

## MBM SUBMISSION TO LAW COMMISSION CONSULTATION ON HATE CRIME LAWS

We welcome the opportunity to respond to the Commission's consultation on hate crime legislation in England and Wales. Our response draws on our scrutiny of the Scottish Government's draft Hate Crime and Public Order (Scotland) Bill (hereafter 'Scottish Hate Crime Bill') which is currently under consideration in the Scottish Parliament. At the time of writing, the Bill has passed Stage 1, having been debated by all MSPs on 15 December 2020. It will shortly proceed to Stage 2, when MSPs on the Justice Committee will consider and vote on amendments to the Bill from the Scottish Government and opposition MSPs.

The observations shared here relate primarily to discussions about including 'sex' as a protected characteristic in the context of the current wider debate relating to women's sex-based rights, and the rights of individuals with transgender identities.

### **Summary of concerns on Scottish Hate Crime Bill**

Our concerns about the Scottish Hate Crime Bill can be summarised as follows:

- The argument was not convincingly made by the Bracadale Review or the Scottish Government that expanding stirring up offences will fill a legislative gap on paper, or reduce in practice the number of hate-related attacks on individuals in particular groups. Nor do other sources of evidence support this. The main purpose of the proposed expansion of stirring up offences appears to be symbolic.
- The Scottish Government has not treated with sufficient seriousness the potential impacts on freedom of expression of the expansion of stirring up offences.
- There is likely to be a substantial "chilling effect" from the combined effect of (a) behaviour only being required to be deemed "abusive" (b) likelihood being a sufficient test (c) the much weaker framing of the freedom of expression provision (for religion) compared to equivalent existing legislation in England and Wales and (d) the extension of freedom of expression protections to only two characteristics (religion and sexual orientation). Whilst the Scottish Government has indicated that it will seek to amend the Bill to change the legal threshold for stirring up offences, it is still far from clear that it will be open to strengthening the freedom of expression protections adequately.
- How these provisions will work in relation to transgender identity, where there are strongly divergent views about what constitutes 'hate', is a particular concern, magnified by the absence of a mirror provision for sex.
- By increasing the number of characteristics included, the Bill reinforces a hierarchy between those characteristics that are protected and those that are not. The longer the list of groups included, the stronger the signal sent about the status those who are not. We are particularly concerned about the message sent by the omission of sex from the same protection as other characteristics, as the list expands.

We encourage the Commission to consider our [submission](#) to the Scottish Parliament's Justice Committee on the draft bill, which provides greater detail on our concerns in this area. Part 2 of the submission considers the Scottish Government's proposal to extend the offence of 'stirring up hatred', whilst Part 3 considers the potential impact of the Bill on the current debate about sex and gender identity. Part 4 explores our concerns that the effect of the Bill will be to deepen the existing hierarchy in hate crime legislation between those characteristics that enjoy legal protections, and those that do not.

The following comments are made in response to the questions contained in Chapter 12 of the consultation document.

*Question 13*

*We provisionally propose that a protected category of "women" is more suitable than "misogyny", if sex or gender-based hate crime protection were to be limited to the female sex or gender. Do consultees agree?*

We share the Commission's concern that 'misogyny' is a term that will not resonate widely, and that it differs from the way in which existing hate crime law is framed in that it is not an identity characteristic, but rather an example of a form of prejudice. However, the Commission should carefully consider using 'woman' as a protected category, which is also not an identity characteristic. In particular, the Commission should be mindful of the current debate about the definition of 'woman'. In particular, we draw their attention to the [judicial review](#) of the Scottish Government's Gender Representation on Public Boards Act 2018 being brought by the campaign group For Women Scotland.

*Question 14*

*We provisionally propose a protected category of "sex or gender" rather than choosing between either "gender" or "sex" if hate crime protection were to adopt a general approach. Do consultees agree?*

We would not support such an approach. It is our view that if there is a proposal to include women as a protected group under hate crime legislation in 'gender neutral' terms, the protected characteristic should be 'sex' only, not 'sex or gender'. Decades of research show that women suffer discrimination and disadvantage on the basis of sex, and there is extensive evidence to demonstrate that sex discrimination remains rife.

Many people may regard these two terms as synonyms. For example, in giving evidence to the Justice Committee, Lord Bracadale stated that his original remit was gender, but in the context of hate crime, this meant 'the same thing' as sex ([col. 39](#)). There is however increasing acceptance that these terms have distinct meanings. Sex is taken to refer to biological characteristics. Indeed, the Commission itself adheres to such an understanding in the consultation document. Gender is taken to mean social roles or stereotypes associated with someone's sex. This distinction has been drawn by a number of Ministers of the Scottish Government over the past few years as well as women's groups.

The Commission states its own preference for ‘gender’ on the basis that it is “more inclusive”, and notes that this was also the preference of the Bracadale Review. However, as noted above, gender was *stipulated* in the remit ([2018: 2](#)), and treated as synonymously with sex, rather than as a separate or ‘more inclusive’ concept. We also draw the Commission’s attention to recent remarks made during the Stage 1 debate of the Scottish Hate Crime Bill, where the Cabinet Secretary for Justice noted that the Scottish Government is calling for “a sex aggravator to align with the provision with the Equality Act 2010”.

### **Other issues**

We have considered some aspects of the Scottish Hate Crime Bill in more detail:

[Defining transgender identity in the Hate Crime and Public Order Bill and beyond](#)  
[Should Variations in Sex Characteristics be included in the Hate Crime and Public Order Bill?](#)  
[The limits of precedent and the special case of racial hatred](#)  
[The Hate Crime and Public Order \(Scotland\) Bill: Views from Scottish policing](#)  
[Protecting Speech that Offends: Theory and Practice](#)

### **About us**

Established in late 2018, [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.

MurrayBlackburnMackenzie  
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