

JUSTICE COMMITTEE**HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL****SUBMISSION FROM DR KIM BARKER, UNIVERSITY OF STIRLING AND DR OLGA JURASZ, OPEN UNIVERSITY LAW SCHOOL**

1. Do you think there is a need for this Bill and, if so, why? Are there alternatives to this legislation that would be effective, such as non-legislative measures, wider reforms to police or criminal justice procedures? Are there other provisions you would have liked to have seen in the Bill or other improvements that should have been made to the law on hate crime?

1.1. Yes, the Bill is much needed in order to achieve the following objectives:

- i. Consolidate the existing hate crime legislation
- ii. Amend the existing hate crime legislation to reflect the social realities and context within which it operates ('making it fit for the 21st century')
- iii. Equalise the standing of various existing protected characteristics
- iv. Introduce new protected characteristics – including sex and/or gender, as previously proposed and considered in past consultations

1.2. Given the ongoing equivalent legislative review efforts in Northern Ireland and in England & Wales, Hate Crime Bill is an opportunity for Scotland (and the Scottish Government) to lead the way in the UK in terms of paving a way to a truly modern, inclusive, and pioneering piece of legislation, capable of addressing a number of inequalities within the existing law. However, as currently articulated and presented, the Bill does not achieve these objectives. In particular, the Bill ignores the previously made commitment of the Scottish Government to take gender hostility – an element emphasised in Lord Bracadale's recommendations as well as widely supported by the organisations taking part in the survey (60%).¹

1.3. It is particularly surprising to see the glaring absence of either 'sex' or 'gender' characteristic in the current Bill. As we argued elsewhere², the omission also appears to contradict the previously made commitments of the Scottish Government to make Scotland a safer place for women³. This is surprising because the Scottish Government in its legislative programme for 2020/2021 indicated its intention to update the law on hate crime in line with Lord Bracadale's recommendations, including the addition of new characteristics, which were widely reported to include gender.⁴ It is also curious as to why the current opportunity to make a pioneering

¹ Hate Crime and Public Order (Scotland) Bill, Policy Memorandum (2020) para.252, <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotlandbill/introduced/policy-memorandum-hate-crime-and-public-order-scotland-bill.pdf>

² Kim Barker & Olga Jurasz, 'Scots Hate Crime Bill – A Missed (Gender) Opportunity?' *Policy Blog* 1 May 2020 <https://policyblog.stir.ac.uk/2020/05/01/scots-hate-crime-bill-a-missed-gender-opportunity/>.

³ Scottish Government, *Equally Safe: national strategy* (23 March 2016) <https://www.gov.scot/publications/equally-safe/>

⁴ J Boothman, 'Academics tell Bracadale review: Make online misogynistic abuse a hate crime' (*The Times*, 8 April

piece of legislation has been ultimately foregone given that aggravation related to gender was already considered back in 2003 in s7(2)(b) of the Draft Criminal Code for Scotland.

2. The Bill brings together the majority of existing hate crime laws into one piece of legislation. Do you believe there is merit in the consolidation of existing hate crime laws and should all such laws be covered?

2.1. Yes, there is merit in consolidating the existing hate crime laws into one piece of legislation. However, the process of drafting and introducing the Bill is also an opportunity to improve the existing law, as per suggestions made via Lord Bracadale's review and results of the One Scotland consultation.

2.2. Bringing together of the existing provisions should also encompass addressing the current shortcomings in how hate crime framework operates. For instance, the Bill was (what now appears to be missed) an opportunity to equalise the way in which all protected characteristics appear in the law and operate within it. We believe that this would allow to redress the apparent 'hierarchy of characteristics' (and, what follows, a hierarchy of harms resulting from hate crime) which currently exists within hate crime framework, both in Scotland and in England & Wales (Barker & Jurasz, 2019).

2.3. However, it is crucial that efforts to enact a new piece of legislation are not driven only by consolidation but rather focus on the genuine improvement of the current legal framework concerning hate crime and its suitability for the modern times. As such, the emphasis should be on making better laws and introducing new provisions where these are long overdue and where the absence of them leads to a social injustice. Therefore, the absence of provisions addressing 'sex' or 'gender' in the current Bill are striking.

3. Do you think that the statutory aggravation model should be the main means for prosecuting hate crimes in Scotland? Should it be used in all circumstances or are there protected characteristics that should be approached differently and why? For example, the merits of a statutory aggravation for sex hostility rather than a standalone offence for misogynistic harassment?

3.1. The aggravation model does not provide a direct line to prosecutions, and because of the aggravation element still requires an underlying offence. As such, whilst it potentially criminalises behaviours, it really criminalises aggravations. Its usefulness is therefore limited as a means for prosecuting hate crimes because that in itself is reliant on the prosecution of crimes and the identification of both the aggravation, and the evidence for the aggravation.

