

JUSTICE COMMITTEE

HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

SUBMISSION FROM THE EQUALITY AND HUMAN RIGHTS COMMISSION

**Who we are**

The Equality and Human Rights Commission is the National Equality Body (NEB) for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected characteristics set out in the Equality Act (EA) 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. We are an “A Status” National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).

**How we have approached this consultation**

We welcome the Scottish Government’s consultation on its Hate Crime and Public Order (Scotland) Bill which provides for modernising, consolidating and extending hate crime legislation in Scotland and aims to provide greater clarity, transparency and consistency.

Since our inception, the Commission has worked to better understand and tackle harassment, hostility and hatred and has been involved in initiatives both to research its extent, and to propose solutions to the need for greater community cohesion. We took part in the reference group supporting Lord Bracadale’s 2018 review of hate crime legislation in Scotland.

We responded to the Scottish Government’s prior consultation on hate crime legislation in March 2019 (available here). We re-present aspects of our prior response below. We highlight areas where this response is substantively different from our prior response, because of factors such as greater clarity in Scottish Government direction, for example.

## **Introduction**

### **Domestic and international legal framework**

#### **The public sector equality duty**

There is an obligation under the Equality Act 2010 for public authorities including Scottish Government to address the needs of people who may become victims of hate crime.

We refer to the public sector equality duty as set out in the Equality Act 2010 as the 'general equality duty'.

The general equality duty requires public authorities, in the exercise of their functions, to have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct
- advance equality of opportunity between people who share a relevant protected characteristic and those who do not
- foster good relations between people who share a protected characteristic and those who do not.

To meet the general equality duty, a public authority must have due regard to all three of its needs.

The Equality Act explains that the second need (advancing equality of opportunity) involves, in particular, having due regard to the need to:

- remove or minimise disadvantage suffered by people due to their protected characteristics
- take steps to meet the needs of people with certain protected characteristics where these are different from the needs of other people.

The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended) were introduced to help authorities listed in the Regulations in their performance of the general equality duty.

#### **Human Rights**

There is a positive duty, under the European Convention on Human Rights, to put in place specific legislation for the effective investigation and prosecution of suspected hate crimes. This is a development of case law on the obligation to ensure there are criminal law provisions for the prevention, suppression and sanctioning of crimes more generally in terms of the right to life (article 2), the prohibition against inhuman and degrading treatment (article 3) and the right to respect for private and family life (article 8). Member states are required to have and apply an adequate legal

framework to afford effective protection against both physical and verbal acts of violence.

The Court's case law is clear that failure to take into account the underlying attitude behind hate crimes may violate the non-discrimination principle (article 14).<sup>1</sup> These protections concern not only acts of violence based on a victim's actual or perceived personal characteristics but also acts of violence based on a victim's association or affiliation with another person who possesses a particular status or protected characteristic.<sup>2</sup>

The Scottish Government also has obligations to meet international standards on combatting hate crime under various international instruments. These include;

- **Race:** Convention on the Elimination of Racial Discrimination, article 4 and General Recommendation No.35
- **Women:** Convention on the Elimination of all forms of Discrimination against Women, article 2 and General Recommendation No. 28
- **Women:** Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence ("the Istanbul Convention", not yet ratified), article 49
- **Religion:** General Assembly Resolution 67/178 on Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief
- **Race and Religion:** International Covenant on Civil and Political Rights, article 20.

Such international instruments have often featured prominently within the reasoning of the European Court of Human Rights.<sup>3</sup>

These standards also have to be considered alongside the right to freedom of expression (ECHR article 10 and ICCPR article 19) and the prohibition of abuse of rights (article 17 ECHR and article 54 EU Charter of Fundamental Rights). This is discussed further at Question 8 below.

