

Justice Committee: Hate Crime and Public Order (Scotland) Bill

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Introduction

We welcome the opportunity to submit evidence to the Committee. Annex 1 provides a note about who we are and how we are funded.

We believe that the Stage1 process needs to consider not only the general principles of the Bill, which we hope at their highest level will be uncontroversial, but also the likely effect in practice of the specific proposals. The Bill as introduced raises issues about the rationale for expanding stirring up offences, impacts on freedom of expression and the robustness of the evidence to justify the inclusion of some protected characteristics and the omission of others. In particular, the Bill raises significant issues in relation to the current debate on sex and gender identity, and the ability to discuss these matters properly.

Part one summarises our main arguments. Part two looks in detail at the stirring up hatred provisions. Part three then considers how the sex and gender identity debate is likely to be affected by the stirring up hatred provisions, particularly in higher education, where we provide an example from our own experience and then consider how accusations of hate are now routinely made in universities and the impact this is already having. Part four considers what principles should guide which characteristics are covered by the Bill, whether for aggravations or stirring up hatred offences.

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Part 1. Summary of key arguments

- 1.1. The argument is 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.
 - 1.2. The Scottish Government has not treated with sufficient seriousness the potential impacts on freedom of expression of the expansion of stirring up offences.
 - 1.3. 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).
 - 1.4. How these provisions will work in relation to transgender identity, where there are strongly divergent views about what *beliefs* are intrinsically hateful, is a particular concern, strengthened by the absence of a mirror provision for sex.
 - 1.5. 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.
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Part 2. Stirring up offences

Summary of concerns

- Despite a long process of review, the proposals before the Parliament represent a reactive approach, based simply on elaborating the existing framework. The opportunity appears to be being lost in Scotland to consider entirely from first principles whether further legislation on hate crime would be of practical benefit, and for whom.
- In the absence of persuasive evidence for practical benefits, law is being made mainly for symbolic reasons. This is being done without sufficient weight being given to the potential for negative consequences in practice of extending its reach.
- Conclusions about a limited impact on freedom of expression are being drawn from experience in England and Wales, when the legislation proposed for religion in Scotland is substantially different, and more characteristics are being proposed, without protection for freedom of expression.
- Negative effects will come from individual parts of the law having an impact *in combination*. Looking at each provision in part 2 of the Bill separately will miss their potential cumulative effect. The most substantial potential negative effects will be hidden and so impossible to monitor.
- These effects will be immediately and acutely felt in relation to the extension to transgender identity. This legislation arrives at a point where the debate around gender identity and sex is contested and volatile, and people have already felt justified in trying to limit as “hateful” the expression of certain views which other people hold to be important statements of fact, with no hateful content.

- There are particular risks in legislating for stirring up hate on transgender identity in this atmosphere. Even if freedom of expression protections are added for transgender identity and other threshold tests raised, the concept of “hate” is so deeply contested here, that any stirring up legislation is still likely to have effects in practice which interfere unequally with freedom of expression in debates on sex and identity.
- The more groups are added to an exclusive list of characteristics, the greater the symbolism attached to those which are *excluded*. Sex is the exclusion we most wish to highlight, but similar arguments could be made about others. This argument also applies to the provisions on aggravating factors. We explore this point further in Part 4

Additional questions for consideration

- Would a person recording or producing material in England and Wales commit an offence under the current Bill if the writing or material either appears in or is broadcast in Scotland?
- Why is the freedom of expression provision for religion weaker than the 1986 Act?
- Why does freedom of expression protection not extend to transgender identity?
- Has the Scottish Government considered giving additional protections in relation to academic freedom?
- Does the Scottish Government intend that guidelines for prosecutors will be issued, on how the new stirring up hatred offences should be interpreted?

Legislative background: Public Order Act 1986

- 2.1. Part Two of the Bill creates standalone stirring up hatred offences for each of the listed characteristics
- 2.2. Stirring up racial hatred is currently an offence under the Public Order Act 1986; this provision applies to England and Wales, and Scotland. The 1986 Act was subsequently amended for England and Wales only to cover stirring up hatred in relation to religion, via the Racial and Religious Hatred Act 2006, and sexual orientation, via the Criminal Justice and Immigration Act 2008.
- 2.3. If passed as introduced, the Racial and Religious Hatred Bill would have made it an offence in England and Wales to use threatening, abusive or insulting words or behaviour if this were either intended to, or perceived as likely to stir up religious hatred.
- 2.4. The Bill prompted widespread criticism in relation to the low threshold for criminalisation and attendant freedom of speech implications. This included public protests and an organised campaign headed by actor Rowan Atkinson (BBC, 2005).¹ SNP MPs also expressed concerns about the cross-border implications.² An analysis of 2006 Act by Goodall (2007: 90-91)³ notes that “anyone being recorded or producing material in Scotland may commit the offence if for instance their writings appear in England or their material is broadcast over the border”.⁴

¹ BBC (11 October 2005) [Protest over religious hate Bill](#)

² Stuart Hosie SNP MP (31 January 2006) [HC Debate c204](#)

³ Goodall, K. (2007) [Incitement to Religious Hatred: All Talk and No Substance?](#) Modern Law Review (70)1.

⁴ Goodall states: “Although Part 3A does not extend to Scotland other than police powers, it will affect anyone whose legal activities in Scotland also take place in England and Wales, as where Scottish newspapers are circulated in England or Scottish programme material is shown in England.” (2007: 91 n.14).

- 2.5. The House of Lords passed a set of amendments (the Lester amendments) that introduced additional safeguards and raised the criminalisation threshold for religion, compared to racial hatred.

“To criticise the colour of someone’s skin is irrational. To criticise someone’s religion or politics is a wholly different matter. I could go so far as to say that it is a fundamental human right that we are able to do so.” (Lord Hunt, 2005, HoL c.1073)⁵

- 2.6. The Lords amendments removed the likelihood clause, removed the grounds of “abusive” and “insulting” behaviour, and introduced an expansive freedom of speech provision that allowed for “discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system”.
- 2.7. MPs voted twice to back the Lester amendments (Conservative, Liberal Democrat, DUP, SNP and Plaid Cymru MPs, and 21 Labour MPs all supported the amendments)⁶ defeating the then Labour government (BBC, 2006).⁷
- 2.8. **We note that the original and heavily criticised proposals on stirring up religious hatred in England bear a close resemblance to the provisions in the Bill now being brought forward by the Scottish Government.**

Overview of stirring up offences

- 2.9. The Bill covers “behaviour of any kind” or making material available to another person in any way, and may “consist of a single act or a course of conduct”.
- 2.10. For characteristics other than race, behaviour needs to be either “threatening” or “abusive”, but not both. For race, behaviour can also be “insulting”, which is a continuation of the 1986 Act. The Scottish Government state that a separate approach for race is justified “due to the historical and structural nature of racism, the prevalence and seriousness of race hate crime and the impact that this has on community cohesion” (para. 152).⁸ We agree with this assessment. We also think that the distinction made in the Lords, between characteristics based on fixed or physical attributes, and those involving beliefs and/or practice, is helpful in assessing the current Bill.
- 2.11. The behaviour threshold for the new characteristics in the Bill (i.e. abusive or threatening) is lower than that for religion and sexual orientation in the 1986 Act, which requires behaviour to be threatening. Lord Bracadale argues that the requirement for “threatening” behaviour under the 1986 Act and the now repealed Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (OBFTCA) “sets the threshold too high” (para. 5.37).⁹
- 2.12. The Bill is consistent with section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (CJLSA), one of the most common charges in Scottish criminal law (effectively replacing Breach of the Peace), under which, as Advocate Andrew Crosbie observes, “there is a vast range of actions that could be threatening or abusive in any given context”.¹⁰

⁵ Lord Hunt (25 October 2005) [House of Lords: Racial and Religious Hatred Bill](#).

⁶ See: [Orders of the Day - Racial and Religious Hatred Bill](#)

⁷ BBC (1 February 2006) [Ministers lose religious bill bid](#)

⁸ Scottish Government (2020) [Hate Crime and Public Order \(Scotland\) Bill Policy Memorandum](#)

⁹ Lord Bracadale (2018) [Independent Review of Hate Crime Legislation in Scotland. Final Report](#)

¹⁰ Crosbie, A. “Threatening or Abusive Behaviour” [Criminal Justice and Licensing \(Scotland\) Act 2010 s38](#)

- 2.13. It is not necessary to demonstrate for any characteristic that a person has stirred up hate, nor that a person intended to stir up hate; only that it this was a “likely” outcome. Again, this is a significantly lower threshold, compared to the equivalent provisions for religion and sexual orientation in the 1986 Act, which require intent.¹¹
- 2.14. Lord Bracadale states that he considers “the wider test”, incorporating likelihood, “would give more flexibility” (para. 5.38). He notes that a slightly different likelihood test¹² was inserted later into the Race Relations Act 1965, following criticism that the requirement for proof of intent made the offence unusable in practice. On the impact on freedom of expression, he simply states that “I do not consider that including the likelihood leg would interfere with freedom of speech” (para. 5.38).
- 2.15. **We believe that the discussion of these points in the Bracadale Review is too limited. The Policy Memorandum does not compensate for this.** Surprisingly, because they are immediately relevant to the issue of freedom of expression, the Bracadale Review does not consider in any detail the debates on the Racial and Religious Hatred Bill 2005, which led to it being substantially amended for religion to remove the likelihood test and to require behaviour to be threatening. Although the Review does note that the House of Lords removed the likelihood test in relation to religion and sexual orientation, it does not discuss why.
- 2.16. The policy development process around freedom of expression appears confusing. There is no clear explanation as to why the freedom of expression provision for religion in the Bill is much weaker than the 1986 Act, while the Policy Memorandum does not discuss in any detail why this protection should be limited to religion and sexual orientation.
- 2.17. The Bracadale Review recommends that “A protection of freedom of expression provision similar to that in sections 29J and 29JA of the Public Order Act 1986 and section 7 OBFTCA should be included in any new legislation relating to stirring up offences” (Recommendation 16). It is not however, clear whether recommendation 16 is intended to only apply to religion and sexual orientation, as per the respective sections in the 1986 Act, or, if “similar to” and “any new legislation” are intended to cover all new characteristics.
- 2.18. The Policy Memorandum interprets recommendation 16 narrowly, adding specific references to religion and sexual orientation: “Lord Bracadale recommended that a protection of freedom of expression provision similar to that in sections 29J and 29JA of the 1986 Act **concerning religion and sexual orientation** and section 7 the 2012 Act **concerning religion** should be included in any new legislation relating to stirring up offences” (para. 185, our emphasis).¹³
- 2.19. However, the 2018 One Scotland consultation interpreted recommendation 16 much more broadly. Question 26 asked: “Do you agree with Lord Bracadale’s recommendation that there should be a protection of freedom of expression provision for offences concerning the stirring up of hatred?” without specifying any characteristics.¹⁴

¹¹ [Public Order Act 1986: Acts intended to stir up religious hatred or hatred on the grounds of sexual orientation](#)

¹² “having regard to all the circumstances racial hatred is likely to be stirred up thereby”

¹³ Scottish Government (2020) [Hate Crime and Public Order \(Scotland\) Bill Policy Memorandum](#)

¹⁴ Scottish Government (2018) [One Scotland: Hate Has No Home Here Consultation on amending Scottish hate crime legislation](#)

- 2.20. The Policy Memorandum states that consideration was given to extending freedom of expression protection to other characteristics, but that “Lord Bracadale did not make any recommendation in his report on this matter, and consultation respondents’ concerns about the impact of the offence on freedom of expression **related specifically to religion and sexual orientation**” (para. 192 our emphasis).¹⁵
- 2.21. We note however, for example, that the ForWomenScotland submission to the 2018 consultation, in response to question 26, discusses their own experiences of being labelled “transphobic” for organising a meeting to discuss women’s rights, which pertains to transgender identity.¹⁶
- 2.22. The Bill includes a “reasonable defence” provision if “evidence adduced is enough to raise an issue as to whether that is the case, and the prosecution does not prove beyond reasonable doubt that it is not the case”. We are concerned that this is a very difficult provision for a lay person to make sense of, and both for that reason and due to its actual content, it will not provide sufficient reassurance for those concerned about their ability to engage in public debate without risking criminal sanctions or the threat of these.