3.2. There are characteristics which are missing from the Bill – notably gender / sex. Part of this

2018) <https://www.thetimes.co.uk/edition/scotland/academics-tell-bracadale-review-make-online-misogynisticabuse-a-hate-crime-lfqcx2jt7>

question is not answerable because the Bill does not ensure that there is no hierarchy of characteristics, especially as one characteristic in particular (sex/gender) is missing from the proposed s(1)(2), and the proposed s3(3).

3.3. If, as the Policy Memorandum suggests,⁵ the policy objectives are to ‘modernise, consolidate, and extend’ hate crime legislation in Scotland, then the aggravation model is one way of modernising. That said, an aggravation for sex hostility does not capture the same behaviours as a suggested standalone offence of misogynistic harassment.

3.4. Misogynistic harassment should be considered separately to the hate crime legislation as a broader part of the criminal law.⁶

3.5. Similarly, a gender hostility aggravation would be a welcome addition to the bill to ensure that gender / sex is captured as an aggravation within hate crime more broadly. At the very least, this is necessary to ensure that there is no hierarchy of characteristics within the hate crime framework.

3.6. It should be noted here that misogynistic harassment may not amount to a hate crime, and equally where there is an offence of misogynistic harassment, this may not satisfy the threshold to be prosecuted with a hate crime aggravation – the two are not interchangeable and should not be presumed to capture the same behaviours, or criminality.

6. Do you have views on the merits of Part 2 of the Bill and the plans to introduce a new offence of stirring up of hatred?

6.1. The introduction of a new offence of stirring up hatred is not entirely new as its origins exist elsewhere in the current hate crime framework – something acknowledged by the differentiation of stirring up in relation to racial hatred (proposed s3(1) and stirring up of other characteristics (s3(2))).

6.2. The proposal though has merit, because it offers the potential to cover a broader range of behaviours.

6.3. The merits of Part 2 of the Bill are interesting, especially because of the ways in which the behaviours are potentially captured under the proposed s3(6) and the proposed s3(7), and especially given the proliferation of online abuse, and online abuse that is potentially hateful.

6.4. That said, the stirring up offence does not cover all potential characteristics, and again, gender/sex is missing here.⁷ This is a significant omission given the volume of

⁵ Hate Crime and Public Order (Scotland) Bill Policy Memorandum, SP Bill 67-PM 1 Session 5 (2020), 1.

⁶ Kim Barker & Olga Jurasz, ‘Misogynistic Harassment: Advancing Scots Criminal Law?’ *Policy Blog*, January 2020 <https://policyblog.stir.ac.uk/2020/01/27/misogynistic-harassment-advancing-scots-criminal-law/>.

⁷ Kim Barker & Olga Jurasz, ‘Scots Hate Crime Bill – A Missed (Gender) Opportunity?’ *Policy Blog* 1 May 2020 <https://policyblog.stir.ac.uk/2020/05/01/scots-hate-crime-bill-a-missed-gender-opportunity/>.

gender-based hatred that is spread, especially in digital forms,⁸ and especially targeting prominent women, and women in politics especially.⁹

Other Issues Relevant to the Committee's Consideration of the Bill

Gender needs to be incorporated as a characteristic in the hate crime bill in order to capture (and prosecute, where applicable) instances of misogyny (both on and offline).¹⁰

Misogyny in itself does not amount to a hate crime, and furthermore, there is no legal definition of either misogyny, or of behaviour that is regarded as misogynistic. The mooted potential misogynistic harassment offence does not fit within the Hate Crime Bill given the current absence of gender as a characteristic from the proposed Bill (as introduced).

Specific provisions dealing with offences involving malice or ill-will based on gender prejudice should be created in Scots Law.¹¹

Dr Kim Barker and Dr Olga Jurasz
8 June 2020

⁸ Kim Barker & Olga Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* Routledge, 2019; Kim Barker & Olga Jurasz, 'Why Misogyny and Hate Crime Reforms Need More Than Slick Campaigns.' *The Conversation*, March 2020 https://theconversation.com/why-misogyny-and-hate-crime-reforms-need-more-than-slick-campaigns-134265#comment_2180791.

⁹ Kim Barker & Olga Jurasz, 'Gendered Misinformation & Online Violence Against Women in Politics' *ColInform*, March 2020 <https://coinform.eu/gendered-misinformation-online-violence-against-women-in-politicscapturing-legal-responsibility/>

¹⁰ For further details, please see: Kim Barker & Olga Jurasz, Submission of Evidence to Scottish Government Independent Review of Hate Crime Legislation (Bracadale Review) (November 2017) <http://oro.open.ac.uk/52612/>; Kim Barker & Olga Jurasz, Expert Response to One Scotland Consultation on Amending Scottish Hate Crime Legislation. (February 2019) <http://oro.open.ac.uk/66207/>

¹¹ Kim Barker & Olga Jurasz, 'Misogynistic Harassment: A Stumbling Block for Scots Hate Crime Reform?' (Juridical Review, submitted 2020); Kim Barker & Olga Jurasz, *Hate Crime and Gender: Scots Law Perspectives*. Palgrave, 2021 (forthcoming).