

## **JUSTICE COMMITTEE**

### **HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL**

#### **SUBMISSION FROM STONEWALL SCOTLAND**

##### **Introduction**

1. [Stonewall](#) is Britain's largest organisation campaigning for lesbian, gay, bi and trans (LGBT) equality. Since 2000, Stonewall Scotland has been campaigning to improve the lived experience of LGBT people in Scotland. We work with a range of partners, including Police Scotland, the Crown Office and Procurator Fiscal Service (COPFS), and the Scottish Courts and Tribunals Service, through our [Diversity Champions programme](#), and are a member of Police Scotland's LGBTI Reference Group.
2. Stonewall Scotland welcomes the opportunity to respond to this Stage 1 Call for Views on the Hate Crime and Public Order (Scotland) Bill. We support the introduction of this Bill, which will consolidate and modernise hate crime legislation while strengthening protections for LGBT people, including through the extension of existing stirring up of hatred offences to apply on the grounds of sexual orientation and transgender identity. We would encourage Members to support the general principles of this Bill at Stage 1.

##### **Anti-LGBT Hate Crime and Discrimination in Scotland**

3. Since the Offences (Aggravation by Prejudice) (Scotland) Act 2009 ('the 2009 Act') came into force, the number of charges of sexual orientation aggravated crime reported to the Procurator Fiscal has risen annually with the sole exception of one year, from 452 (2010-11) to 1486 charges (2019-20). Notably, within the last year, there was a 24 per cent increase in charges reported of sexual orientation aggravated crime. While on a smaller scale, charges reported of transgender identity aggravated crime have risen steadily

from 14 (2010-11) to a peak of 52 (2017-18)<sup>1</sup>.

4. However, despite increased numbers of charges reported, the true scale of hate crimes against LGBT people – and other minority groups – is recognised as likely being higher than such official figures would suggest. Research from Stonewall and YouGov identified that more than four in five LGBT people in Scotland (87 per cent) who disclosed having experienced a hate crime or incident in the previous year did not report the incident to the police and three in four (75 per cent) did not report the incident to anyone else<sup>2</sup>. Almost half of trans people surveyed (48 per cent) disclosed having experienced a hate crime or incident because of their gender identity in the previous year.

### **Support for the Bill and the Consolidation of Hate Crime Legislation**

5. With regards to the Committee's question on effective alternatives to legislation, we recognise that while wider non-legislative measures are necessary to help tackle endemic issues such as that of the under-reporting of hate crime, such measures should be taken forward in tandem with legislative reform and not solely as an alternative. While hate crime legislation such as that which is proposed by this Bill cannot in and of itself encourage reporting or build confidence in criminal justice agencies, it can support attempts to do so.
6. Stonewall Scotland supports that Part 1 of the Bill consolidates the majority of hate crime laws into one single statute, including the aggravations of sexual orientation and transgender identity under section 2 of the 2009 Act. We are of the view that having different aggravated offences and other hate offences relating to different characteristics being outlined in separate statutes may have contributed to the wider lack of clarity surrounding hate crime and

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<sup>1</sup> <https://www.copfs.gov.uk/images/Documents/Statistics/Hate%20Crime%20in%20Scotland%202019-20/Hate%20Crime%20in%20Scotland%202019-20.pdf>

<sup>2</sup> <https://www.stonewallscotland.org.uk/lgbt-scotland-hate-crime-and-discrimination>

exacerbated issues of under-reporting. Consolidation should provide greater clarity and improve the accessibility of hate crime legislation to the general population, which, in turn, may have beneficial effects on levels of reporting.

7. Furthermore, it is crucial to ensure there is robust and accessible hate crime legislation to protect vulnerable groups, and that which does not act as a further barrier to seeking justice. Stonewall Scotland welcomes that protections for LGBT people would be strengthened by this Bill through the extension of stirring up of hatred offences under Part 2 to include sexual orientation and transgender identity, amongst other characteristics. This strengthening of protections can only be achieved through legislative measures, such as the introduction of this Bill.
8. In addition, Stonewall Scotland supports the call from BEMIS Scotland for a legal requirement to be integrated into the Bill that places a duty on the Scottish Government, Police Scotland, and any other relevant duty bearers to develop a bespoke system of hate crime data collation and disaggregation across all characteristics covered by this Bill.

### **Part 1 – Aggravation of Offences by Prejudice**

9. Stonewall Scotland supports that, under section 1 of the Bill, the statutory aggravation model will continue to be employed as the core method of prosecuting hate crimes based on sexual orientation and transgender identity in Scotland, in addition to the offences of stirring up hatred for those characteristics introduced by Part 2. In particular, as corroboration is not required to add a statutory aggravation to a baseline offence, as per section 1(4), – unlike standalone offences – this should enable crimes aggravated by sexual orientation and transgender identity to continue to be more simply prosecuted as hate crimes, in turn making the reporting and prosecution process somewhat less difficult for victims than it otherwise might be.