Is there a gap in the law?

- 2.23. The Bracadale Review provides a limited justification for standalone stirring up offences filling a gap in the legal framework, stating “I recognise that almost every case which could be prosecuted as a stirring up offence could also be prosecuted using a baseline offence and an aggravation” (para. 5.15). This was the argument accepted by the Scottish Parliament in repealing the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.
- 2.24. The Review’s counter-argument is that even if a prosecution could be equally well pursued using aggravation, a stirring up charge would be more “appropriate” in some circumstances because the offence “was directed against the group rather than individual members of it”.
- 2.25. The sole argument to support the Review’s claim “that there is a gap in the law in the absence of stirring up offences in relation to the protected characteristics apart from race” therefore appears to be that a case would be more accurately labelled, but not necessarily more effectively prosecuted.
- 2.26. Similarly, the Bill’s Financial Memorandum states, “The new offences will more accurately define the conduct in question (which is a key policy driver for creating them), but it is the case that the conduct in question would already constitute existing criminal offences such as breach of the peace or threatening or abusive behaviour” (para. 26).¹⁷

Are there practical benefits?

- 2.27. The Bracadale Review suggests that establishing parity between protected characteristics outweighs consideration as to whether there a practical need for new offences (para. 5.33).
- 2.28. In Scotland, there were just eight proceedings for stirring up of racial hatred offences under the 1986 Act between 2011-12 to 2017-18 (see Financial Memorandum, Table 2).¹⁸ Race however, accounts for well over half of charges under hate crime legislation more generally (see Figure 1 below).

¹⁵ Scottish Government (2020) [Hate Crime and Public Order \(Scotland\) Bill Policy Memorandum](#)

¹⁶ ForWomenScotland (2019) [Review of Hate Crime consultation response](#)

¹⁷ Scottish Government (2020) [Hate Crime and Public Order \(Scotland\) Bill Financial Memorandum](#)

¹⁸ Scottish Government (2020) [Hate Crime and Public Order \(Scotland\) Bill Financial Memorandum](#)

- 2.29. Prosecutions for the narrower (and now repealed) offence of stirring up religious hatred under section 6 of the OBFTCA (as read with subsection (5))¹⁹ were also uncommon, with only seven prosecutions between 2011/12 and 2017/18 (Ibid: Table 3). The law in England and Wales, which covers stirring up of hatred on the grounds of race religion and sexual orientation, has seen 15 cases prosecuted from 2014-15 to 2017-18 (Ibid: para.34).
- 2.30. So, at first sight, prosecutions for other individual characteristics being legislated here for the first time appear likely to be rare. We argue below that extending the scope of stirring up offences is only likely to lead to prosecutions insofar as there is a lack of a clarity or insufficient protection for freedom of expression in relation to understandings and beliefs, particularly those relating to sex and gender identity.

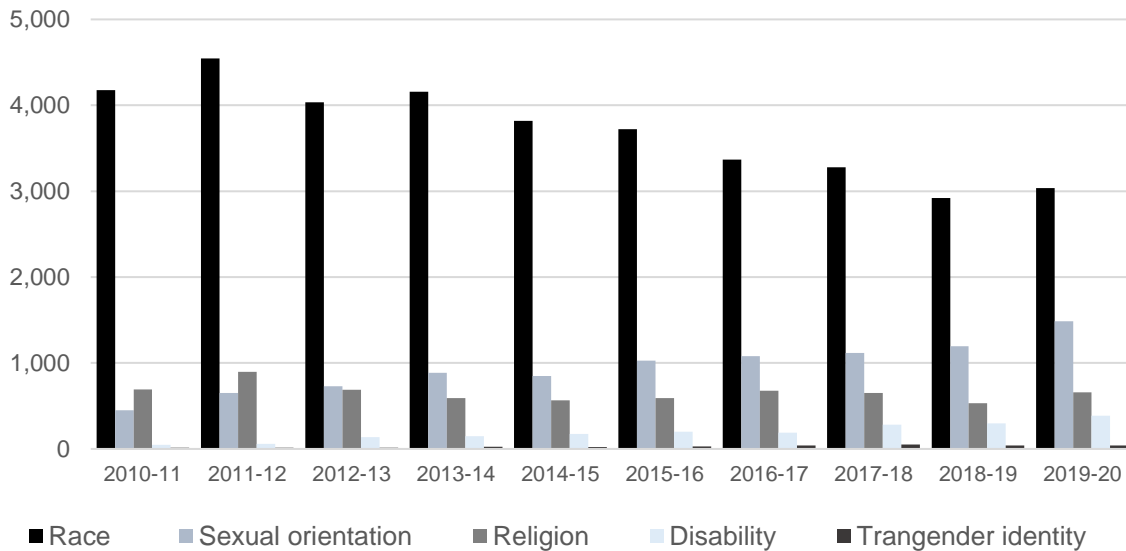
A deterrent effect?

- 2.31. Guidance to the 2017 consultation suggested that the number of prosecutions is not the only measure of practical benefits, and that stirring up hatred legislation may have a deterrent effect: “it could be argued that the low number of prosecutions is because the law has been successful in making certain types of discriminatory speech and conduct unacceptable in society, and that it therefore has an important role to play” (2017: 19).²⁰
- 2.32. However, **we think it is very difficult to draw any conclusions from the available data on the deterrent effect of stirring up offences**, and it is far from clear how far the existing law on “stirring up” has been successful in making certain types of speech and conduct unacceptable.
- 2.33. Figure 1 shows that the majority of hatred-related charges in Scotland relate to racial hatred, that is, to the only category for which a “stirring up” offence already exists. The volume of such charges, brought under other hate crime legislation such as racially aggravated conduct, has fallen over time, particularly in very recent years, while the law on “stirring up” has remained unchanged since 1986 and been little used. Within this period there has been no clear trend on religion-related hate crimes. Charges relating to other characteristics tended to increase over the period, although it is difficult to assess how far this may have reflected increasing confidence in reporting cases or greater awareness among the police about the availability of these charges.

¹⁹ This offence related to where a person communicated material to another person where the material was threatening and the person communicating it intended by so doing to stir up hatred on religious grounds.

²⁰ Scottish Government (2017) [Independent Review of Hate Crime Legislation in Scotland. Consultation non-technical guide](#)

Figure 1. Race crime and other aggravated hate crime: charges reported to COPFS by characteristic, 2010-11 to 2019-20



1. Data shows number of charges reported, not individuals.
2. Race includes charges related to racially aggravated harassment and behaviour, and charges related to another offence with a racial aggravation.
3. Religion includes additional religious charges reported under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 between 2012/13 and 2016/17 (data for 2017/18 is marked unavailable), which account for between 6% and 10% of charges.
4. Sexual orientation, disability and transgender identity refer to charges for offences aggravated by each characteristic.

Source: [Hate Crime in Scotland 2019/20](#)

- 2.34. We believe the attempt to draw a causal relationship between the existence of stirring up provisions and a reduced experience of hate incidents in practice is not supported by the available data and so cannot be more than the assertion of a hoped-for effect.
- 2.35. In England and Wales, the Law Commission examined the case for extending the stirring up offences to disability and gender identity. The Commission concluded that a practical need had not been established, given the low number of charges for stirring up racial hatred, religion, or sexual orientation, compared to the number of charges for aggravated offences (2014: para. 1.68 n 45).²¹
- 2.36. The Law Commission noted that the type of hate speech typically found in relation to disability and transgender identity was unlikely to satisfy the requirements for a stirring up offence and that many of the examples brought to the Commission's attention would be covered by other offences (Ibid: para. 168).
- 2.37. The Law Commission argued that if new offences of stirring up hatred on the grounds of disability and transgender identity were created, there would be very few successful prosecutions, and that the deterrent and communicative effects of the new offences and any other impacts as to reporting of hate crime would be very limited (Ibid.).

²¹ Law Commission (2014) [Hate Crime: Should the Current Offences be Extended?](#) Law Com No. 348. The Commission notes, "between 2008 and 2012, only 113 charges of stirring up racial hatred and 21 charges of stirring up hatred on the ground of religion or sexual orientation reached a first hearing in a magistrates' court. We contrasted this with over 75,000 charges for the aggravated offences over the same period."

- 2.38. The Bracadale Review acknowledges this argument but concludes that the argument for establishing parity between all characteristics is strong, and by implication outweighs the practical argument (para. 5.33). We discuss further below how far the current state of debate on sex and gender affects the assessment of likely effects made in 2014, at least as regards fear of prosecution.

Symbolic function

- 2.39. **The main purpose of the proposed stirring up offences appears to be symbolic.** The Bracadale Review states that “I do not consider that the argument that there might not be many prosecutions is persuasive against having a regime of stirring up hatred offences. Indeed, their relative rarity may only enhance their symbolic value” (para. 5.14) and that legislation “sends a clear message to the victim, the group of which the victim is a member, and wider society, that criminal behaviour based on bias and inequality will not be tolerated” (page iv). We wish to highlight two points here.
- 2.40. First, taking the symbolic argument on its own terms, as the list of characteristics expands, there is an increasingly damaging symbolism in *excluding* other characteristics. We would highlight the exclusion of women. The Bill as introduced “sends a clear message” that stirring up hatred against women is more socially acceptable than it is for those characteristics included.
- 2.41. So, while the Bracadale Review is concerned with avoiding a hierarchy *within* the group of chosen protected characteristics, its recommendations reinforce the hierarchy between characteristics that are afforded protections in law, and those that are not. This point is discussed further in Part 4.
- 2.42. How the interaction between protected and non-protected characteristics is likely to play out in practice becomes more of an issue as the list grows. We think that the new hierarchy created by the Bill is likely to be most strongly felt in relation to the division between transgender identity, which is protected, and sex, which is not, which we discuss further below.
- 2.43. Second, we take issue with the implication that law in this area as a symbolic gesture is a straightforward benefit, carrying little risk. Most importantly, **the Bill as introduced does not take sufficiently seriously the risks to freedom of expression.**

Impact on freedom of expression

- 2.44. As noted earlier, the Bill only provides freedom of expression protection for religion and sexual orientation. One effect of this is to create a lower threshold of criminalisation for stirring up hatred in relation to transgender identity than for sexual orientation or religion.
- 2.45. In response to increasing criticism that the Bill posed a risk to freedom of speech, a Scottish Government blog published on 15 June described this as a “myth”, and referred to the freedom of expression provisions for religion and sexual orientation, but failed to refer to the absence of protection for the other characteristics.²²
- 2.46. Defending the balance of freedom of expression and criminalisation in the Bill, Godzisz and Walters (2020)²³ state, “Similar concerns were raised in England & Wales when religious and sexual orientation hatred were added to the law in 2006 and 2008 respectively. Yet few cases have ever been successfully prosecuted, due primarily to the law’s emphasis on freedom of expression.”

²² Scottish Government (2020) [Blog: The Hate Crime and Public Order \(Scotland\) Bill](#)

²³ Godzisz and Walters (2020) [Hate Crime: mapping the boundaries](#). Law Society of Scotland

- 2.47. However, as noted, the Bill does not extend freedom of expression to all the new characteristics proposed, while the provisions it does include for religion are weaker than those applying in England Wales.
- 2.48. Box 1 compares the protection in the Bill for religion with existing law in England and Wales, and shows that whereas the 1986 Act provides for “discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse”, the current Bill only provides for “discussion or criticism”. We suggest MSPs should therefore be wary of reassurances about the Bill’s potential impact of freedom of expression based on experience in England and Wales to date.

Box 1. Comparison of freedom of expression provisions in the 1986 Public Order Act and Hate Crime and Public Order Bill

1986 Public Order Act (Section 29J)	Hate Crime and Public Order Bill Part 3 s11(2)
Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.	Behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes- (a) discussion or criticism of- (i) religion, whether religions generally or a particular religion (ii) religious beliefs or practices, (b) proselytising, or (c) urging of persons to cease practising their religions.