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<sup>1</sup> Alkovic v Montenegro 66895/10 5<sup>th</sup> December 2017

<sup>2</sup> Skorjanec v Croatia application 25536/14 28<sup>th</sup> March 2017

<sup>3</sup> See for example Talpis v Italy 41237/14 2<sup>nd</sup> March 2017

## Consultation questions

### General

#### Question 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?**

Yes, we welcome the Bill and the Scottish Government's aim of ensuring Scotland's hate crime legislation is fit for the 21<sup>st</sup> century.

In making progress towards the goal of eliminating hate crime, the Commission would like to see Scotland achieve: wider general understanding of what constitutes a hate crime; greater acceptance of the need to prohibit this behaviour; less tolerance of hate crime; greater willingness to report incidents; and increased trust both in the law, and in the willingness and capacity of police and prosecution services to deal effectively with reported hate crime. We believe modernising, consolidating and extending hate crime law will contribute towards this goal.

#### ***Provision we would like to have seen in the Bill***

##### ***Intersectionality***

We agree with the statement in Engender's prior response to Scottish Government's consultation on hate crime legislation:

"It is vital that Scotland's response to 'hate crime' be responsive to incidents that occur at the intersections of different identities."

The experiences of, for example, Muslim women, as cited illustrate why it is critically important that hate crime legislation is capable of both acknowledging these experiences and dealing with them effectively. The Bill currently proposes a list of distinct characteristics and it must consider how legislation will reflect and respond to these realities in operation.

#### ***Provision we would like to see considered***

##### ***Online***

As noted in our prior response, the UK Government Law Commission is considering reform of criminal law and now, in phase 2 of the Abusive and Offensive Online Communications project, will consider specific recommendations for reform.

As previously we agree with the Bracadale report that Scottish Government do nothing at this stage, and keep open the possibility of further specific legislative change until it can consider the outcome of the UK Government Law Commission review.

## Consolidation

### Question 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?**

In the interests of contributing to progress towards the goal of eliminating hate crime we believe there is merit in the consolidation of hate crime laws and in updating the language used to reflect 21<sup>st</sup> century Scotland. Consistency in legislation is a desirable principle in such consolidation, but is not an overriding consideration and we highlight where our response supports a position which is not in line with the principle of consistency.

To be effective, hate crime legislation must also be supported by appropriate wider services to support victims and by sustained educational and promotional activity, including within the police and justice system and partner agencies.

Foundational to progress towards eliminating hate crime is a recognition and understanding of what hate crime is and what it represents. It is an abuse of power, used to intimidate and exclude. It targets a victim's identity and is highly corrosive to community cohesion. It is, consciously or otherwise, rooted in attitudes and values which hold that minority groups such as ethnic minorities, disabled people, and lesbian, gay, bisexual or transgender people do not deserve equal respect. It is situational and carries the weight of particular histories.

We recommend that Scottish Government works with stakeholders to further develop and promote wider general understanding of hate crime.

We also recommend Scottish Government explicitly encourage study of prejudice and hate crime as an opportunity for learning within Curriculum for Excellence, within a framework of promoting community cohesion and respect for human rights.

### **How to prosecute hate crime?**

### Question 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?**

#### ***Statutory aggravation model***

In the interests of achieving wide general acceptance and understanding of what constitutes a hate crime, we believe an aggravation of existing offences is preferable to a separate offence.

This achieves a consistency of approach which can potentially be extended by listing new characteristics for the statutory aggravations if required in the future.

### **Listed characteristics**

Please see our comments on intersectionality at Question 1.

Characteristics listed in the Bill for offences aggravated by prejudice are: age; disability; race, colour, nationality (including citizenship) or ethnic or national origins; religion or, in the case of a social or cultural group, perceived religious affiliation; sexual orientation; transgender identity; and variations in sex characteristics.

### **Transgender identity and variations in sex characteristics**

We note that the Bill's definition of transgender identity has been updated and now includes a male to female transgender person, a female to male transgender person, a non-binary person and a person who cross-dresses.

The terms 'transsexualism' and 'transvestitism' are removed from the definition of transgender identity as outdated terms and 'a person who cross-dresses is included to ensure continued protection previously provided by the term 'transvestitism'. 'Intersexuality' has been removed from the definition of transgender identity and a distinct listed characteristic 'variations in sex characteristics' has been created.