10. We had made representations in previous consultations that the language of the thresholds for the statutory aggravations, of “evincing malice and ill-will”, was overly technical and inaccessible for the general public, and we supported Lord Bracadale’s view that this uncertainty surrounding what constitutes a hate crime is likely to contribute to under-reporting. However, we recognise, as noted in the Policy Memorandum (para. 79), that it is considered by the Scottish Government that the existing phrasing must remain to ensure the current thresholds for aggravated crime can be maintained.
11. We welcome the proposal, as noted in the Policy Memorandum (para. 80-81), for the Scottish Government to therefore produce guidance to accompany the legislation, which will explain “how the law operates in user-friendly ways” and provide “an explanation of the thresholds as provided for in the Bill.” We accept that this approach provides a balance between improving public awareness and understanding of the law and ensuring the thresholds for what is considered a hate crime are not unintentionally amended.
12. Research has suggested there is an uncertainty amongst the LGBT community, and wider population, as to whether an experience has crossed the threshold between a “hate incident,” and a “hate crime,” for which charges could be brought against the perpetrator. It has been identified that many LGBT people will recognise anti-LGBT abuse as an experience inherent to their sexual orientation or transgender identity, fail to identify the severity of such behaviour, and consequently not report any such incidents as potential hate crimes<sup>3</sup>. Including examples and case studies, where appropriate, in the guidance of where anti-LGBT incidents have met the threshold to be aggravated by prejudice based on sexual orientation or transgender identity may be useful for victims to more easily recognise where they may have experienced a hate crime.

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<sup>3</sup> <https://www.equalityhumanrights.com/sites/default/files/research-lgbt-hate-crime-reporting-identifying-barriers-and-solutions.pdf>

13. Furthermore, in modernising hate crime legislation, we welcome that the existing definition of 'transgender identity' as outlined within the 2009 Act has been updated by section 14(7) of this Bill. This removes 'intersexuality', in addition to terms which can be regarded as outdated such as 'transvestism' and 'transsexualism'. Whilst there can be common experiences between trans people and intersex people/those with variations of sex characteristics (VSC), intersex/VSC is different from gender identity, and the specific needs of people with variations of sex characteristics are often not represented through this approach. Furthermore, outdated phrasing on trans identities has the potential to contribute to a lack of community confidence in the justice sector's ability to understand trans people's experiences.
14. It is important to note that, aside from 'intersexuality', which has been moved to a separate variations of sex characteristics aggravator, the updated transgender identity aggravator encompasses the same groups that are currently covered by the existing aggravator under the 2009 Act, including non-binary people (in the 2009 Act, 'any other gender that is not standard male or female gender identity') and people who cross-dress ('transvestitism'). It is crucial that in modernising the language used in hate crime legislation, the protections of minority groups are not removed. We therefore welcome that the definition in section 14(7) of this Bill aligns appropriately with the 2009 Act and maintains the protections for trans people against hate crime.
15. Stonewall Scotland supports the inclusion of variations of sex characteristics as a separate aggravator under section
16. 1(2) of the Bill, particularly considering the removal of "intersexuality" from the definition of the transgender identity aggravator under section 14(7). It is undoubtedly positive that people with variations of sex characteristics are currently protected by hate crime legislation. Therefore, in consolidating and

modernising hate crime legislation, it is only right that people with variations of sex characteristics continue to have the protections against experiencing hate crime that they currently do under the 2009 Act. We would encourage Members to consider the extensive evidence provided by the Equality Network and partners on the importance of including I/VSC as a distinct category within hate crime legislation.

17. Stonewall Scotland supports that the Bill introduces provisions under section 1(5) for offences to be aggravated where the offender evinces malice and ill-will towards the victim on the basis of their association with members of groups referenced in section 1(2). This would enable a sexual orientation or transgender identity aggravated crime due to the victim's association with a member from the LGBT community – including their friends, parents, siblings, partners, or children – to be prosecuted as such. Under current legislation, only the race and religion statutory aggravations apply in relation to those who have an association with persons with those characteristics. We welcome that this Bill will address this inconsistency and extend these provisions to all characteristics.
18. Additionally, we welcome that statutory aggravations will continue to apply where an offender evinces malice and ill-will towards a victim that they presume to have a characteristic referenced in section 1(2). Often, hate crimes and incidences of discrimination against people who are LGBT, or those who are presumed to be LGBT, may occur due to the perpetrator's perception of their identity, based on their appearance and other factors, rather than the definitive knowledge that they are lesbian, gay, bi, and/or trans. Furthermore, if victims were required to confirm their identity to prosecutors in order for charges to be brought forward for offences aggravated by sexual orientation or transgender identity, this may have a negative effect on levels of reporting.
19. Section 2 outlines the consequences of aggravation by prejudice, including requirements for the court to state where the sentence in respect of the

offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or otherwise, the reasons for there being no such difference. We strongly support the Scottish Government in retaining this requirement from the 2009 Act and other legislation, contrary to Lord Bracadale's recommendation. This will be crucial in ensuring transparency and reassuring victims, particularly considering that there is no obligation for the courts to impose a different sentence for aggravated offences than for baseline offences without any aggravation.