Academic freedom

- 2.49. No additional protections are provided in relation to academic freedom. In Part 3 we outline some of the pressures that academics currently face in relation to the debate on sex and gender identity, and the chilling effect on free expression that is already evident in universities as a result of accusations of transphobia.
- 2.50. We suggest the Committee should explore the implications of the Bill for section 23 of the Higher Education Governance (Scotland) Act, 2016 (on academic freedom). This contains the caveat “within the law”. The Hate Crime and Public Disorder (Scotland) Bill would appear to have priority, and would therefore restrict academic freedom more heavily in Scotland than other parts of the UK, and may have cross-border implications for academics based in other UK jurisdictions, whose work is published in Scotland.

Police workload

- 2.51. The Committee should consider what risk there is that the Bill as drafted will stimulate vexatious, malicious, or unfounded complaints.
- 2.52. In response to the broadly framed consultation question “Do you agree with Lord Bracadale’s recommendation that there should be a freedom of expression provision for offences concerning the stirring up of hatred?”, Police Scotland state:

“The inclusion of a freedom of speech provision is to be welcomed. In a football context the inclusion of such a provision in the Offensive Behaviour at Football Act 2012 provided operational officers with valuable guidance. **The absence of such a clause could result in Police Scotland being burdened with vexatious reports of ‘crimes’ which are not in fact criminal in nature but which still require to be recorded and investigated to confirm if criminality is involved.**” (Police Scotland 2019; 22, our emphasis).²⁴

²⁴ Police Scotland (2017) [Consultation on hate crime legislation response](#)

- 2.53. The Police Scotland response appears to assume that freedom of expression protections would apply to all the characteristics, however this is not the case in the Bill as introduced.
- 2.54. It should also be noted that the threshold for recording hate incidents is subjective. Police Scotland Standard Operating Procedures state that the perception of the complainant (or any other person) is the defining factor in deciding whether to record an incident and instigate an investigation:
- ‘The perception of the victim should always be explored, however they do not have to justify or provide evidence of their belief and police officers or staff members should not directly challenge this perception. Evidence of malice and ill-will is not required for a hate crime or hate incident to be recorded and thereafter investigated as a hate crime or hate incident by police.’ (2018, paras. 5.5.1).²⁵
- 2.55. Police Scotland recording procedures also allow officers to identify whether a reported incident was motivated by hate, independent of the complainant’s perception. The extent to which police perceptions could themselves become more sensitive to effects on some groups than others is a relevant issue here (see further Murray, 2019).²⁶ We have written elsewhere²⁷ about what the OECD terms “policy capture”, a process by which one interest group may obtain more influence over a policy maker to the detriment of others, and are concerned that any law-making in this area should be alert to that possibility.
- 2.56. The lack of freedom of expression protection for most characteristics combined with a subjective threshold for recording hate incidents or crimes creates a context in which a new offence of stirring up hatred is vulnerable to generating a large volume of complaints, which, as Police Scotland note, will “require to be recorded and investigated to confirm if criminality is involved”.
- 2.57. As an example of how easily the police may already be drawn into investigating hate-related complaints, in January 2019 it was reported that stickers had been seen on the University of Edinburgh campus, with slogans such as “Female is a biological reality” and “Woman. Noun. Adult human female”.²⁸ Responding to a comment about the stickers on Facebook, the Scottish Trans Alliance manager was reported to have stated: “Please log it by reporting on the Police Scotland online hate crime form. We need the stats.” The Edinburgh University Students’ Association’s vice-president for welfare described the stickers as “clear violations of policies against harassment and discrimination”.
- 2.58. This view appeared to be supported by the University Principal, who stated that those responsible for the stickers would be traced through CCTV and disciplined, and that Police Scotland had been contacted. Police Scotland confirmed that stickers had been posted across Edinburgh city centre and that no criminality had been established.
- 2.59. The Committee is invited to note that the statements on these stickers were perceived by the University Principal to meet the threshold for disciplinary action and for reporting to the police; and to consider how far the Bill as drafted would increase the level of investigation the police would feel obliged to undertake in any future equivalent case.

²⁵ Police Scotland (2018) [Hate Crime Standard Operating Procedure v.6](#).

²⁶ Murray, K. (7 November 2019) [Policing the Gender Identity debate](#) Sceptical Scot.

²⁷ See Part 3 below.

²⁸ Times, 24 January 2019 [Principal backs transgender students over ‘hurtful’ stickers](#)

Part 3. Impact on the sex and gender identity debate

- 3.1. **We are particularly concerned that the lack of freedom of expression protections in relation to transgender identity, taken with the requirement that a behaviour or communication need only be perceived as “abusive”, the likelihood test, and the lack of protection for sex as a characteristic, will combine to have a very unequal impact on those who wish to argue the continuing rights based on sex, for example in the context of reform of the Gender Recognition Act.**
- 3.2. In that specific context, we note that the Scottish Government unusually gave advance notice that it would not publish responses to its most recent consultation on the Gender Recognition Act if they were deemed “offensive” including “language which is derogatory ...about a group in society”. No similar statement was made in relation to the Hate Crime Bill consultation, for which only defamatory material was removed before publication.²⁹
- 3.3. There is a depth of disagreement here about what beliefs and opinions are in themselves “hateful” that may surprise those who have not followed this debate closely, and undermines Lord Bracadale’s assessment that “In most cases it is likely to be quite obvious that the conduct is stirring up hatred of a group rather than contributing to meaningful public debate” (para. 5.29)
- 3.4. The Stonewall definition of transphobia includes “the denial/refusal to accept [someone’s] gender identity”³⁰ and is often read as requiring people to adopt as their own belief another person’s declaration that they are a woman or a man (or male or female), or neither, irrespective of their physical sex, and to believe more generally that declarations of gender identity should take priority over sex in all circumstances,³¹ or at minimum to require that no disbelief is expressed.³²
- 3.5. This conception of transphobia has been influential in multiple settings. For example, following court rules in England, a woman victim in an assault case was told by a judge in 2018 to use female pronouns when referring to the defendant, who identified as a woman, and was criticised by the judge at the end of the case for doing so inconsistently and “with a bad grace”.³³

²⁹ This included material deemed “transphobic” or “misogynistic”. When asked to clarify how it would define “transphobic”, officials confirmed that this would include any responses which referred to any named person who had transitioned to live as a woman being ‘male’ or ‘male-bodied’, although it would publish responses which described people in this group generally in those terms. See: [Women and Girls in Scotland, 1 March 2020: Twitter](#). The Scottish Government also stated that it would not publish any responses naming individuals who had a transgender identity who had been reported as being convicted of any crime: in this case it cited data protection, although in other contexts the Scottish Government has itself named individuals convicted of particular offences in its own documents, and again, no such restriction was made for the consultation on the Hate Crime Bill.

³⁰ As provided to the court in the case of [Campbell vs Dugdale](#).

³¹ Although there is evidence that not all people who undertake some form of social and/or physical transition and who would be covered by the characteristic of transgender identity under the 2009 Act subscribe to a belief in gender identity. See for example, Kristina Harrison, Debbie Hayton, and Seven Hex, all of whom spoke at the Scottish Parliament in February 2020.

³² Philosopher Mary Leng has argued that an influential group in this debate are those who are mainly concerned with ensuring statements that they agree are true are nevertheless not expressed (see [Harry Potter and the Revere Voltaire](#) 12 July 2020).

³³ The instruction appears to have been guided by the [Equal Treatment Bench Book](#). We understand similar guidance applies in the Scottish courts although we are not aware of a similar instance here. The victim has since stated that while she did not feel able to use female pronouns honestly under oath as she strongly perceived her assailant to be male, she tried instead to use the assailant’s name and to avoid using male pronouns but found this difficult under the stress of the court appearance. The defendant was found guilty, but the judge reduced the compensation payable to the victim to reflect his criticism of her use

- 3.6. This approach also informs guidance to the media from IPSO³⁴, which has led to criticism of its effect on reporting in some cases.³⁵
- 3.7. Consistent with this, **it has been our experience that the core disagreements here are not about whether people should be able to present in whatever way they wish, free from harassment or discrimination in their day to day life; but about beliefs about the nature of sex and gender, the relationship between the two, and from that, the implications for public policy and discourse.**
- 3.8. In line with the Stonewall definition, it is regarded by some as *intrinsically hateful* not to share the belief that each person has an inner/innate “gender identity” that exists independently of their sex as observed at birth, and that where the two diverge (as judged by normal social expectations), a person’s self-declared identity should take precedence over sex in how they are treated in society, policy and law.
- 3.9. Other beliefs associated with this position include the view that the words “woman” or “man” should only be used to refer to categories based on identity, not sex, and that to do otherwise is hateful (see the case study below). This view is sometimes extended to the terms “female” and “male”, and to arguments such as: “sex” has no basis in physical reality, is not confined in humans to two categories, and may be changed from male to female or vice versa by surgical or hormonal intervention; that ‘lesbian’ should not be limited to meaning same-sex attracted people born female; that a person should never be required to provide information on their sex at birth, except possibly in some medical settings; and that all those who declare that they identify as women should be assumed to have patterns of behaviour, including offending behaviour, which are typically female rather than male.
- 3.10. Further, it is our understanding that to describe (as we would) any of these positions as *beliefs*, and to argue that what is being sought *in some situations*³⁶ is specifically the protection of a particular interpretation of what it means to be transgender³⁷, and that this is more akin to seeking protection for a belief, than for a characteristic such as race, age or sexual orientation, would in itself be seen as “hateful” by some people.

of pronouns. See Daily Mail (13 April 2018) [Transgender model who punched feminist and smashed her £120 camera in violent brawl at Hyde Park Speakers' Corner protest walks free from court](#)

³⁴ [IPSO Transgender guidance](#)

³⁵ This has been the case in particular with the reporting of some criminal cases, for example most recently in the reporting of the conviction of a child sex offending case BBC 14 July 2020 [Blackpool woman accessed child abuse images in hospital bed](#)

³⁶ We are not arguing that all the protection sought for this group is for a set of beliefs. Offending behaviour directed at people simply because they fall or are assumed to fall within this group does not raise issues about divergent beliefs.

³⁷ As noted above, this interpretation is not shared by all people who transition, including some who undertake full surgery. As an explanation for why some people seek to transition, it is discussed and challenged in a recent article by a group of medical practitioners who argue that “viewing transgender as a fixed or stable entity, rather than a state of mind with multiple causative factors, closes down opportunities for doctors and patients to explore the meaning of any discomfort” (Griffin, L., Clyde, K., Byng, R., & Bewley, S. (2020) [Sex, gender and gender identity: A re-evaluation of the evidence](#). BJPsych Bulletin, pp1-9 doi:10.1192/bjb.2020.73 Open Access). We believe their position would be regarded as transphobic by those who follow the Stonewall definition.

- 3.11. Groups and individuals who argue for the continuing relevance of sex to law and policy-making (as we do) and the importance of sex-based rights, such as the right to access single-sex services and facilities, and to organise on the basis of a person's sex, as set out in the Equality Act 2010, and for the right to use 'woman' as a sex-based term, are therefore routinely described as hateful, anti-trans and transphobic, or accused of spreading misinformation. Such accusations have been levelled by MPs and MSPs, high-profile figures and by government-funded organisations.³⁸ Annex 2 contains examples of this.
- 3.12. The types of impacts on freedom of expression in this area already evident are:
- Self-censorship³⁹
 - Loss of opportunities to publish/speak/teach/attend events⁴⁰
 - Complaints to employers leading to investigations, and sometimes to employer/professional disciplinary action or loss of employment⁴¹
 - Police investigations leading to no charges, but sometimes to non-crime incident recording against individual's names⁴²
 - Hate-related prosecutions⁴³ (none yet successful).
- 3.13. The impact on freedom of expression may therefore be felt directly, where a person is reported to the police, but more often indirectly, where a person changes their behaviour or is refused support of some sort by an organisation, because of the perceived risk of being reported or threats that they will be. This possibility was a key consideration in the Lester amendments:

"We have to face the fact that if we make it a criminal offence to stir up hatred against a group of people, then we create a climate within which people will think twice about even criticising it. In turn, people will surely run shy of saying anything that might stir up hatred of the ideology or religion itself and also develop a fear of being critical of it, satirising it or even poking the slightest fun at it. It is no good Ministers claiming that there is no slippery slope to self-censorship because we all know that there is." (Lord Hunt, HoL 25 Oct 2005: col. 1073)⁴⁴

³⁸ For example, a [letter](#) (10 September 2019) sent to the Europe, Culture Committee from the Equality Network and other LGBT organisations described those arguing that the census should ask for sex as officially recorded rather than self-identified as "opponents of trans equality", citing our research in this area.

