

The exclusion of sex and extension of stirring up hatred (Stage 1 debate briefing)

MBM Hate Crime Briefing 10

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Introduction

This briefing was prepared for the Stage 1 debate on the Hate Crime and Public Order (Scotland) Bill. The briefing focuses on two areas: the exclusion of sex from the hate crime protected characteristics, and aspects of the extension of the offence of stirring up hatred.

Part One: The exclusion of sex

We strongly agree with Tim Hopkins' (Equality Network) comment during Stage 1 oral evidence, as highlighted in the Stage 1 report ([para. 228](#)) that: *"it is important that people can see themselves in the bill."*

Women are regularly the target of offending behaviour based on hostility towards their sex. It is now well-established that women in public life face much higher levels of online abuse than men, with consequences for their participation.¹ Three quarters (71%) of British women have taken action to guard against the threat of harassment: this rises to 88% for 18-24 year olds. Meanwhile discussion in Scotland about including women in hate crime legislation dates back over a decade.

We note that a man is reported to be [on trial at the High Court](#) in Edinburgh this week charged with planning acts of terrorism alleged to be motivated by "incel" beliefs, which the expert witness describes as including general hostility to women. If the prosecution succeeds, even if the court agrees his motivation included a general hatred of women, this will go unrecognised in the sentencing and in the recording.

The proposal to add age to the hate crime protected characteristics leaves sex as the main characteristic that is protected under the Equality Act, but not under hate crime legislation.² Under the Bill as it stands, the recognition in law that women can be victims of hate crime will be delayed at the very least until after the report of the Working Group on Misogynistic Harassment.

The longer the law is unchanged, the more the message is reinforced that hatred based on sex is less serious than hatred based on other characteristics.

This message is strengthened by the annual Scottish Government *Dear Haters* campaign and local anti-hate initiatives, which refer only to the hate crime characteristics protected in law.

¹ See: <https://www.democraticaudit.com/2013/10/30/online-misogyny-prevents-women-from-fully-participating-in-democracy/>

² The Equality Act 2010 also protects pregnancy/maternity and marriage/civil partnership status.

The ongoing exclusion of sex also means that **Scotland continues to have no statistics** on offences motivated by prejudice based on sex on its own, or intersecting with other characteristics. Giving oral evidence at Stage 1 Isobel Ingham-Barrow (Muslim Engagement and Development) stated:

*“Women are overwhelmingly the victims of particularly violent instances of hate crime against Muslims. There needs to be an understanding of the intersection between instances of hatred directed against people with different characteristics”.*³

Of the six specialist local providers of services to women suffering abuse who met the Scottish Government or responded to its consultation, five favoured introducing an aggravator which would cover hatred against women, with or without developing a standalone offence separately.⁴

The Bracadale Review considered and rejected the arguments for continuing to exclude hatred based on sex,⁵ as put forward by a group of national-level organisations.⁶

These organisations have argued that: there might be better options for protecting women which would be ignored once an aggravator is introduced; an aggravator might not make much difference; it would be wrong to treat some sexual and domestic abuse cases differently from others; and an aggravator might be used by domestic abusers against their victims. However:

- The Working Group on Misogynistic Hate will be able to consider medium/longer term options. But it is still being formed and, despite the Committee’s expectation that the group will deliver its report in one year, it is likely to take at least 2-3 years for any alternative proposals to be developed, agreed, consulted on, and taken through the Parliament.
- Meantime, including sex now would mean that public information campaigns and local initiatives can, at last, start to send the message that hatred based on sex is as unacceptable as other forms, and statistics can be collected.
- Sexual and domestic abuse are not the totality of the offences where women are targeted for being women. If agreed necessary, provision could be made to exclude a sex-based aggravator from being used in some circumstances.
- The argument that an aggravator would be used to harm women was asserted during Stage 1, but how it is believed such a provision would be used in that way remains to be set out.