We support these changes, which reflect improved accuracy in terminology and an understanding of the terms preferred by people covered by these legal protections rather than changes in the legal protections themselves.

We remain of the view that Scottish Government should be guided on language by groups representing the interests of trans people and people with variations of sex characteristics, such as The Equality Network and Scottish Trans Alliance.<sup>4</sup>

### **Age**

We do not believe that age should be a listed characteristic and address this at Question 4.

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<sup>4</sup> The Equality Act 2010 protects individuals from discrimination and harassment because of specified 'protected characteristics'. This protection applies to those who have the protected characteristic, those perceived to have it and those who are associated with it. One of these protected characteristics is sex, which applies "to a man or to a woman". Another is gender reassignment, which protects an individual who "is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex".

The Equality Act 2010 uses the term 'transsexual' to describe someone who has the protected characteristic of gender reassignment. Language has since evolved; 'transsexual' is generally considered to be an outdated term and is not used by most trans people. We use the term 'trans' to refer to a person with the protected characteristic of gender reassignment and the term 'transsexual' in specific instances when we need to refer to The Equality Act 2010.

## **Sex and gender**

We note that the Bill includes the power to enable Scottish Ministers to add the characteristic of sex by regulations at a later date.

As stated in our prior response from March 2019, we would welcome an aggravation based on both or either sex (which aligns with the Equality Act 2010) or on gender (which captures social constructs that may underpin hostility).

The UK Government Law Commission review of hate crime legislation in England and Wales which commenced in March 2019, will consider how to make their current legislation more effective, and whether protections should be extended to additional characteristics such as sex and age. The first part of the review, published in November 2018 found misogynistic online abuse was a ‘particularly prevalent and damaging concern’.

Our 2018 response to the UK Government’s eighth periodic report to the Committee on the Elimination of Discrimination against Women (CEDAW) recommended that the UK Government should, in relation to England and Wales, consider amending hate crime legislation to extend protections on the basis of gender. This is in line with the The Council of Europe Convention on preventing and combating violence against women and domestic violence (“the Istanbul Convention”), based on the understanding that violence against women is a form of gender-based violence that is committed against women because they are women. It is the obligation of the state to fully address it in all its forms and to take measures, including legislative measures, to prevent violence against women, protect its victims and prosecute the perpetrators. Our 2019 CEDAW update report recommended that devolved governments should consider amending legislation if gaps in protection for women and fair and appropriate access to justice are identified.<sup>5</sup>

Specific deterrence of aggravated offending against women by adding the characteristic of sex has symbolic significance, but in itself may not ensure adequate or appropriate protection from the particular issue of misogyny, as highlighted by organisations with specialist expertise in this area, such as Engender, Scottish Women’s Aid, Rape Crisis Scotland and Zero Tolerance.

As noted above, consistency in legislation is a desirable principle in consolidation but is not an overriding consideration, and here our response supports a position which is not in line with the principle of consistency.

In our prior response we did not support development of a standalone offence of misogynistic harassment, stating that we believed a strategic and educational approach would be more effective. However we now note that the Scottish Government has committed, in principle, to developing a standalone offence and will establish a Working Group to take this, and the potential addition of the characteristic of sex, forward.

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<sup>5</sup> We also note Lord Bracadale’s comments that while “the essence of the conduct which we are seeking to cover is usually against women, it is not inconceivable that there could be hostility against a man”, and “a consistent approach which is capable of applying in equivalent cases, regardless of the sex of the victim, is better.”

We note Police Scotland's prior response that a strong evidence base would be needed before introducing a standalone offence. Our 2019 CEDAW update report also called for further investment in research into online abuse marked by misogyny, violence against women and girls, and other bias-motivated hostility, and for effective mechanisms and interventions for tackling misogyny to be developed.