³⁹ Self-censorship is hard to measure. We have been contacted by individuals in academic and other professional roles who have told us they feel unable to express their views. We note below some case histories gathered by Professor Kathleen Stock, which include statements about self-censorship. An [opt-in survey](#) conducted by Maya Forstater in June 2020 on Twitter obtained around 500 responses, 87% of whom said they were not as publicly vocal on this issue as they would like to be.

⁴⁰ See: Professor Selina Todd, BBC (4 March 2020) [Oxford University professor condemns exclusion from event](#); Professor Alice Sullivan (24 May 2020) [Stonewall's new boss Nancy Kelley let census expert be no-platformed](#).

⁴¹ See: BBC (19 December 2019) [Maya Forstater: Woman loses tribunal over transgender tweets](#). Note the judgement in the initial hearing is currently under appeal.

⁴² See: BBC (14 February 2021) [Harry Miller: Police probe into 'transphobic' tweets unlawful](#). Note that aspects of the initial judgement are under appeal.

⁴³ In 2019, a transwoman (Miranda Yardley) was prosecuted in England by the Crown Prosecution Service for harassment. Yardley maintained however that the complaint was driven by opposition to Yardley's view that a person cannot alter their sex, regardless of how they identify or what physical interventions they undertake. The case was dismissed by the judge on the first day of the hearing reportedly on the basis that there was no case to answer. See: Daily Mail (2 March 2019) [Britain's first transgender hate crime trial is halted after one day as judge says 'there is no case and never was a case](#).

⁴⁴ House of Commons (25 October 2005) [Racial and Religious Hatred Bill](#)

- 3.14. We believe that if the Bill is passed as introduced, that institutions of various sorts, police and prosecutors will come under substantial additional pressure to block, investigate or prosecute statements that represent previously established (and on available polling, still widely held)⁴⁵ positions on the nature and relevance of sex in policy making and the meaning of words, based on the assertion that these meet the test of abusive behaviour or communication and are likely to stir up hatred related to transgender identities. Although convictions may be regarded as unlikely, we think it would be prudent to assume that there will be pressure to bring test cases.⁴⁶
- 3.15. We believe that debate in this area can therefore be strongly predicted to be curtailed further, mainly through entrenching and invigorating existing processes of self-censorship and institutional caution. Specifically, perspectives that acknowledge the relevance of biological sex, or advocate for women's rights on this basis will be at risk of being reported and potentially criminalised for stirring up hate on the basis of transgender identity. While the chance of successful prosecution may be low, the threat and fear of being reported and investigated is likely to further constrain what arguments, evidence and analysis are shared in the public sphere.
- 3.16. **We therefore invite the Committee to consider very carefully what safeguards are in place against unintended outcomes here, given the specific examples provided in this submission as to what has been deemed abusive or hateful in this context in the recent past. The potential for a “chilling effect” of legislation in this area which goes undocumented is a significant issue MSPs should consider. Such an effect is likely to be exacerbated by the substantial penalties in the Bill.**
- 3.17. In addition to the material above and in Annex 2, we provide below examples of how easily serious accusations of transphobia and stirring up hatred are made and shared. First we detail our own experience of publishing an academic paper on women's rights. We then look more generally at academic freedom within universities. The analysis shows that the current climate around sex and gender identity has already had an impact in this area *despite additional legal protections for academic freedom*.
- 3.18. To avoid making this note any longer we have not included examples from our experience of arguing that the census should collect data on sex as objectively recorded as *well* as collecting data on transgender identity for the first time (footnote 38 above refers briefly). Members may be aware that since Joan McAlpine MSP first challenged plans to use the long-standing “sex” question in the census to gather data on sex as subjectively self-identified, she has been subject to multiple accusations of hatred and transphobia. Jenny Marra MSP, Johann Lamont MSP and Elaine Smith MSP have been subject to the same accusations for supporting discussion of the impact on women of plans to reform the Gender Recognition Act.

⁴⁵ For example, a UK-wide [YouGov poll](#) in July 2020 found that 46% of people believed that a person who identified as a woman but had not had surgery should not be allowed access to women's changing rooms vs. 26% who thought they should (28% don't know), while a Panelbase Scotland-only poll in April 2020 found that 72% found the description “adult human female, with XX chromosomes and female genitalia” to be closest to what they believed ‘woman’ to mean, while 28% chose “anyone who says they're a woman, regardless of their biology”.

⁴⁶ We note the JustRight law centre is specifically interested in strategic public interest litigation in Scotland on matters relating to transgender rights. See Herald (13 November 2019) [JustRight law centre gears up to bring clarity to trans and disability rights](#)

Case study: Academic publishing

- 3.19. In 2019 an attempt was made from within a Scottish academic publisher to prevent the publication of an article that we had authored. On the basis of damaging and unsupported accusations made from within the publisher, and without our knowledge, the publisher raised with the university with which two of us are affiliated, the possibility that we had breached the university's internal Dignity and Respect policy.
- 3.20. The full series of events is provided at Annex 3 but in summary, in summer 2019 our paper 'Losing Sight of Women's Rights: the unregulated introduction of gender self-identification as a case study of policy capture in Scotland' was accepted for publication by the journal Scottish Affairs, which is published by the Edinburgh University Press (EUP). Setting out two case studies, the article examined the extent to which public organisations had considered women, as a group defined by sex, in their policy-making processes. From a detailed examination of the available evidence, we argued that this had been done inadequately in the context of policy making on transgender issues, and that this failure was an example of what the OECD terms "policy capture". The full text is available online,⁴⁷ if Committee members wish to compare its contents with its characterisation below.
- 3.21. After the text had been peer-reviewed, signed off by the journal and sent to EUP to arrange publication, a member of EUP staff, who we were later advised would not normally have any role in relation to journal content, wrote in an internal note (provided in full in Annex 3) that:

X has passed me the Murray, Blackburn and Mackenzie article mooted for publication in Scottish Affairs. I want to express my concern about it. It both expresses anti-trans sentiment and also uses terms that are discriminatory and insulting towards trans women (for example, the use of the word 'women' as specifically excluding trans women).

As well my personal belief that it is morally wrong and socially irresponsible to provide a respected scholarly platform to such divisive and discriminatory opinions, publishing this article would actively harm the Press' reputation. ...

We do have a precedent of refusing to publish books that have passed peer review because they have later (often at Press Committee, but sometimes as late as handover) been found to be Islamophobic, anti-Semitic or written by authors who have publicly expressed homophobic or sexist opinions. Transphobia is just as serious as any of these other forms of intolerance and I strongly feel that we should take the same principled approach, both as a business decision and an ethical stance.

- 3.22. We draw to the Committee's attention that the only specific example given to justify the highly derogatory and inaccurate description of our work and motives was our use of "women" to refer specifically to those people who share the characteristic of being born female, which mirrors the wording of the UK's flagship anti-discrimination legislation, the 2010 Equality Act.⁴⁸

⁴⁷ Murray, K. and Blackburn, L. (2019) [Losing sight of women's rights: The unregulated introduction of gender self-identification as a case study of policy capture in Scotland](#) Scottish Affairs , Vol. 28 (3). Lisa Mackenzie was acknowledged as a co-author in a [statement](#) published by Scottish Affairs in February 2020.

⁴⁸ The Equality Act 2010 defines a woman as "a female of any age".

- 3.23. Senior EUP staff contacted the editor of Scottish Affairs to draw his attention to the concerns raised in the note, copied to him in full, offering us no opportunity to challenge its contents. The EUP also at this point sent a copy of the article to the University of Edinburgh (UoE) Legal Services team for advice. It is unclear on precisely what terms EUP approached the legal team, as EUP have refused to release their note to the legal team note to us. However, from other material released to us, it is clear that the approach was motivated by a belief that two of us were UoE staff members and that the article might contravene the university's internal Dignity and Respect policy. The EUP has also confirmed that we were named in the communication with the university. There is no suggestion in any of the available papers that there was any concern that the material might be unlawful. The university was approached without our knowledge.
- 3.24. The UoE legal team (whose response the EUP was willing to release) declined to comment, on the grounds that to do so would be at odds with academic freedom. The legal team noted that "our University has been approached several times regarding a position on transphobia and gender identity".
- 3.25. The journal rejected the analysis in the EUP internal memo. However, given the seriousness of the comments made from within EUP, the editor understandably felt obliged to seek the backing of the journal's full board. All members of the board were sent the article in draft with the authors anonymised, to review the decision-making process. The publication of our article therefore rested on the willingness of the journal to stand fast against the claims made about us from within the EUP.
- 3.26. Publication went ahead, with only minor changes further explaining our choice of language. Our article attracted an unprecedented level of interest and we have received substantial supportive feedback from academic and lay readers. We have very recently received a pre-publication copy of a formal critical response to our article, which will be published in Scottish Affairs in January 2021, together with a response from us. This allows the issues to be considered in a conventional academic format, which we welcome.
- 3.27. We have been advised that the events here are unprecedented in the experience of those responsible for Scottish Affairs, which regularly publishes on controversial topics in current public policy.
- 3.28. **It is our strong view that had these events happened with the existing Bill as law, it is likely that the risk of legal challenge under "stirring up hate" provisions would have been invoked from within EUP, rather than simply a possible infringement of university policy, and the invoking of that in a context where the definition of terms is uncertain and contested, and serious criminal penalties would apply, would have raised the stakes considerably for EUP, the journal and ourselves.**
- 3.29. Under the terms of the Bill as introduced, we think it is far more likely that the article would have been withdrawn in response to the original note, or at minimum been subject to delay, further scrutiny and potentially demands for larger textual changes, to the detriment of achieving more serious debate and scrutiny of this area on the terms we felt were required from our examination of the evidence. Any such effects would not be picked up by any monitoring of the impact of the legislation.

Impact on Higher Education and academic freedom

- 3.30. Within universities the climate around sex and gender identity has affected the ability and confidence of researchers and students to hold events and freely engage in intellectual debate. It is not unusual for those advocating for policies based on self-defined gender identity to invoke the language of hate speech. The overall effect is one of self-censorship and institutional caution within academic settings, together with a marked imbalance in terms of the views and arguments that are articulated within Higher Education.
- 3.31. While the sex and gender identity debate impacts on key social issues, including power and inequality, data reliability, the balance of rights between different vulnerable groups, as well as wider societal shifts (including a sharp increase in referrals to gender identity services of young girls), very few academics are engaging with these issues from any perspective other than one which prioritises declarations of gender identity over sex.
- 3.32. Academic events to discuss women's sex-based rights have been subject to defamatory comment, disruption, and sabotage. Activists have put pressure on organisers and/or institutions to cancel events to discuss sex-based rights, citing hateful or transphobic motives. Bristol University Feminist Society stated the views expressed at a meeting to discuss GRA reform "amount[ed] to hate speech" and endangers transwomen.⁴⁹ A talk by Professor Jo Phoenix exploring tensions around the placement of trans prisoners was cancelled by Essex University due to the threat of disruption.⁵⁰
- 3.33. Professor Selina Todd was disinvited from an event to mark 50 years since the inaugural Women's Liberation conference at Ruskin College, which she had both helped organise and was due to speak at, due to pressure from activists.⁵¹ Professor Todd has also been given security protection by Oxford University after receiving threats from activists on social media.⁵² Professor Michelle Moore, the editor of the journal 'Disability and Society', was subject to a campaign (albeit unsuccessful) to have her removed from this role.⁵³ In 2019, a collection of cases studies of impacts in higher education was collated by Professor Kathleen Stock⁵⁴ who has herself been subject to attempts to reduce her access to various forms of academic engagement⁵⁵.