The Committee concluded that the arguments here are finely balanced. **Until further proposals are brought forward and enacted, we believe the default position should be the inclusion of sex among the protected characteristics.**

³ In written evidence, the specialist women’s charity Amina stressed the need for an intersectional approach to hate crime, which recognised that people may be targeted for more than one characteristic, and that women are particularly vulnerable to this. Danny Boyle of BEMIS also highlighted the intersection of sex and race.

⁴ These were ASSIST, East Renfrewshire VAWP, Glasgow VAWP, Stirling GBVP, Wise Women. Angus VAWP preferred a standalone offence. See MBM blog [Legislating for hatred against women: the view from the coalface](#) (4 December 2020).

⁵ Bracadale used the term “gender hostility”: the Scottish Government’s provision for amending the Bill by Order uses “sex”.

⁶ Engender, Scottish Women’s Aid, Rape Crisis Scotland, Zero Tolerance.

Part 2: Stirring up hatred

As the Justice Committee has noted, extending stirring up offences raises questions about impacts on freedom of expression, and citizens' engagement in democratic debate. We welcome that the Committee recommends that the protection for freedom of expression should be strengthened.

Stirring up offences are used far less than aggravators to deal with hate-related offending and in England, where there has already been some extension, are still largely used for race.⁷ The case for extending stirring up offences in Scotland beyond race has been made largely on symbolic value and the ability to record differently the small number of relevant cases, rather than concern about cases currently going unpunished.

The changes already proposed by the Scottish Government and the further changes suggested by the Committee to Part 2 are helpful, but do not address the problem which arises where there is substantial conflict over what is considered "hateful" in relation to particular characteristics.

This was considered for religion and sexual orientation when the law was extended in England and Wales by providing specifically and separately for each case: for sexual orientation the legislation provides that discussion or criticism of certain topics "shall not be taken of itself to be threatening or intended to stir up hatred".

The Bill only includes freedom of expression provisions for two of the characteristics it adds (religion and sexual orientation), and exempts certain types of criticism or discussion only from being deemed "threatening or abusive".

We draw MSPs' attention to the unusually deep disagreement about what should be described as hate in relation to the characteristic of transgender identity.

Making any argument about the relevance and importance of physical sex, especially to women, in any context now often meets charges of transphobia and/or hate.

Departing from expressing or following the belief that the terms "woman" and "man" should only be used as terms based on identity, rather than biological sex, or making any argument for biological sex as a relevant feature in policy or law, or that sex is an immutable physical characteristic, is likely to be described as motivated by hostility.

For example, the Equality Network has described those arguing that the census should gather data on sex as a binary variable, and not based on self-identification, in addition to gathering information separately on transgender identity, as '[anti-trans lobbyists](#)'.

The passing of the amendment to the Forensic Medical Services (Scotland) Bill, which replaced 'gender' with 'sex' in s9 of the Victims and Witnesses (Scotland) Act, was [described](#) by a group of SNP activists as a 'dog-whistle' for 'anti-trans campaigners'. They asserted that the issue had been overshadowed by transphobic rhetoric, and that in whipping MSPs to support the amendment, parties had pandered to those hostile to trans rights. Examples of social media comments include: "a proxy vote of transphobia, in an ongoing campaign to stir up hate"; "came from hatred towards trans women and its blatantly obvious."; "validating a hate campaign"; "designed to uphold hateful rhetoric"; "an amendment based on her hatred for trans people"; "it exists purely to terrorise trans people"; "Sex-based rights' is a transphobic dog-whistle term".

⁷ Religion and sexual orientation are also covered in the legislation for England and Wales since 2008 and 2010 respectively. The Law Commission (2014) [states](#) "between 2008 and 2012, only 113 charges of stirring up racial hatred and 21 charges of stirring up hatred on the ground of religion or sexual orientation reached a first hearing in a magistrates' court. We contrasted this with over 75,000 charges for the aggravated offences over the same period." There were therefore around 560 aggravated charges for every charge of stirring up

Individuals have been threatened, attacked, investigated at work, lost work and had opportunities to speak and to publish removed, based on accusations of transphobia. We give further examples in our submission to the Committee.⁸

Many women find troubling, offensive and distressing the argument that they must no longer recognise or care about physical sex in certain situations, and that any discussion of the relevance of sex to law or policy is motivated by hatred or prejudice. However, this view appears to be strongly held by many who argue for basing rights on gender identity rather than sex.