We therefore welcome further investigation and research into how a new offence could operate to fill gaps in ensuring adequate legal protection for women and girls from misogynistic harassment, and how any new offence would relate to the proposed power to add the characteristic of sex to the new hate crime framework established by the Bill. We agree with Lord Bracadale that this process should not delay, but rather be fuelled by, the current "momentum and political will to take renewed action" in relation to offending involving sex hostility.

#### **Question 4**

**Do you think that a new statutory aggravation on age hostility should be added to Scottish hate crime legislation? Would any alternative means be measured effective? For example, would there have been merit in introducing a statutory aggravation (outwith hate crime legislation) for the exploitation of the vulnerability of the victim?**

#### ***Statutory aggravation for the characteristic of age***

We note that the Bill proposes that hate crime is prosecuted via the attachment of a statutory aggravation when a person has committed an offence and has evinced, or has been motivated by, malice and ill-will towards a person or group of persons based on a listed characteristic.

As stated in our prior response, we do not believe that the characteristic of age should be listed for these statutory aggravations as there is insufficient evidence that, in crimes against older or indeed younger people, the threshold for statutory aggravation is met.

The inclusion of age could therefore detract from the achievement of wider general understanding of what hate crime is and what it represents (see Question 2). In a submission to the Scottish Parliament's Justice Committee, Action on Elder Abuse Scotland said:

"While we know that in some cases, older people may experience hostility or ill-will on the basis of their age, the vast majority of crimes against older people are driven by the perpetrator's perception of the victim's vulnerability."

We agree with Police Scotland's prior response in this respect, that offending based on the perceived vulnerability of older people, or the exploitative nature of the crime, would be more effectively addressed separately from hate crime through vulnerability sentencing aggravations.

We note that the Scottish Sentencing Council is currently developing a Sentencing Process Guideline which will set out factors which may make the particular offence



under consideration more serious for sentencing purposes. Among these potential factors is “the deliberate targeting of a victim who is vulnerable or perceived to be vulnerable”.

We recommend that this mechanism be the means of addressing crimes against older people separately from hate crime.

## **Other forms of crime not included in the Bill**

### **Question 5**

**Do you think that sectarianism should have been specifically addressed in this Bill and defined in hate crime legislation? For example, should a statutory aggravation relating to sectarianism or a standalone offence have been created and added?**

No. We agree with Lord Bracadale that sectarianism is a broader societal issue and that an approach that develops a long-term debate in relation to tackling sectarianism is likely to be more effective than through hate crime legislation.

We note Police Scotland’s prior response that “‘sectarianism’ manifests itself as either racial or religious prejudice or both” and their support for Lord Bracadale’s conclusion that no new offence or statutory aggravation is necessary to tackle hostility toward a religious or racial identity that would be considered sectarian. (Please see also our comments on intersectionality at Question 1.)

In our prior response we expressed support for the idea of strict liability with respect to football in Scotland, to help to incentivise football clubs to prevent sectarian crime and disorder in and around matches through the imposition of sanctions. We also recommend Scottish Government explicitly encourage study of sectarianism as an opportunity for learning within Curriculum for Excellence, within a framework of promoting community cohesion and respect for human rights.

## **Stirring up offences**

### **Question 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?**

The Commission welcomes the introduction in Scotland of a new stirring up of hatred offence in respect of each of the listed characteristics.

As noted in our prior response, in England and Wales stirring up racial and religious hatred and hatred based upon sexual orientation are offences under the Public Order Act (POA) 1986. The offence of stirring up racial hatred under sections 17 to 29 of POA 1986 differs in its legal elements from the offences of stirring up religious hatred and hatred based upon sexual orientation under sections 29A to 29N of POA 1986. There are currently no stirring up offences based on disability or transgender identity. In England and Wales, prosecution rates for the stirring up offences are extremely low.

In Scotland there are currently stirring up offences in relation to racial hatred (sections 18-23 of POA 1986). The Independent Review of hate crime: consultation noted that the number of prosecutions in Scotland under stirring up offences is small when compared to other hate crime provisions. However this is to be expected as stirring up offences have a high bar for prosecution and the incidence of such offences is relatively rare. The rarity of the offence coming to court however does not undermine its necessity.

