Offences (Scotland) Act 2009.

Section 15

90. Section 15 of the Bill if enacted would provide the Scottish Ministers with the regulation-making power to "add the characteristic of sex" to the list of characteristics in sections 1(2), 3(3), and 5(3) of the proposed Act, and to modify the terms of the proposed section 14 "by adding interpretative provision relating to the characteristic of sex". Regulations under the proposed section 15 are to be subject to the affirmative procedure.

91. The proposed sections 1(1), 3(2), and 5(3) of the Act referred to in clause 15 provide, respectively, for the aggravation by prejudice of any existing offence, and two new statutory offences (stirring up hatred, and possessing inflammatory material), all of which are based either on the victim possessing a particular characteristic or on the offending behaviour being directed at a group of persons defined by reference to such a characteristic.

92. As presently drafted, the characteristics referred to in the 'aggravating' provision (section 1(2) for the purposes of section 1(1)) are: (i) age; (ii) disability; (iii) race; (iv) colour; (v) nationality

(including citizenship); (vi) ethnic or national origins; (vii) religion or, in the case of a social or cultural group, perceived religious affiliation; (viii) sexual orientation; (ix) transgender identity; and (x) variations in sex characteristics. The characteristics referred to in both the 'stirring up hatred' provision (section 3(3) for the purposes of section 3(2)) and the 'possessing inflammatory material' provision (section 5(3) for the purposes of section 5(2)) are the same under exception of race, colour, nationality (including citizenship), and ethnic or national origins, in respect of which characteristics a standalone offence is created in the proposed subsection (2) of each provision. Neither the characteristic of 'sex' (the term used in the Equality Act 2010) nor that of 'gender' is currently the subject of criminalising provision in any of the substantive provisions of the proposed Act.

93. The Faculty notes that the Policy Memorandum prepared by the Scottish Government in respect of the Bill identifies, at paragraph 241, the purpose behind the regulation-making as opposed to primary legislative approach which has been adopted in relation to the inclusion of the characteristic of 'sex' to be to provide: "flexibility to allow sex to be included as an additional characteristic to the hate crime legislative framework at a later date and to define that characteristic". The rationale for the Scottish Government's approach in this regard is identified at paragraph 243 of the Policy Memorandum as being the opposition of a number of women's organisations to the inclusion of the characteristic of gender within the list of characteristics, and their call for the development of a standalone offence for misogynistic harassment outwith hate crime legislation.

94. At paragraph 38, the Policy Memorandum, referring to the proposed Working Group on misogynistic harassment which is to consider the issue of a standalone offence, states (emphasis added):

> "It is intended that *the Working Group will, in due course, also consider whether the characteristic of 'sex' ought to be added (by regulations)* to the list of characteristics which apply in relation to the aggravation of offences by prejudice in Part 1 of the Bill and/or to the lists of characteristics which apply in relation to offences relating to stirring up hatred in Part 2 of the Bill. To this end, and *to ensure the Working Group has the space and flexibility required to develop the distinct approach required* to tackle misogyny in Scotland, *an enabling power is included within this Bill*. This will allow sex to be included as an additional characteristic

within the hate crime legislative framework at a later date, *for example if that is recommended by the Working Group*".

95. The Faculty notes that Lord Bracadale, in his Independent Review of Hate Crime Legislation in Scotland, considered the issue of whether a standalone offence of misogynistic violence ought to be provided for (paragraph 4.45) and concluded that it ought not to be provided for (paragraph 4.48), on the basis that he did not consider it to be necessary to depart from the underlying philosophy which he had applied throughout his recommended scheme, being "baseline offences and statutory aggravations which reflect identity hostility" (ibid). Instead, at paragraph 4.50 of his report, Lord Bracadale recommended:

> "… a new statutory aggravation based on gender hostility, following the pattern used in the existing statutory aggravations for race, religion, disability, sexual orientation and transgender identity. Where an offence is committed, and it is proved that the offence was motivated by hostility based on gender, or the offender demonstrates hostility towards the victim based on gender during, or immediately before or after, the commission of the offence, it would be recorded as aggravated by gender hostility. The court would be required to state that fact on conviction and take it into account when sentencing".