⁴⁹ Telegraph (1 March 2018) [Bristol University students seek to ban 'Terf' speakers who question transgender status of women](#)

⁵⁰ Guardian (14 January 2020) [Sacked or silenced: academics say they are blocked from exploring trans issues](#)

⁵¹ BBC (4 March 2020) [Oxford University professor condemns exclusion from event](#)

⁵² Mail Online (24 January 2020) [Feminist Oxford professor is given security guards at work to protect her after threats from transgender activists](#)

⁵³ Times (26 June 2019) [Journal editors quit in protest over "transphobic" academic](#)

⁵⁴ Stock, K. (3 July 2019) [Are academics freely able to criticise the idea of 'gender identity' in UK Universities?](#)

⁵⁵ Times Higher Education (7 January 2020) [Kathleen Stock: life on the front line of transgender rights debate](#)

- 3.34. In June 2019 the University of Edinburgh (UoE) held an event to discuss women's sex-based rights, attended by several MSPs from four of the five political parties currently represented at Holyrood (a recording is available,⁵⁶ if committee members wish to compare the contents to how it was described by those opposed to it taking place). In language reflecting the proposed Bill, Edinburgh University Students' Association Liberation group stated that they "oppose the University's promotion of people widely criticized for stirring up transphobia".⁵⁷
- 3.35. Security arrangements at the UoE event included: several pre-meetings between the organisers and security managers, a one-hour security briefing for the speakers, organisers, and chair, seven security guards, a security sweep of the lecture theatre beforehand, and ID needed for entry.
- 3.36. Following the event, the University's Staff Pride Network (SPN) committee resigned after accusing the university authorities of "failing to take a stand against transphobic hate on campus". An assault on one speaker while leaving the event was prevented by security officers: the case was later dealt with by the Crown Office by way of an alternative to prosecution.
- 3.37. In November 2019, a UoE research seminar on transgender identity and schools was postponed due in part to a social media backlash, and an attempt to sabotage the booking system.⁵⁸ The SPN claimed the speakers had a "*history of transphobia*". The university initially responded to objections from the SPN requiring the organisers also provide a speaker representing their views, and when no such speaker could be persuaded to attend, de-designated the event as a professional development event, reducing the likelihood of attendance by staff teaching in schools.

⁵⁶ YouTube (25 July 2019) [Women's Sex-Based Rights: What Does \(& Should\) the Future Hold? Panel event at the University of Edinburgh](#), 5 June 2019.

⁵⁷ Scotsman (8 May 2019) [University debate on women's rights branded 'transphobic'](#)

⁵⁸ Daily Mail (4 December 2019) [Edinburgh University axes conference on helping transgender school pupils amid fears speakers and guests could be at risk from activists who branded the event 'transphobic'](#)

Part 4. Who counts? Criteria for hate crime protection

Summary of concerns

- The Bill as introduced deepens the existing hierarchy in hate crime legislation between those characteristics that enjoy legal protections, and those that do not. Any exclusive, closed list of protected characteristics for hate crime sends a signal as to the relative seriousness of hatred towards those not included. In particular, the omission of sex from the proposed list sends a powerful and damaging message which the Parliament needs to consider.
- We think that the Bill offers an opportunity to step back from the legacy of the 2009 Act and consider, at a more fundamental level, why, and therefore when and for whom, hate should be seen as an aggravator.
- The approach to defining the characteristic transgender identity relies substantially on a person's subjective sense of self. This means that in Part 2 of the Bill a new criminal offence, without a freedom of expression provision, is being proposed in relation to a group lacking a clear objective definition.
- The replacement of the term 'intersex' with 'Variation in Sex Characteristics' recognises that this is a physical condition and should not be conflated with gender identity. Yet the continued inclusion of this group in the Bill appears to be based only on its inclusion in the 2009 Act when it was mistaken for an identity. Neither the Bracadale Review nor the Scottish Government provide a rationale for including VSCs as a hate crime characteristic: the sole evidence provided in support of its inclusion is based on a small, self-selecting survey⁵⁹ that used terminology ('intersex') that we understand to be contested by some groups that represent individuals with DSDs.

Note: Annex 4 compares the definition of characteristics included in the Bill with those in existing hate crime legislation and with the Equality Act.

Which groups are excluded?

- 4.1. The Bill does not recognise as specifically vulnerable to hate some obviously vulnerable or disadvantaged groups. For example, in England and Wales, nine police forces recorded 4,940 attacks against people described as homeless, having no fixed abode or rough sleeping over a five-year period (Guardian, 2018).⁶⁰ Nor does the Bill provide protection against hate based on personal appearance, separate to disability: for example, at present attacks or abuse based on facial disfigurement are only protected by being treated as a disability, even if a person does not regard themselves as being disabled.⁶¹
- 4.2. The Bracadale Review discusses the rationale for excluding some groups, which hinges on the idea of identity. For instance, in relation to socio-economic status, including homeless people, Lord Bracadale states: "I am not persuaded that a person's socioeconomic position can be equated with any kind of identity characteristic: it is a matter of fact determined by a number of factors (employment, poverty, security of housing etc.) which will change over time" and that "it would stretch the concept of 'hate crime' too far from what is readily understood by society to treat offending based on hostility to these factors as hate crime" (para. 4.87).

⁵⁹ Equality Network (2017) [Scottish LGBTI Hate Crime Report](#)

⁶⁰ Guardian [Recognise attacks on rough sleepers as hate crimes, say experts](#) (19 December 2018)

⁶¹ Changing Faces (online) [Dealing with appearance-related abuse and harassment](#)

- 4.3. **We do not find the existing lines between which groups are designated as worth protecting from hate and those which are not to be as straightforward as this suggests.** The assertion that the possibility that a characteristic can change over time rules out inclusion is contradicted by characteristics already included (not least but not only religious belief; nor are only permanent disabilities covered).
- 4.4. **The Bill offers an opportunity to take a larger step back from the legacy of the 2009 Act and consider, at a more fundamental level, why, and therefore when and for whom, hate should be seen as an aggravator.**
- 4.5. For the aggravators, it may be worth considering whether there are ways to maintain clear protections for the existing characteristics plus age (possibly excluding VSCs, see below), without limiting the characteristics for which hate is an aggravating factor to a closed list. For example, some other jurisdictions have moved away from relying on an exclusive list to a general provision dealing with crimes aggravated by hatred of a group of people due to a common characteristic, with examples included in the legislation that are not exhaustive (see Chalmers and Leverick, 2017: 66).⁶²
- 4.6. As discussed earlier, for stirring up hatred specifically, we think the Committee needs to consider very carefully the basis for any extension of characteristics covered beyond race.

Sex

- 4.7. The Scottish Government does not propose to introduce protections for sex in the current Bill, although there is a provision that allows sex to be added to the list of characteristics at a later date by means of regulations. The Scottish Government has also stated that it will also establish a working group to consider a standalone offence which would criminalise serious misogynistic harassment, although the Bracadale Review argued against this approach, stating that the process would take a number of years (para. 4.45) and instead recommended a new statutory aggravation based on “gender” hostility.
- 4.8. The omission of sex under the Bill as introduced reinforces the existing hierarchy within hate crime legislation. In 2018 we were aware of comments and surprise expressed online that the Scottish Government/Police Scotland ‘Dear Haters’ campaign omitted mention of women as a group it was unacceptable to hate. Objectors argued that the campaign sent a message to those exposed to it that hate based on sex was less problematic than other forms. We think this is a reasonable criticism.
- 4.9. The omission of sex in the current Bill seems particularly difficult to justify, given the wealth of empirical evidence that shows that women are victimised on the basis of their sex. We are surprised that the Policy Memorandum appears to imply that hate based on sex is not currently an issue, stating “**while the focus of the legislation is on addressing hate crime in today’s society**, such as racial and religious hatred, provision is also included to enable the characteristic of sex to be added into the new legislative framework established by the Bill, at a later date” (page 4, our emphasis).⁶³

⁶² For example, such an approach has been taken in New Zealand, Canada and New South Wales. See: Chalmers, J. and Leverick, F. (2017) [A Comparative Analysis of Hate Crime Legislation A Report to the Hate Crime Legislation Review](#).

⁶³ Scottish Government (2020) [Hate Crime and Public Order \(Scotland\) Bill Policy Memorandum](#)

- 4.10. Data on domestic abuse aggravations provides the nearest comparable indicator of the abuse that is directed at women, overwhelmingly by men. Table 1 shows the number of convictions with a domestic abuse aggravator (both non-statutory and statutory)⁶⁴ recorded between 2010/11 and 2017/18, alongside hate crime convictions. Within this period, men accounted for 87% and upwards of domestic abuse convictions (as well the majority of convictions with an aggravation for other hate crime categories).

Table 1. People convicted with an aggravation against the main charge 2010/11 to 2018/19

	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19
All aggravators	9,519	10,040	10,481	12,294	13,751	13,828	12,258	11,226	10,495
Domestic abuse	8,566	8,877	9,292	11,077	12,441	12,376	10,836	9,884	9,210
Of which statutory	-	-	-	-	-	-	-	4,328	7,752
Racial	614	626	696	699	701	761	719	660	629
Religious	275	370	272	256	241	247	278	253	204
Sexual orientation	56	155	194	227	320	369	356	358	356
Disability	5	9	21	30	40	68	53	59	89
Transgender	3	3	6	5	8	7	14	12	7

Note: Each proceeding may have one or more aggravation codes associated with it. A proceeding will be counted under each aggravation code associated with it. e.g. A homicide with a 'racial' and 'religious' aggravation will appear once in the racial aggravation column and once under the religious aggravation column.

Source: [Criminal Proceedings in Scotland 2018-19 Table 12](#).

- 4.11. Some academics argue that the prevalence of violence against women has deterred legislators from including sex within the scope of hate crime. As Mason (2014)⁶⁵ observes, “perversely, victimization that is perceived to be too widespread or common may also encounter resistance to legislative inclusion”. Similarly, in a study of legislative reform in New Jersey, Hodge (2011)⁶⁶ shows how anxiety that the system would be overrun by sexual assault cases played a key role in their exclusion from legislative reform.
- 4.12. Accepting the prevalence argument, however, leads to the signalling problem exemplified by the “Dear Haters” campaign. **In our view once laws relating to hate are structured on exclusive lists covering multiple named groups omitting sex from the list sends a powerful and damaging message that the Parliament needs to consider.**
- 4.13. We understand this is a difficult area, where there is not a consensus among those who would like greater protection for women, and that this influenced the decision not to include sex or gender as a protected characteristic in the 2009 Act. We note that women’s groups argued then that sexual assault was inherently misogynistic and it would be undesirable to identify some of these cases as more aggravated by hate based on sex than others; and that domestic violence was the largest expression of violence against women as a group, and better dealt with by using specific aggravators (as has now been done).

⁶⁴ The Abusive Behaviour and Sexual Harm (Scotland) Act 2016 created a statutory aggravation of domestic abuse, although non-statutory aggravations for domestic abuse were recorded prior to the Act.

⁶⁵ Mason, G. (2014) The symbolic purpose of hate crime law: Ideal victims and emotion. *Theoretical Criminology*, 18(1)

⁶⁶ Hodge, J (2011) *Gendered Hate: Exploring Gender in Hate Crime Law*. US: Northeastern University Press.

