

# HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL: STAGE 3 BRIEFING

## MURRAYBLACKBURNMACKENZIE

### Part 1

In line with the Bracadale Review, **we agree that sex should be included as an aggravator** (amendment 4). The current omission of sex sends a message that hate directed at women is less important than other characteristics. The Misogyny and Criminal Justice in Scotland Working Group, whose work will take 12 months and conclusions cannot be pre-empted, does not compensate for this. The basis for the suggestion that this might introduce actual harms for any women remains to be clearly explained.

**Sex should also be defined on the face of the Bill in line with the Equality Act** (amendment 17). We draw to MSPs' attention that the Cabinet Secretary said at Stage 1 that the Order making power in the Bill refers deliberately to a sex aggravator in order "to align the provision with the Equality Act 2010."

### Part 2

**We are very concerned about the Bill's potential to have unintended chilling effects on freedom of expression, particularly in relation to the discussion of issues related to sex and gender identity.**

If the Bill is passed as proposed, for everything other than religion a person's freedom to make particular statements without risking at least the disruption of a police investigation will rest only on what front-line police decide a "reasonable person" might judge is "abusive or threatening" towards any of the new characteristics covered.

Much evidence has been presented to the Parliament that what is hateful, abusive, and reasonable is heavily contested in the context of discussing sex and gender identity, up to and including the involvement of the police in cases that have later been abandoned or lost.

Without greater clarity on the face of the law, uncertainty about how some words and phrases, including statements of fact, will be interpreted, should someone complain, will have a chilling effect, particularly on women.

**Amendment 11B would reduce that effect**, by giving clear guidance in relation to statements about sex. This is in line with the recommendations of the Bracadale Review, which argued that the freedom of expression provisions in equivalent legislation for England and Wales should be used as models, to help draw clear lines between the criminal and the offensive, being tailored as necessary to each new characteristic added.

By referring only to "discussion or criticism", government Amendment 11 rejects that advice in relation to all the new characteristics, except religion.

The drafting of amendment 11 also introduces a serious technical weakness. It has the effect of making an "expression of antipathy, dislike, ridicule or insult" enough to meet the legal test for being "abusive or threatening" by itself, without further consideration of its specific content, nature or context, for every characteristic other than religion. This would extend to any beliefs related to characteristics other than religion.

This problem was introduced very late. By overtly and substantially lowering the basis on which a police investigation into a person's intent would be justified for some characteristics, we think it may introduce an ECHR issue. In our view, **amendment 11 should not be accepted without further amendment** (amendment 11F addresses this: amendments 11C and 11G may also do so to some degree).

### Legislating to best effect

For the new offences created in Part 2, Lord Bracadale and the Scottish Government agree that the serious offending behaviour they seek to tackle should already be covered by existing law. The purpose of extending the offence of “stirring up hatred” beyond race is largely symbolic.

In Scotland, on average around one proceeding a year for stirring up racial hatred has been taken in recent years. Race accounts for about half the convictions under the existing aggravators. England and Wales saw just 15 prosecutions for stirring up hatred on the grounds of race, religion, and sexual orientation between 2014/15 and 2017/18. If the law operates strictly as intended, the practical effect of the new proposals in Part 2 will be very low numbers of cases being prosecuted in a different way from before. Prosecutions for some characteristics are likely to be very rare.

We understand that law can have a valuable symbolic role and that the harm caused by rarely occurring offences still deserves to be properly recognised. For both these reasons, creating new offences related to stirring up hatred, extended beyond race, has been welcomed by many of those representing the groups affected.

It is not clear however why Part 2 of the Bill needs to pass right now, while a range of organisations, including the Society of Editors and front-line police bodies, are still expressing anxieties over the potential for unintended impacts on freedom of expression.

Despite coinciding with the disruption of the start of the first lockdown, this Bill received the largest number of Stage 1 evidence submissions (around 2,000) of any considered by the Scottish Parliament. It continues to be highly controversial.

It has had to be heavily amended since introduction, including to remove two entire subjects (culpability for public performance and possession of inflammatory material), and substantial changes have had to be made to the core statutory thresholds.

Detailed discussion of the provisions intended to clarify the protection for freedom of expression was left to the very end of this process. The government’s limited proposals were only disclosed and examined hurriedly, after the end of Stage 2, with initial confusion over its handling of religion and race. The National Secular Society described this process as “perplexing and farcical” and the Network of Sikh Organisations as “frankly remarkable”.

We have argued that changes to the law here are most likely to have a positive impact on behaviour if they are built as far as possible on good process, with the government working seriously to address unresolved concerns, minimise controversy and anxiety, and maximise public support.

That is still our view and we are therefore disappointed and concerned that that is not the context in which the Parliament is now being asked to approve this Bill.

**We urge MSPs to test carefully the government’s reasons for pressing ahead now with Part 2 in its current form, and to take action to avoid creating new chilling effects on freedom of expression in Scotland, particularly in relation to sex and gender identity.**

**8 MARCH 2021**

## Further material

MBM briefing on how and why the Bill as drafted will have chilling effects in practice.  
<https://murrayblackburnmackenzie.org/2021/03/04/the-thin-blue-line-what-inadequate-protection-for-freedom-of-expression-means-in-practice/>

MBM evidence for the Justice Committee's emergency meeting on 22 February to discuss the government's initial proposals for amendments on freedom of expression:  
<https://murrayblackburnmackenzie.org/2021/02/20/response-to-emergency-consultation-on-protection-of-freedom-of-expression-in-the-hate-crime-and-public-order-scotland-bill/>

MBM Stage 2 briefing, including a large number of examples where people, mainly women, have been branded hateful or abusive:  
<https://mbmpolicy.files.wordpress.com/2021/01/mbm-stage-2-briefing-on-hate-crime-bill-31-january-2021-1.pdf>

MBM briefing for the Stage 1 debate: <https://mbmpolicy.files.wordpress.com/2020/12/mbm-briefing-stage-1-hate-crime-and-public-order-bill2.pdf>

MBM evidence submitted at Stage 1:  
[https://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/JS520HC312\\_MurrayBlackburnMackenzie.pdf](https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS520HC312_MurrayBlackburnMackenzie.pdf)