96. In addition, in discussing the extension of hate crime laws to other characteristics from those already provided for, Lord Bracadale concluded that: "if stirring up offences are to be extended to other protected characteristics, they should extend to all, including any new protected characteristics" (paragraph 5.33). That would include the characteristic of sex.

97. The Faculty notes that Lord Bracadale's conclusion in relation to aggravation in particular was based on the consistency which the unified approach would achieve with other existing hostility aggravations which he considered to be more easily understood by practitioners and the public (paragraph 4.41). He also referred to what he described as the "significant advantage" which including 'gender' would have in cases based on multiple characteristics (giving the example of "an assault on a hijab-wearing Muslim woman"), because "the sheriff or jury would be asked to apply the same test when deciding whether the offence involved hostility on both religious and gender grounds" (ibid).

98. Subject to the point made at paragraph 100 below, the Faculty agrees with Lord Bracadale's recommendations as to the need for a new statutory aggravation in this context and extending the 'stirring up' offence to all characteristics. It reserves its position as to whether a standalone offence of misogynistic harassment is required in addition to the provision which might be made under the proposed Act in that regard.

99. In relation to the mechanism by which provision is proposed to be made, the Faculty considers that the decision as to whether to include 'sex' within the list of characteristics in sections 1(2), 3(3), and 5(3) of the proposed Act—and, in particular, how to define that characteristic — is properly a decision for the Scottish Parliament in considering and, if it wishes, amending the proposed primary legislation, rather than for a Working Group. The Faculty's view in this regard is not altered by the fact that the affirmative procedure is to be utilised for any regulations under the proposed section 15, on the basis that although subject to some Parliamentary scrutiny, any such regulations could not be amended, and no consultation process (as in the super-affirmative procedure) is required.

100. The Faculty agrees with the approach taken in the Bill regarding identifying the protected characteristic as that of 'sex' rather than 'gender'. As noted in the Policy Memorandum and the Equality Impact Assessment, this is the relevant characteristic for the purposes of the Equality Act 2010, which unified the approach to discrimination law in the United Kingdom and which forms part of the backdrop to the present Bill. The Faculty considers, however, that the treatment of the characteristic of sex set out in clause 15 departs from the idea of a unified approach, commended by Lord Bracadale, and does so in a manner which is less satisfactory than resort to primary legislation.

Consolidation of legislation.

101. The Faculty considers that one of the important aspects of the proposed legislation is that it would bring together all of the different kinds of hate crime under one banner. Lord Bracadale dealt with this at Chapter 9 of his report. Recommendation 20 of the Bracadale Review was that "All Scottish hate crime legislation should be consolidated into one new hate crime statute."

102. At present, hate crime aggravations appear in a number of different statutes:

i) Section 96 of the Crime and Disorder Act 1998 relating to race;

ii) Section 74 of the Criminal Justice (Scotland) Act 2003 relating to religion;

iii) Section 1 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 relating to disability; and

iv) Section 2 of the same Act relating to sexual orientation and transgender identity.

103. In addition, there are other offences recognised as hate crimes, namely those established by:

i) Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995; and

ii) Sections 18-23 of the Public Order Act 1986.

104. The one current offence which is neither repealed nor consolidated in the Bill is that provided for by Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 referred to above ("Section 50A"). Section 50A provides as follows :

"Racially Aggravated Harassment

(1) A person is guilty of an offence under this section if he—

(a) pursues a racially-aggravated course of conduct which amounts to harassment of a person and—

(i) is intended to amount to harassment of that person; or

(ii) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person; or

(b) acts in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress.