We are concerned that creating a new criminal offence of intentionally stirring up hate based on transgender identity in this climate will stimulate more reports, and threats and fears of reports, to workplaces and to the police based on the expression of differences of belief.

In January 2019 it was reported that stickers had been seen on the University of Edinburgh campus, with slogans such as “Female is a biological reality” and “Woman. Noun. Adult human female”.

Responding on Facebook, the Scottish Trans Alliance manager was reported to have stated: “Please log it by reporting on the Police Scotland online hate crime form. We need the stats.” The Edinburgh University Students’ Association’s vice-president for welfare described the stickers as “clear violations of policies against harassment and discrimination”. This view appeared to be supported by the University Principal, who stated that those responsible for the stickers would be traced through CCTV and disciplined, and that Police Scotland had been contacted.

We do not think it is sufficiently predictable how police, prosecutors and the courts will interpret the law *specifically in relation to transgender identity*. Unless and until case law establishes otherwise, we believe reports of alleged offences under the Act are likely to be common and threats and fears of reporting even more so, in cases where people are expressing views about the relevance of sex to law and policy that are important to them, in what they regard as accurate language, and which we believe they should have the right to express freely as citizens.

This will reinforce the existing climate of self-censorship and institutional caution on this topic which particularly affects women in less powerful and prominent positions, as recently documented here: <https://gender-dissidents.net/>.

We welcome the Committee’s suggestion that “abusive” should be subject to a “reasonable person” test, but believe it will not be easy to predict how the courts would determine what a reasonable person would decide in this context.

Even with the additional safeguards suggested by the Government and the Committee, a serious risk remains that legislating here will cast a long shadow over freedom of expression, and that women in particular will be further deterred from taking part in democratic debates that concern them, from speaking up where they have professional concerns, and from developing the full range of arguments and evidence in academia and elsewhere needed to inform proper public debate.

The case for extending stirring up legislation in this direction has not been made on grounds of urgent need. Recent [Hate Crime Statistics](#) (2019/20) show 3,038 charges aggravated by race, of which 2,480 led to court proceedings, compared to 41 charges aggravated by transgender identity, of which 33 resulted in court proceedings. Under the carefully drawn rules in England and Wales on stirring up hatred, covering only race, religion and sexual orientation, with tailored freedom of expression provisions, the Law Commission found

⁸ [Justice Committee: Hate Crime and Public Order \(Scotland\) Bill Submission by MurrayBlackburnMackenzie](#)

stirring up was very infrequently used compared to aggravated charges, with only one charge of stirring up for around every 560 cases of charges involving an aggravator (note 7).

We note that in expressing support for Part Two, giving evidence Tim Hopkins (Equality Network) commented "*I should say that, for us, Part One of the bill is by far the more important part*".

Scrutiny and compassion

Careful scrutiny of legislation does not mean lack of compassion for the groups it sets out to help. Effective legislation requires critical engagement. We urge MSPs to reject any argument that suggests that expressing any concerns or fears about the unintended consequences of this Bill shows a failure to care about the experience of victims of offences motivated by hatred.

We remain concerned at the scale of the task the Parliament faces with this Bill, the number of issues raised, and the complexity of some of the issues and judgements, compared to the time available for its scrutiny. We note that the Bill attracted an unprecedented number of submissions to the Committee. We would ask MSPs to recognise that the shortened timetable between the Stage 1 Report and debate is likely to have put individuals and voluntary campaigners in particular at a disadvantage in expressing their views to MSPs.