- 4.14. Accepting these arguments however still leaves women as a group unrecognised as deserving protection from hate in other contexts, and creates significant data gaps. For example, we reported to the police a threatening email we had received in response to work we had published on women's rights: it was initially suggested to us that it could be recorded as a hate incident. We had to explain to the police officer that this was not possible, as sex is excluded as a characteristic under current legislation.
- 4.15. There is growing evidence that women receive much more substantial levels of threatening and abusive communication on-line than men, containing threats of related to their sex, particularly of sexual violence. We assume this problem has grown substantially since 2009. More generally, we would be concerned at any assumption that women will not be targeted as the victims of crimes other than domestic abuse or sexual assault, in contexts where hatred based on sex is relevant.
- 4.16. Separate offences based on "misogyny" or "misogynistic harassment" offer one response. We have concerns however, about how well these would translate as concepts in law and how easily a separate law based on "misogyny" could be communicated accurately in plain language.
- 4.17. Separate provision for "misogyny" also fails to address the continued exclusion of sex from a list of characteristics in a context where "hate", specifically, is seen as unacceptable. One alternative here would be to add sex as a further specific aggravator category in the current Bill, rather than delay. Another would be to adopt the more open-ended forms of legislation found in some other jurisdictions, as noted at para. 4.5 above.
- 4.18. If there are concerns about the interaction with the domestic abuse aggravator, it might be possible to provide for sex as an aggravator only in cases where that domestic abuse aggravator is not taken to apply. Indeed, the availability of this new, separate provision would move the debate on from where it was in 2009. The arguments about avoiding a differentiation in the treatment of sexual assault cases, and the sheer scale of these, could in theory be met by excluding such offences from those for which hatred based on sex could be taken as an aggravating factor, although that might be separately controversial.
- 4.19. Whatever the Committee decides, it should pay particular attention to the potentially damaging effect of legislative change which results in sending a message that hatred based on sex is less serious than hatred based on the characteristics already covered by the 2009 Act, plus age.

Transgender identity

- 4.20. Transgender identity is a hate crime characteristic under section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009, defined in the following terms:
 - a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004, changed gender, or
 - b) any other gender identity that is not standard male or female gender identity.⁶⁷
- 4.21. The current Bill specifies four categories that constitute 'transgender identity', and removes the reference to 'intersexuality'. The categories are: (a) a female-to-male transgender person; (b) a male-to-female transgender person; (c) a non-binary person; (d) a person who cross-dresses.
- 4.22. In response to a parliamentary question on the inclusion of cross-dressing people, the Justice Secretary stated that this is intended to 'ensure that the protection provided by the word 'transvestitism' [under existing legislation] is not lost'.⁶⁸

⁶⁷ [Offences \(Aggravation by Prejudice\) \(Scotland\) Act 2009](#)

- 4.23. The Scottish Government does not define these terms further. In response to written parliamentary questions, the Justice Secretary has stated that these four terms 'are not specifically defined in the Bill because it is not considered necessary for those phrases to be given any special definitions for the purposes of the Bill'.⁶⁹
- 4.24. In response to a parliamentary question asking for clarity on the concept of 'gender identity', as referred to in the Explanatory Notes (para. 80), the Justice Secretary replied in circular terms, describing this as 'an individual's gender identity where this is different from their sex at birth'.⁷⁰
- 4.25. This lack of clarity contrasts with other characteristics in the Bill. For example, the Explanatory Memorandum (para. 77) states that disability refers to 'a physical or mental impairment of any kind, and includes a medical condition which has (or may have) a substantial or long-term effect, or is of a progressive nature'.⁷¹ Annex 4 provides further examples of how characteristics are defined in legislation.
- 4.26. The 2009 Act also appears to protect non-stereotypical aspects of appearance and behaviour, regardless of how a person identifies. The Explanatory Notes state:
 '... the definition also extends expressly to cover other persons under the generality of broad reference to non-standard gender identity. For example, those who are androgynous, of nonbinary gender **or otherwise exhibit a characteristic, behaviour or appearance which does not conform with conventional understandings of gender identity.**' (para. 17, our emphasis)⁷²
- 4.27. In this respect, the current Bill appears more narrowly circumscribed than the 2009 Act. Specifically, it is not clear if women or men who are targeted because their appearance or behaviours do not conform to sex-based stereotypes, but who do not identify with any of the four categories listed under transgender identity, would be protected under the current Bill. We are particularly concerned about whether the re-definition removes protection from women and girls when they present in ways which reject feminine stereotypes but who would reject the description of themselves as transgender or cross-dressing.
- 4.28. Again, we understand that this is a difficult area of law and policy. However in a context where the Scottish Government is proposing to create a new criminal offence in relation to stirring up hatred towards a particular group of people, without a freedom of expression provision, we think it is imperative that the government properly clarifies on what grounds a person could and could not be included in this group.
- 4.29. We also ask the Committee to consider that some people who may be the target of abuse or harassment on the basis that they have transitioned in some way do not ascribe to a belief in gender identity, and to explore how well the legislation provides them with protection.

Variations of Sex Characteristics

- 4.30. The reclassification of 'intersex' and change in terminology in the Bill is motivated by the recognition that VSCs are a physical condition and should not be conflated with gender identity. However, the continued inclusion of this group in the Bill appears to be based on it having been included in the 2009 Act, directly because of the misunderstanding that it is an identity.

⁶⁸ [Question S5W-29940](#) 15 June 2020

⁶⁹ [Question S5W-29941](#) and [Question S5W-29940](#) 15 June 2020.

⁷⁰ [Question S5W-29943](#) 7 July 2020

⁷¹ [Hate Crime and Public Order Bill Explanatory Notes](#)

⁷² [Offences \(Aggravation by Prejudice\) \(Scotland\) Act 2009 Explanatory Notes](#)

- 4.31. The 2018 consultation asked respondents if VSCs should be separate to transgender identity, for which there was broad agreement; however, it did not ask whether VSCs should be included as a hate crime characteristic.
- 4.32. The Bracadale Review and Scottish Government state that the Equality Network support the inclusion of VSCs in the Bill, however we have found no empirical evidence to support this view, aside from a Equality Network survey⁷³ cited in the policy memorandum, which refers to the experiences of five respondents who identified as intersex.
- 4.33. During the passage of the Census (Amendment) (Scotland) Bill, which initially sought to include 'intersex' under the 'trans' category (see Policy Memorandum, para. 18),⁷⁴ the Scottish Government removed references to "intersex" people completely in recognition that there was no justification for singling out this group, compared to any other group of people sharing a specific type of medical history.
- 4.34. The Committee is invited to consider this precedent, to consider whether VSCs should be included as a hate crime characteristic, examine the evidence base for its inclusion, and in particular, to engage with those who have the relevant expertise to speak about what are rare congenital conditions.

⁷³ Equality Network (2017) [Scottish LGBTI Hate Crime Report](#)

⁷⁴ Scottish Government (2018) [Census \(Amendment\) \(Scotland\) Bill Policy Memorandum](#)

Annexes

Annex 1. Funding

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. We are Edinburgh based.

We formed in November 2018. All of the research and analysis we undertook initially was done on an unpaid basis.

To put our work on a more sustainable footing, over the past ten months, we have raised funds via two crowdfunders. In September 2019, we launched a [crowdfunder](#) to enable us to scrutinise the Scottish Government's plans for reforming the Gender Recognition Act 2004.

In May 2020, we launched a smaller [crowdfunder](#) to enable us to scrutinise the Scottish Government's draft Hate Crime and Public Order (Scotland) Bill.

Crowdfunder	Total amount raised	Number of supporters	Average donation
GRA reform	£8,780	293	£28.98
Hate crime	£3,430	108	£30.82
	£12,210.00		

Across both crowdfunders, we raised a total of **£12,210** (£11,413.75 after fees). We have also received offline donations via PayPal of **£447**.

The majority of these funds have been used to pay for our time. We have allocated the work between us based on our individual availability, paying ourselves an hourly rate of £15. However, we continue to supplement this with unpaid hours as necessary.

Annex 2. Examples of statements deemed hateful or transphobic

Example 1. Patrick Harvie MSP and Megan Murphy

- a. Addressing the Pride march in 2019, Patrick Harvie MSP said, “*I am sorry that this Parliament very recently was used as a platform for transphobic hatred and bigotry*”⁷⁵. He was referring to a meeting held in the Scottish Parliament the previous month, on the theme of women’s sex-based rights, chaired by Joan McAlpine MSP and attended by MSPs from several parties. An STV piece about the meeting is available [here](#).
- b. Mr Harvie later stated⁷⁶ that his specific objection was that one of the invited speakers was Meghan Murphy, a Canadian journalist and feminist activist, who he described as “an anti-trans speaker”.
- c. Mr Harvie’s characterisation of Ms Murphy as demonstrating “transphobic hatred” appears to be based on: her rejection of the use of “woman” and “man” as terms based on gender identity; her use of these as terms instead as ones based on sex; her view that sex is a characteristic which cannot be changed by declarations of identity, social transition or hormonal or surgical interventions; and that a person’s maleness or femaleness remains relevant in various legal and policy settings.
- d. Mr Harvie’s position is also reflected in a motion passed at the Scottish Green Party conference in 2018, which noted:

The Scottish Green Party affirms that trans women are women, trans men are men, and that all genders (or lack thereof) are inherently valid. The Scottish Green Party requires that all members of the party accept the gender determined by each individual. The Scottish Green Party regards refusal to do so as transphobia, and affirms that any behaviour which demonstrates transphobia is trans-exclusionary⁷⁷.
- e. Extracts of a speech given by Ms Murphy at a heavily-protested event in Toronto in October 2019 are provided below. They are provided as an example of the type of statements which we believe those taking Mr Harvie’s view would regard as hateful, and which we believe the stirring up provisions of the Bill would therefore be used to attempt to limit. We have also included comments from Ms Murphy on accusations that her views are hateful.

“I have personally been threatened with death and rape numerous times, libelled, and called every name you can imagine, simply for asking questions about the impact of gender identity legislation on women, and for stating it is not possible to change sex through self-declaration...

I have not said trans people should not have rights or that they are dangerous. I have not suggested trans people be excluded from spaces. I am not interested in whether or not people identify as trans, it has no bearing on my arguments. I am interested in who is male and who is female. I do not wish violence on anyone. I have never encouraged violence. I have never engaged in hate speech.

I have never said that “transwomen are not real women.” I have said that trans-identified males are male. Because they are. This is not a judgement or an insult, it is simply a material reality — a biological reality. If you are born male, you remain male for life. Everyone knows this. It is not a belief or an opinion, it is a fact. Also, to be clear: This does not — or should not — preclude males from wearing clothing designated for women, wearing makeup, growing their hair long, or even getting cosmetic surgery ...

⁷⁵ Scotsman (23 June 2019) [Patrick Harvie accused of smear over claim parliament was ‘platform for transphobic hatred’](#)

⁷⁶ Scotsman (30 June 2019) [Patrick Harvie: Don’t let Pride give in to hatred](#)

⁷⁷ Extract from the full text, found at [Scottish Green Party Affirms Transpositivity](#).

We are no longer women, but 'cis women', which means, supposedly, we are women who 'identify with the gender assigned to us at birth'. This is insulting. I am not a woman because I identify with femininity. Femininity refers to the set of stereotypes imposed on women in a patriarchal society. I do not identify with those stereotypes. ... Labelling women "cis" defines us based on only gender stereotypes — something feminists have been fighting since the get-go...

I have never promoted hatred or discrimination against anyone. I will NOT stand by and allow people to claim that protecting women is bigoted...

One of the reasons I challenge gender identity ideology is because I think it is regressive, sexist, and nonsensical. I think it limits us, rather than allowing us a full range of options as human beings with diverse interests and personality traits. But I also think it has incredibly negative impacts on women's rights, in particular. And I think it's important that, when enacting legislation and making sweeping changes to policies that impact women and girls, we be having a conversation about it, and engaging in rigorous, public debate. ...

Women have specific rights based on the history and reality of sex based oppression. We also have specific sex segregated spaces, based on the understanding that men pose a threat to women — not all men, but only men. Female firefighters had to fight in order to have access to their own locker rooms and facilities, because they were being subjected to sexual harassment and assault in the shared spaces. They only won this fight recently in Canada. Feminists built and funded transition houses for women escaping male violence. ... Now, we're being told this is "discriminatory." That having spaces for women, to protect them from male violence is "bigoted"...