Stirring up hatred is a particularly corrosive crime and, while rare, needs to be prioritised if we are to maintain good community relations.

### **Question 7**

**Do you have any views on the Scottish Government's plans to retain the threshold of 'threatening, abusive or insulting' behaviour in relation to the stirring up of racial hatred, contrary to Lord Bracadale's views that 'insulting' should be removed?**

As stated in our prior response we agree with Lord Bracadale's view that the existing provisions concerning the stirring up of racial hatred should be revised so they are formulated in the same way as the other stirring up hatred offences. Consistency in legislation, wherever possible, is a principle which will support wider understanding of hate crime and how it is dealt with.

We are persuaded that it would be safe to make this revision by the evidence advanced by Lord Bracadale that the deletion of the word 'insulting' from the English harassment offence under section 5 of the Public Order Act 1986 in 2013 did not undermine the ability to bring prosecutions as the Crown Prosecution Service was unable to find any case that could not be characterised as 'abusive' as well as 'insulting'.

### **Other issues**

### **Question 8**

**Do you have any comments on what should be covered by the 'protection of freedom of expression' provision in the Bill?**

The Commission welcomes the introduction in Scotland of a new stirring up of hatred offence in respect of each of the listed characteristics. The threshold for the offences is that conduct must be 'threatening or abusive'. The Commission is aware that the Bill has attracted some criticism that it will have a chilling effect on freedom of expression.

We note the Bill contains provisions on freedom of expression that material or behaviour is not to be taken as threatening or abusive solely on the basis that it includes or involves discussion or criticism which may be robust, challenging or offensive or urges people to cease or modify practices, for example.

The right to freedom of expression exists under Article 10 of the European Convention on Human Rights, and is not an absolute right, so that material which may – depending on circumstances and context – amount to threatening or abusive behaviour is not protected.

Our legal framework on Freedom of Expression (2015) discusses hate speech and the limitations on freedom of expression imposed by Article 20(2) ICCPR. This notes that the factors likely to be relevant in distinguishing between lawful expression and hate speech include the intention of the person making the statement, the context in which they make it, the intended audience, and the particular words and form of communication.

Our response to the Home Affairs Select Committee inquiry on hate crime (2016) further discusses the boundary between freedom of expression and hate crime:

“Any restrictions on freedom of expression must always be clearly set out in law, necessary in a democratic society for a legitimate aim, and proportionate. Subject to these conditions, freedom of expression may be limited in certain circumstances, including in order to protect others from violence, hatred and discrimination. In particular, freedom of expression does not protect statements that unlawfully discriminate against or harass, or incite violence or hatred against, other persons and groups, particularly by reference to their race, religious belief, gender or sexual orientation.”

We believe that the approach in the Bill strikes the necessary balance between protecting freedom of expression and protecting people from hate speech.

### **Question 9**

**Do you agree with the Scottish Government that Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment should not be repealed?**

No. Consistency in legislation, wherever possible, is a principle which will support wider understanding of hate crime and how it is dealt with.

As stated in our prior response, we are persuaded by the evidence cited by Lord Bracadale that there have been no convictions with a sentence greater than five years for a section 50A offence (which provides seven years maximum sentencing) that it would be safe to repeal Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 about racially aggravated harassment.

### **Question 10**

**What is your view on the plans for the abolition of the offence of blasphemy?**

Section 79 of the Criminal Justice and Immigration Act 2008 abolished blasphemy in England and Wales.

The 2016 Religion in Scots law: Report of an Audit at the University of Glasgow notes "the statutory basis of the law of the crime of blasphemy has been repealed two centuries ago, [...] what remains is a vestige of the common law, which has not been enforced for more than 170 years".

We agree with Scottish Government that the common law offence of blasphemy no longer reflects the kind of society in which we live and we welcome the plans to abolish it.

Equality and Human Rights Commission  
24 July 2020