(2) For the purposes of this section a course of conduct or an action is racially aggravated if—

(a) immediately before, during or immediately after carrying out the course of conduct or action the offender evinces towards the person affected malice and ill-will based on that person's membership (or presumed membership) of a racial group; or

(b) the course of conduct or action is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group.

(3) In subsection (2)(a) above—

"membership", in relation to a racial group, includes association with members of that group;

"presumed" means presumed by the offender.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) above whether or not the offender's malice and ill-will is also based, to any extent, on—

(a) the fact or presumption that any person or group of persons belongs to any religious group; or

(b) any other factor not mentioned in that paragraph.

(5) A person who is guilty of an offence under this section shall—

(a) on summary conviction, be liable to a fine not exceeding the statutory maximum, or imprisonment for a period not exceeding six months, or both such fine and such imprisonment; and

(b) on conviction on indictment, be liable to a fine or to imprisonment for a period not exceeding seven years, or both such fine and such imprisonment.

(6) In this section—

"conduct" includes speech;

"harassment" of a person includes causing the person alarm or distress;

"racial group" means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins,

and a course of conduct must involve conduct on at least two occasions."

105. Lord Bracadale recommended that the offence created by Section 50A should be repealed. The basis for his recommendation was that both of the offences contained within that section could be effectively charged as a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 ("2010 Act") along with the statutory aggravation. Section 38 of the 2010 Act provides as follows:-

"38 Threatening or abusive behaviour

(1) A person ("A") commits an offence if—

(a) A behaves in a threatening or abusive manner,

(b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and

(c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.

(2) It is a defence for a person charged with an offence under subsection (1) to show that the behaviour was, in the particular circumstances, reasonable.

(3) Subsection (1) applies to—

(a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done, and

(b) behaviour consisting of—

(i) a single act, or

(ii) a course of conduct.

(4) A person guilty of an offence under subsection (1) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both."

106. The Bill proposes retaining the Section 50A offence due to a perceived potential gap in the law and/or the contention that race related hate crime requires a unique approach due to the prevalence of such behaviour. The Faculty is of course aware of the potential sensitivity of this part of the legislation in general and particularly in light of recent incidents of behaviour and the Black Lives Matter movement. Notwithstanding that, the Faculty is of the view that the section should be repealed in accordance with Lord Bracadale's recommendation. The reasons for this are as follows:

i) The aim of this legislation is to consolidate and simplify hate crime legislation.

ii) Repeal would ensure that the tests were the same irrespective of the characteristic involved in the hate crime.

iii) It would create consistency amongst the characteristics referred to in the legislation and avoid any suggestion that hate crime involving one particular characteristic is worse than any other.

107. The Faculty does not consider that there is a gap in the law. Although the language of the two sections is slightly different, it is difficult to think of circumstances in which something which would currently be an offence in terms of Section 50A above would not also be an offence under section 38 of the 2010 Act. The courts have always adopted a very flexible approach to offences of breach of the peace, section 38 effectively being a statutory breach of the peace, and the Faculty is confident that conduct which could be covered by Section 50A at present would be covered in the manner suggested by Lord Bracadale. *Mack v Procurator Fiscal, Falkirk* 2015 HCJAC 113 is a good, if brief, example of the Appeal Court's view of this matter.

Concluding remarks

108. In conclusion, the Faculty is not opposed to and indeed supports the principles behind the Bill. It agrees that consolidation of the legislation in this area is appropriate and agrees with many of Lord Bracadale's recommendations as set out in the Bracadale Review. It has concerns, however, regarding the potential impact of certain sections of the Bill on freedom of expression and the potential which the Bill, if enacted, would have in terms of a chilling effect on legitimate, if controversial, debate and the performing arts. It also questions whether the approach taken in a number of respects in relation only to particular characteristics is appropriate. In light of the difficulties which exist with the current text, the Faculty considers that there is no alternative but to reconsider the draft Bill.