## **Part 2 – Offences Relating to Stirring Up Hatred**

20. Stonewall Scotland welcomes that sections 3(2) and 5(2) of the Bill would extend stirring up offences and those related to the possession of inflammatory material to apply on the grounds of sexual orientation and transgender identity, amongst other characteristics. This aspect of the Bill supports the recommendations of Lord Bracadale, who had recognised there to be “gap in the law in the absence of stirring up offences in relation to the protected characteristics apart from race<sup>4</sup>.”

21. We recognise that while these are ‘new’ offences, they are largely similar to the existing offences for stirring up of racial hatred, which are currently contained within the Public Order Act 1986 and are being consolidated within sections 3(1) and 5(1) of this Bill. The only difference being that the new offences have a slightly higher threshold for prosecution by way of requiring the behaviour or communication to have been ‘threatening or abusive’, as opposed to ‘threatening, abusive, or insulting’ as is the case in relation to racial hatred.

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<sup>4</sup> <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/6/>

22. Extending stirring up offences should improve the consistency and parity in how characteristics are protected by hate crime legislation. Furthermore, extending to include sexual orientation and transgender identity would help reassure LGBT people and communicate to potential perpetrators that society condemns the stirring up of hatred against LGBT people, and that the law has taken steps to protect this group, amongst others, from hatred.
23. In addition to having an important symbolic function, there is also practical value in the extension of stirring up offences. While some stirring up offences could be prosecuted with a baseline offence and an aggravation, an increased sentence is more likely to be given if charged as a stirring up offence to reflect the seriousness of the crime. Furthermore, as noted in the Policy Memorandum (para. 126) with respect to disability and age, it is crucial to have these offences on the statute book to “enable action to be taken in the event that someone does engage in behaviour intended or likely to stir up hatred”, particularly where this behaviour may not have been able to have been prosecuted as offences aggravated by prejudice.
24. In England and Wales, there have been stirring up offences on the grounds of sexual orientation for over a decade, introduced within Part 3A of the Public Order Act 1986 by the Criminal Justice and Immigration Act 2008. While there have been relatively few successful prosecutions during this time, it is important to recognise that there is a high threshold for prosecution, particularly in comparison to racial hatred. The behaviour or communication in England and Wales must be ‘threatening’, as opposed to ‘threatening, abusive or insulting’, and the offender must have ‘intended’ to stir up hatred, regardless of whether hatred was ‘likely to be stirred up thereby.’
25. We therefore strongly welcome that the offences introduced by sections 3(2) and 5(2) of the Bill set the threshold in Scotland at the offender having intended to stir up hatred against a group, or it having been likely that hatred would

have been stirred up thereby. As noted in the Policy Memorandum (para. 141), the Scottish Government recognises that in limiting offences to a strict intention to stir up hatred “would be prohibitively restrictive in practice as in real-life cases it may often be very difficult to prove beyond reasonable doubt what the accused’s intent was, even where it is very clear that their behaviour would be likely to result in hatred being stirred up.” Stonewall Scotland supports these remarks.

26. We are aware of concerns regarding the impact of hate crime laws, in particular stirring up offences, on freedom of expression. Freedom of expression is a fundamental human right that is enshrined in law and vital to the functioning of a democratic society. However, it is not absolute – it can legitimately and lawfully be restricted, including in the case of hate speech. We would reaffirm that Lord Bracadale and the Scottish Government noted that such offences are, in principle, compatible with Article 10 of the European Convention on Human Rights (para. 182 of the Policy Memorandum). Furthermore, we would stress that if existing stirring up of racial hatred offences do not contravene rights to freedom of expression, then similar offences with a higher threshold for other characteristics should not either. Such offences have been in Scots law for over twenty years, and courts and prosecutors should be well versed in the distinction between freedom of expression and incitement to hatred.

27. We remain unconvinced as to the benefits provided to hate crime legislation by protections of freedom of expression with respect to sexual orientation, as has been introduced by section 12 of this Bill in relation to the stirring up offences. Stonewall opposes the equivalent section in England and Wales – section 29JA of the Public Order Act 1986 – for the offence of stirring up of hatred on the grounds of sexual orientation, which largely mirrors section 12 of this Bill. As the Policy Memorandum notes (para. 190), it is clear from the Bill that only behaviour or communication which meets the thresholds outlined in sections 3(2) and 5(2) would be regarded as an offence. Therefore, we are

unclear as to the purpose served by explicitly referencing behaviour or material that would not meet the thresholds, and for this explicit provision to only apply to sexual orientation and religion. As such, we would welcome consideration from the Committee as to the inclusion of section 12 within the Bill. Furthermore, we are keen to ensure that the inclusion of section 12(2)(b) on the urging of persons to refrain from or modify sexual conduct or practice would not implicate any future work of the UK and/or Scottish Governments to ban the so-called sexual orientation and gender identity 'conversion therapy' experienced by LGBT people, and would welcome further clarification on this.

Stonewall Scotland

23 July 2020