

Delegated Powers and Law Reform Committee: Hate Crime and Public Order (Scotland) Bill

Submission by MurrayBlackburnMackenzie

Introduction

1. We welcome the opportunity to submit evidence to the Committee and apologise for not having identified the need to do so sooner.
2. The annex provides a note about who we are and how we are funded.
3. Our comments relate to the regulation-making power in section 15, relating to the characteristic of “sex”.

Including “sex” as a protected characteristic by secondary legislation

4. In our submission to the Justice Committee on the Bill¹ we express concern that **the Bill as introduced deepens the existing hierarchy in hate crime legislation between those characteristics that enjoy legal protections, and those that do not**. We argue that any exclusive, closed list of protected characteristics for hate crime sends a signal as to the relative seriousness of hatred towards those not included. In particular, the omission of sex from the proposed list sends a powerful and damaging message which the Parliament needs to consider.
5. The Scottish Government proposes remitting this issue to a working group and that separate offences based on “misogyny” or “misogynistic harassment” offer one response. We have concerns however, about how well these would translate as concepts in law and how easily a separate law based on “misogyny” could be communicated accurately in plain language. Separate provision for “misogyny” also fails to address the continued exclusion of sex from a list of characteristics in a context where “hate”, specifically, is seen as unacceptable.
6. **We suggest one alternative here would be to add sex as a further specific aggravator category in the current Bill, rather than to delay. Another would be to adopt the more open-ended forms of legislation found in some other jurisdictions, which do not limit protection to a defined list of characteristics.**
7. **We note that the Faculty of Advocates has argued² that the decision on the inclusion of sex is so significant that it should be taken by the Parliament as part of the main Bill process and not remitted to a working group, with any further action by secondary legislation.** We agree with this position. The inclusion of the amending power in the Bill leaves the way open too easily for a decision being deferred for a long period, during which current messages about sex being seen as a less serious basis for hate would be strengthened. There would be no requirement for further parliamentary scrutiny, if a decision was taken to do nothing, or a decision never taken at all.

¹ The full submission is available at <https://murrayblackburnmackenzie.org/2020/08/01/mbm-submission-on-the-hate-crime-and-public-order-scotland-bill/>

² In its evidence on the Bill (paras 99-100), available at <http://www.advocates.org.uk/news-and-responses/news/2020/aug/faculty-publishes-response-to-the-hate-crime-and-public-order-scotland-bill>

8. We note that some women’s groups are concerned that including sex is a difficulty because of the scale of domestic abuse and of sexual abuse more generally. Those groups have argued it is undesirable to identify some such cases as being more motivated by hatred based on sex than others. We recognise that these are substantial points, but are concerned that this argument implies that women may not suffer from or need protection from hate-based crimes that do not fall into either of these categories.
9. We have suggested to the Justice Committee that the Parliament should consider whether any special provision needs to be made so that, for example, where the existing separate domestic abuse aggravator is held to apply, a sex-based hate crime aggravator cannot also be applied, and possibly that certain types of offence should not be open to the application of a sex-based hate crime aggravator. We do not believe these options have yet been considered. While we understand that on further investigation they may not be deemed acceptable ways to facilitate the inclusion of sex as a characteristic, **we are concerned that the simple included/excluded approach to which the regulation-making power is limited precludes the Parliament from considering these options at all, as a way of making it possible to include sex as a protected characteristic, in at least some circumstances.**

Defining “sex” in secondary legislation

10. We note that section 15(2) appears to enable the Scottish Government to put forward a bespoke definition of “sex” for this purpose. We think maintaining a consistent definition in law of “sex” as a characteristic is valuable, and specifically that it would be inappropriate to use ministerial regulation-making powers to depart from the well-established Equality Act definition of “sex”. We see no persuasive argument for that being necessary in this context. **If the regulation-making power is retained, it should be restricted to using the definition of “sex” in the Equality Act 2010.**
11. Relevant to this point, Committee members may wish to be aware that a special definition of “woman” agreed uniquely for use in the Gender Representation on Public Boards (Scotland) Act 2016, during Stage 2 of the relevant Bill, is facing a possible judicial review³.

³ Further background here: <https://forwomen.scot/31/07/2020/news-release-pre-action-letter/>

Based on a legal opinion from Aidan O’Neill QC, the provision is argued to be outside devolved competence based on incompatibility with the Equality Act. We understand that the Scottish Government responded to the pre-action correspondence on 19 August rejecting this position and that the complainants are now moving to seek leave to appeal.

<https://twitter.com/ForwomenScot/status/129712733297745925?s=20>

Annex

MurrayBlackburnMackenzie is an independent policy analysis collective, made up of Dr Kath Murray, Lucy Hunter Blackburn and Lisa Mackenzie. Between us, we have extensive experience in policy-making, research and communications. We are Edinburgh based.

We formed in November 2018. All of the research and analysis we undertook initially was done on an unpaid basis.

To put our work on a more sustainable footing, over the past ten months, we have raised funds via two crowdfunders. In September 2019, we launched a [crowdfunder](#) to enable us to scrutinise the Scottish Government's plans for reforming the Gender Recognition Act 2004.

In May 2020, we launched a smaller [crowdfunder](#) to enable us to scrutinise the Scottish Government's draft Hate Crime and Public Order (Scotland) Bill.

Crowdfunder	Total amount raised	Number of supporters	Average donation
GRA reform	£8,780	293	£28.98
Hate crime	£3,430	108	£30.82
	£12,210.00		

Across both crowdfunders, we raised a total of **£12,210** (£11,413.75 after fees). We have also received offline donations via PayPal of **£447**.

The majority of these funds have been used to pay for our time. We have allocated the work between us based on our individual availability, paying ourselves an hourly rate of £15. However, we continue to supplement this with unpaid hours as necessary.