If we wish to maintain women's rights and protect women's spaces, we cannot separate women from femaleness. It is irrational and dangerous. It makes women and girls vulnerable. Beyond that, there is absolutely no reason why we can't protect the rights of individuals to step outside gender roles, and to express themselves as they like, and also understand that sexual dimorphism is real, that males and females exist, and that those differences matter.

None of this is about transphobia. It is about women having the right to say no to men. To not be gaslighted and bullied for daring to consider their own safety, rights, and *feelings* first. To speak, to tell the truth, to name reality, and to maintain their sex-based rights.

Those who are speaking out about and asking questions about gender identity are not doing so to be cruel, and they are not doing so because they are hateful. They are doing so because they have real, genuine concerns that deserve to be taken seriously and addressed.

It is not ok that I am standing here with a police presence and body guards to state the obvious. It is not ok that people are afraid to speak, never mind to show up. And the only way to combat this is to speak more.

- f. If Committee members wish to read the comments in full context, the speech is available here:

[Gender Identity: What Does It Mean for Society, the Law, and Women — A talk by Meghan Murphy \(31 October 2019\)](#)

Example 2: Response to J K Rowling

- a. In June 2020, the Edinburgh-based author J K Rowling published a series of tweets on women's rights in the context of the debate on gender identity, shown below.



- b. Rowling also published a longer essay, available in full at '[J.K. Rowling Writes about Her Reasons for Speaking out on Sex and Gender Issues](#)'. The essay stated:
- "I believe the majority of trans-identified people not only pose zero threat to others, but are vulnerable for all the reasons I've outlined. Trans people need and deserve protection. Like women, they're most likely to be killed by sexual partners. Trans women who work in the sex industry, particularly trans women of colour, are at particular risk. Like every other domestic abuse and sexual assault survivor I know, I feel nothing but empathy and solidarity with trans women who've been abused by men. So I want trans women to be safe".
- c. The essay also argued that what she termed "natal girls and women" had specific needs and rights which were being overlooked, and expressed concern about the recent large rise in young people transitioning, especially girls and young women.
- d. These interventions prompted a severe critical reaction, online and in the media, and have been described as transphobic, "anti-trans" and hateful, as summarised in the article [here](#). The basis for these claims is Rowling's argument that physical sex is real and separate from how a person identifies, is relevant to women's lives, and therefore to law and policy-making, and that "woman" is an appropriate term to use for those with female biology.
- e. Rowling also received a large volume of direct threats and abuse, some of which was recorded by the philosopher Rebecca Reilly-Cooper in this blog: [J. K. Rowling and the trans activists: a story in screenshots](#). Many of these mention J K Rowling's sex, often in derogatory terms, but under the Bill none of these statements would be recordable as hateful on that basis.

Example 3: Allison Bailey and CrowdJustice

- a. In June, the barrister Allison Bailey launched a crowdfunder on CrowdJustice.com to take her chambers and Stonewall to an employment tribunal, alleging they had worked together to place her under investigation at work, because of her involvement in founding an LGB organisation which is critical of basing law and policy on declarations of gender identity rather than sex, and which argues for campaigning for the interests of same-sex attracted and bisexual people, separately than those of people with transgender identities. This organisation has been repeatedly described as hateful and transphobic, including by at least one MP: its organisers strongly reject this description.
- b. The description of her reasons for taking the case, as originally accepted in full by CrowdJustice and published on their site, is archived here: [Allison Bailey: I am suing Stonewall to stop them policing free speech](#).
- c. After the page had been live for under a day, it was taken down by CrowdJustice, in response to complaints. Ms Bailey's account of the events is available [here](#) and site's public statement is available here: [Statement from CrowdJustice](#)
- d. After some delay, CrowdJustice informed Ms Bailey it required changes to be made to the text which she was not prepared to accept. This appears to have been an unprecedented action by the site, which routinely hosts campaigns for cases on controversial topics, and appears never previously to have responded to complaints in this way.
- e. Ms Bailey has detailed some of statements highlighted by the site, as shown below. Those at paragraphs 36 and 47 illustrate particularly how statements of beliefs about the nature of sex and identity have come to be regarded as unacceptably offensive by some institutional gatekeepers.
- f. Factual observations which might be regarded as relevant to a debate about how to respond to declarations of identity (for example, as at paras 43) were also regarded as unacceptable.
- g. The statement at paragraph 49 – a general statement about the capacity of men not to be what they claim to be – was also seen as an offensive observation in this context, even though it was related to Ms Bailey's account of her abuse as a child by a trusted family acquaintance.

CrowdJustice statements on Allison Bailey crowdfunder

35. Overnight on Saturday, Crowdjustice had written to my solicitor. They had set out statements from my page which they felt were upsetting and offensive. They ranked the statements according to "Severity": High, Medium and Low. Here are some of the statements they ranked:

36. Low severity: **"notions of gender identity that are in conflict with, and doing harm to, the interests, safety and rights of women, children and LGB people"**. How else can we talk about lesbians being pressured into having sex with males and being unable to use dating sites as lesbians seeking other females, and not males, as sexual partners, for example? This is an acute concern for lesbians as lesbian dating sites are overrun with heterosexual males declaring themselves 'lesbian' in the full knowledge that lesbians are prevented from specifying that they do not seek males. It has left lesbians open to a not uncommon form of harassment and abuse but now officially sanctioned by the new trans activism. It's wholly abusive and predatory behaviour.

37. Medium severity: **"a reckoning about this moment in history when men tried to run off with women's rights."** How else can we talk about the loss of women's rights, given away upon the declaration of any male that they are now a woman?

38. High severity: **"I learnt that the new trans activism is focusing ... on young children and declaring them 'trans'; treating puberty as a disease to be blocked with powerful drugs; delivering .. young people into the arms ... of big pharmaceutical companies and plastic surgeons."**

39. How else can we talk about the 1,460% increase of girls receiving medical treatment at the Tavistock, which is blocking their puberty with powerful drugs and the reports from women who have endured such interference and regret it deeply?

40. High severity: **"I saw males ... quick to brandish knives, axes, baseball bats and nooses, as they threatened with rape women who questioned the wisdom of replacing sex with gender — TERFs."**

41. How else can we talk about the abuse we receive online? How else can we describe the things we see on terfisalutur.com? Men wielding trans coloured baseball bats, threatening rape, imploring women to choke on their 'girl-dicks'.

42. High severity: **"calling out the new trans activism as the men's rights movement it so clearly is."** How else can we describe a philosophy that prioritises men who identify as women above women who are women, which is so enthusiastically championed by males, and which leaves women with zero legal boundaries against any male?

43. High severity: **"some 40 per cent or more of trans identified males in the prison population are men with convictions for sex offences, including rape and possession of the most serious indecent images of children."**

44. How else can we talk about this? It is truly chilling to me that Crowdjustice (and the new trans activism) should seek to silence this outrageous reality: disproportionate numbers of male sex offenders are identifying as women. What happens when we put these males in with vulnerable female prisoners? What happens when these males are released from prison?

45. Low severity: **"These women have no way to escape, no choice, they are locked up. I do not see how this is anything other than state facilitated abuse and mental torture."**

46. How else can we talk about women prisoners in the women's prison estate incarcerated alongside transwomen with sexual offences convictions?

47. High severity: **"The new trans activism demands that a man's desire to identify as a woman is more important than the right of imprisoned women to safety and dignity."**

48. How else can we talk about women prisoners? How else can we talk about women?

49. Moderate severity: **"men are often not who they say they are or claim to be."** How else can we talk about safeguarding? How else can we tell the truth? This is not bigoted, it is a fact of safeguarding guidance and one of the grounds for single-sex provision.

50. High severity: **"It is a terrible indictment of the new trans activism, that one of the greatest threats to LGB people today, especially young lesbians, is Stonewall, and its spin-off ... organisations"** How else can we talk about Stonewall and why the LGB Alliance is so needed and why it has had to focus on the new trans activism?

51. Crowdjustice wanted me to give alternative wording to all of the above.

52. I was not prepared to edit out and censor my page in the way Crowdjustice demanded.

Annex 3. EUP case study: Timeline of events

The material below is provided as evidence in support of this case study, as it has not previously been placed on the record. It comes from responses provided to subject access requests. Where possible, we show original EUP and university communications as screenshots. In the context of the Bill, we draw to the Committee's attention that:

- Despite their seriousness, the accusations made against the article and ourselves, do not appear to have been subject to any systematic testing for reasonableness within EUP before they were taken beyond EUP, and no opportunity was offered to us to comment before this was done.
- EUP appears to have treated the allegation that two employees of the university might have written a piece which breached the university's internal Dignity and Respect policy⁷⁸ as enough by itself to justify contacting the university legal team about a piece which had been accepted for publication by an established journal.

9 May 2019

Our article, as accepted by the journal, is submitted to EUP by the Scottish Affairs editor for production and publication. The email from the editor flags up the scope for controversy particularly on social media and the desirability of some preparation for handling: *"There is one article... that deals with a highly controversial and sensitive topic – I wonder if EUP has any particular strategy on this?"*.

EUP respond to Scottish Affairs, and indicate that they will provide any feedback by 13 May.⁷⁹

Will go through the material in detail and get back to you with any queries and feedback on the social media question. Likely be tomorrow or, worst case, Monday morning.

28 May

Three internal emails are exchanged between EUP staff members.⁸⁰

Internal email 1.

██████ has passed me the Murray, Blackburn & Mackenzie article mooted for publication in Scottish Affairs. I want to express my concern about it. It both expresses anti-trans sentiment and also uses terms that are discriminatory and insulting towards trans women (for example, the use of the word 'women' as specifically excluding trans women).

As well my personal belief that it is morally wrong and socially irresponsible to provide a respected scholarly platform to such divisive and discriminatory opinions, publishing this article would actively harm the Press' reputation. We can expect this to blow up on social media and, when it does, it will damage our ability to continue commissioning in areas that we are actively developing, in particular in feminist and gender-studies fields across subject areas including politics, literary studies and philosophy (there aren't many people in Editorial this morning but I've had a chat to ██████ about it – I'm sure they'd be happy to give you their perspective on this).

We do have a precedent of refusing to publish books that have passed peer review because they have later (often at Press Committee, but sometimes as late as handover) been found to be Islamophobic, anti-Semitic or written by authors who have publicly expressed homophobic or sexist opinions. Transphobia is just as serious as any of these other forms of intolerance and I strongly feel that we should take the same principled approach, both as a business decision and an ethical stance.

⁷⁸ The policy is principally concerned with regulating behaviour within the university towards fellow students and staff. The article does not name or discuss any individual associated with the university other than the authors.

⁷⁹ Provided in response to subject access requests in December 2019. Monday here would have been 13 May.

⁸⁰ First seen by authors when copied to them by editor of Scottish Affairs (9 June) but also provided directly to them as part of subject access request (December 2019).

Internal email 2:⁸¹

[REDACTED] I'm
fairly sure the article contravenes the University's dignity and respect policy [REDACTED]
[REDACTED]

Internal email 3:⁸²

[REDACTED] journals are thinking
about publishing an anti-trans article [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

On the same day, EUP email the Scottish Affairs editor, raising concerns that the article might breach University policy, and that EUP might forward it to the University legal team:⁸³

The initial reaction here was that, as it is an academic paper and has been peer-reviewed and accepted for publication in an established journal, it should be ok.
The basic EUP position is that we defer to the editor (and are guided by their expertise in the field) as to the choice of material to publish in the journals but, as you suspected, the subject area has raised a few concerns. Specifically there appear to be worries that it might contravene the University's own diversity & inclusion policy. I suspect not as am sure you are very well aware of all the nuances yourself and it is not the University (as such) that is publishing it – although that fine distinction would no doubt be lost in the wilds of social media. For now [REDACTED] has asked another colleague to look over the article and, on [REDACTED] advice, might also run it past the University legal team.

29 May 2019

EUP informs the Scottish Affairs editor that they have contacted the University of Edinburgh legal team for advice, and share the statement shown in internal email 1 (28 May) that makes allegations of transphobia (the 'pasted comments').⁸⁴

I hope you are well. [REDACTED] forwarded to me [REDACTED] email below regarding the Murray et al article. A couple of members of our team have expressed concerns on the subject matter and I have pasted comments from one of them below. I am very conscious that you, as editor of the journal, have full editorial control over the content published in the journal, as per your contract, but in light of the concerns I asked the University legal team for their advice, in case the content of the article contravened their dignity and respect policy. Their response, also pasted below, comes down on the side of freedom of belief.

For purposes of due diligence, I would be very grateful if you could confirm that the article was formerly peer-reviewed? Could you please forward on the reviewers' comments?

EUP has since declined to disclose the terms on which it approached the university, although it appears that the communication included the statement alleging transphobia shown in internal email 1 (see further note on 1 August).

The University's legal team respond as follows:⁸⁵

⁸¹ Provided as response to subject access request December 2019/February 2020. The Dignity and Respect Policy is the key document at the University of Edinburgh regulating behaviour towards members of the university who are transgender.

⁸² Provided as response to subject access request December 2019/February 2020

⁸³ Provided as response to subject access request December 2019

⁸⁴ Provided as response to subject access request December 2019

Thanks for your email. This is a topical area and I'm not sure what help I can be to you here. Legal Services does not offer a screening or reviewing service for publications. Indeed I think it would be wrong of us to do so not least because 2 of the authors are UoE staff. This is really a matter for the editorial board as you say and then for EUP if it feels that regardless of the view of the editorial board EUP could be brought in to disrepute for publishing an article expressing controversial views.

What I would say is that our University has been approached several times regarding a position on transphobia and gender identity. It is a controversial area and the University, as you would expect, supports freedom of belief and – in line with the Dignity & Respect Policy and the Trans Equality Policy – expects all members of the University community to exercise responsibility in the expression of their beliefs. All staff and students should expect to be treated with dignity and respect in all that the University does and in all interactions between members of the University community.

3 June

Scottish Affairs asks EUP whether our names had been included in the communication with the University legal team.

EUP confirm that our manuscript, which was shared with the legal team, was not anonymised (email undated):⁸⁶

Many thanks for the update. The manuscript was not anonymized for the University legal team – it was in part that the authors were based at the University (along with yourself) that I thought they might want to comment.

7 June 2019

Internal email between EUP staff members:⁸⁷

the communication to the University legal team was entirely to ensure there was no breach of their dignity and respect policy, as two of the three authors are UoE staff members.

7 June 2019

The Scottish Affairs editor informs the authors about EUPs actions.

The editor writes to EUP confirming that after consulting the journal's board, including sharing the (anonymised) article with all members for comment, he confirms his decision to proceed with publication, with some minor textual changes agreed with the authors to explain in more detail the issues and choices round the use of language. Details of peer review process are provided. The editor expresses his concerns about EUP's handling and seeks clarification whether the comments in email 1 (28 May) represent the EUP's position.

We are copied into this correspondence, and made aware for the first time of the comments made about us within EUP. The correspondence also confirms that these were passed in full to Scottish Affairs, and that EUP made a non-anonymised approach to the university legal team about our work.

⁸⁵ First seen by authors when copied to them by editor of Scottish Affairs (9 June) but also provided directly to them as part of subject access request (December 2019).

⁸⁶ Provided as part of subject access request December 2019, date redacted.

⁸⁷ Provided as response to subject access request December 2019/February 2020

11 June 2019

In response, EUP confirm with Scottish Affairs states that the comments made in email 1 (28 May), as shared with the editor, university legal team and seen by us, was not an official EUP position.⁸⁸

Many thanks for your response regarding the peer review process and, to address the concerns in your letter, I would like to reassure you that the feedback provided from EUP was from a single member of staff (not an official position of the Press). The communication to the University legal team was entirely to ensure there was no breach of their dignity and respect policy, as two of the three authors are UoE staff members – and please accept my apologies that the author names were not anonymised. I am entirely satisfied with your account of the article review process and appreciate the rewording offered by the authors. To reiterate, we support your full editorial control in the content of the journal and your decision to publish, with apologies for any concerns caused.

31 July 2019

Scottish Affairs Vol 28(3) is published, with the article as its open access item. We are not aware that the substantial negative impacts predicted for the publisher by the member of EUP staff in the 28 May email have occurred.

1 August 2020

EUP responds to a question from the Chair of the EUP Board of Trustees about how widely the email alleging transphobia had been shared.⁸⁹ The response appears to show that those comments had been shared with the university legal team in May.

I've attached, for your reference, the email I sent to the University legal team. It includes the feedback (from [redacted] to me) copied to the colleagues [redacted] discussed it with. These are the people who saw the comment that included the allegation of transphobia, along with [redacted] who was copied in to my email to Michael. No names were redacted in the article circulated to colleagues at EUP.

8 August

The university-based authors (Hunter Blackburn and Murray) meet the chair of Trustees of the EUP to set out their concerns about the handling of their article and seeking to clarify what happened within EUP and between EUP and other bodies. There is further correspondence with the Chair seeking to establish the chain of events, but the content of the EUP's communication with the University legal team remains unavailable.

17 September 2019

The minutes of the Core Values Meeting of 17 September 2019 record that the article was deemed offensive by some within EUP⁹⁰.

[redacted] raised the issue of an article in *Scottish Affairs* which was offensive [redacted]

19 November 2019 – 17 February 2020

Subject access requests to EUP provide some additional information (as drawn on above) however EUP continues to withhold its communication with the University legal team. We inform EUP of our decision to appeal to the ICO.

⁸⁸ Provided as response to subject access request December 2019

⁸⁹ Provided as response to subject access request December 2019

⁹⁰ Provided as response to subject access request December 2019

17 February 2020

EUP provides a short extract from their communication with the University legal team, but withholds substance:

"Name withheld] has submitted the attached article for publication in the journal by 3 authors (2 of whom are also based at the University of Edinburgh)"

18 February 2020

We lodge an appeal with ICO seeking sight of the communication from EUP about us to the university lawyers.

21 February 2020

A statement is published in *Scottish Affairs* Vol 29(1), confirming Lisa Mackenzie as the third author of the paper.

We are grateful to have the opportunity to put it on the public record that our paper in Volume 28 (3) of *Scottish Affairs* (Murray & Hunter Blackburn, 2019) has a third author. Shortly before the journal proofs were submitted to EUP, Lisa Mackenzie removed her name from the paper to address a perceived conflict of interest on the part of her then employer. Whilst it is not possible to reinstate her authorship on the Version of Record, we are pleased to be able to acknowledge Lisa's substantial contribution to the paper here.

That this article attracted such substantial interest, with 8,123 downloads within three months of publication⁹¹, demonstrates the need for academic publishing in this area from multiple perspectives, to inform policy and law making. We are committed to open discussion of the evidence and arguments presented in the paper, and continue to stand ready to engage with any specific points submitted to us in the conventional way.

30 March 2020

The ICO confirms that legal privilege applies to communication from EUP to lawyers, and they cannot be compelled to release it.

2 June 2020

The two authors based at the University of Edinburgh write formally to EUP, reiterating the concerns about the EUP's treatment of their article, particularly: sharing outside EUP the note alleging transphobia against the authors as named individuals without any opportunity to object; the approach to the university raising a possible breach of university policy by the authors; and the withholding of the exact terms on which the EUP wrote about the authors to their university's legal team. Our letter seeks a formal apology, an update on what has been done to prevent a recurrence for other authors, and asks the EUP to consider a discretionary ex gratia payment to us to recognise the distress caused by its actions at the time, and the time spent since trying to understand properly how we have been discussed within EUP and between EUP and others, and specifically on what terms the EUP approached the university.

The letter has been acknowledged and at the time of writing we are waiting for a response.

⁹¹ We understand that this is around ten times the largest number of downloads for any previous article in the journal, as measured over a 12-month period.

Annex 4. Comparison of protected characteristic definitions

The following table compares the different characteristics as defined in the Bill, with definition under existing hate crime legislation and the Equality Act 2010. Characteristics included in the Equality Act with no equivalent in the Bill, are Sex, Pregnancy and Maternity, and Marriage and civil partnership.

Definitions of characteristics in the Bill, hate crime legislation and the Equality Act 2010

	Hate Crime and Public Order Bill	Existing hate crime legislation	Equality Act 2010 Part 2
Race	(i) ...a group of persons based on the group being defined by reference to race, colour, nationality (including citizenship), or ethnic or national origins,	<p>Crime and Disorder Act 1998 Section 96</p> <p>(6) ... a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.</p> <p>Public Order Act 1986 Section 17 (Stirring up racial hatred)</p> <p>a group of persons... defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.</p> <p>Criminal Law (Consolidation) (Scotland) Act 1995 s50A [racially aggravated harassment (1)(a); racially aggravated conduct (or behaviour) (1)(b).</p> <p>(6).. "racial group" means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.</p>	<p>Section 9</p> <p>Race includes—</p> <p>(a) colour;</p> <p>(b) nationality;</p> <p>(c) ethnic or national origins.</p>
Age	A reference to age includes a reference to an age falling within a range of ages.	Not applicable	<p>Section 5</p> <p>(1)(a) ... a person of a particular age group</p> <p>(2) .. a group of persons defined by reference to a particular age or to a range of ages.</p>
Disability	<p>(3) ... a physical or mental impairment of any kind.</p> <p>(4) For the purposes of subsection (3) (but without prejudice to its generality), a medical condition which has (or may have) a substantial or long-term effect, or is of a progressive nature, is to be regarded as amounting to an impairment.</p>	<p>Offences (Aggravation by Prejudice) (Scotland) Act 2009 Section 1 (7)</p> <p>... physical or mental impairment of any kind.</p> <p>(8) For the purpose of subsection (7) (but without prejudice to its generality), a medical condition which has (or may have) a substantial or long-term effect, or is of a progressive nature, is to be regarded as amounting to an impairment.</p>	<p>Section 6</p> <p>(1) A person (P) has a disability if—</p> <p>(a) P has a physical or mental impairment, and</p> <p>(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.</p>

Religion	(5) ... a group of persons defined by reference to— (a) religious belief or lack of religious belief, (b) membership of or adherence to a church or religious organisation, (c) support for the culture or traditions of a church or religious organisation (d) participation in activities associated with such a culture or such traditions.	Criminal Justice (Scotland) Act 2003 Section 74 (7) a group of persons defined by reference to their— (a) religious belief or lack of religious belief; (b) membership of or adherence to a church or religious organisation; (c) support for the culture and traditions of a church or religious organisation; or (d) participation in activities associated with such a culture or such traditions.	Section 10 (1) ... any religion and a reference to religion includes a reference to a lack of religion. (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
Sexual orientation	(6) ... a reference to sexual orientation towards— (a) persons of the same sex, (b) persons of a different sex, or (c) both persons of the same sex and persons of a different sex.	Offences (Aggravation by Prejudice) (Scotland) Act 2009, Section 2 (7) .. sexual orientation towards persons of the same sex or of the opposite sex or towards both.	Section 12 (1) a person's sexual orientation towards— (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex.
Transgender identity	(7) ... (a) a female-to-male transgender person, (b) a male-to-female transgender person, (c) a non-binary person, 10 (d) a person who cross-dresses.	Offences (Aggravation by Prejudice) (Scotland) Act 2009, Section 2 (8) (a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c. 7), changed gender, or (b) any other gender identity that is not standard male or female gender identity.	Section 7 (Gender reassignment) (1) ... if the person 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.
Variations in sex characteristics	(8) A person is a member of a group defined by reference to variations in sex characteristics if the person is born with physical and biological sex characteristics which, taken as a whole, are neither— (a) those typically associated with males, nor (b) those typically associated with females.	Offences (Aggravation by Prejudice) (Scotland) Act 2009, Section 2 (8) reference to transgender identity is reference to— (a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c. 7), changed gender, or (b) any other gender identity that is not standard male or female gender identity.	Not applicable