



MurrayBlackburnMackenzie submission to the Misogyny and Criminal Justice in Scotland Working Group

Introduction

During the passage of the Hate Crime and Public Order (Scotland) Act 2021, we wrote extensively on the proposed legislation and provided both written and oral evidence to the Scottish Parliament. Our work in this area, including our full submission to the Justice Committee, can be accessed here:

<https://murrayblackburnmackenzie.org/hate-crime-and-public-order-scotland-bill/>

We welcome the chance to submit these comments and the short extension granted to us on the deadline. We want to put on the record our disappointment that the request for external input to the Group's work was made just prior to the start of the Scottish school holidays, on a relatively tight timetable of five weeks, and with no prior notice enabling contributors to plan ahead. The Committee's request could only be met by producing new material to its specification. Taken together, we think this created unreasonable demands on those responding, particularly those with childcare responsibilities. We note such responsibilities are well known to fall disproportionately on women. This therefore fell short of good practice as an approach to gathering wider views on such a complex and important issue for women, regardless of the general timetable set for the Group. If this has not had a serious adverse impact on what the Group has been sent, that will only be because those responding, some of them doing so as volunteers, urgently re-prioritised other work and family commitments around this request. We hope the Group will recognise this.

Note that, given the points above, our substantive response to the Working Group only relates to questions five, six and seven, on whether a standalone offence on misogyny is required, if there should be a protected characteristic of sex under Parts 1 and 2 of the Hate Crime and Public Order (Scotland) Act.

5. Do you think there should be a stand-alone offence to cover misogynistic behaviour in public spaces including the street, around schools, on public transport, online etc.?

No. We are concerned about how easily a separate law based on ‘misogyny’, which does not resonate easily, could be communicated accurately in plain language. The Nottinghamshire Misogyny Hate Crime Evaluation Report also reported concerns that the term might be too academic and inaccessible to gain wider traction. Comments made by those participating in the evaluation included the following:

“It’s a hard term. I think it scares people.”

“I had to Google it, I didn’t know what it was and I have a degree.”

“It sounds like a term academics would use.”

“It’s really hard to remember, it’s a long word.”

“There must be a lot of people who struggle with the concept of it.”

“I don’t think there is an understanding of what it is.”

“It is not familiar enough [a term] for a thing that you want to be talking about as often as you want to be talking about it.”

“The actual word misogyny doesn’t really, if you haven’t come across it before, it doesn’t say it relates to women there’s no part of it whereas a layperson you would think that it refers to females or women...I asked my nieces and none of them knew what it meant.”

“I do wonder about the term misogyny though, because if people aren’t familiar with it and they look it up and it just says hatred of women or something they might not think... well that’s not right. There might be some sexism within their family but they might think ‘well that uncle doesn’t hate me’” ([2018: 28-29](#))

Whilst the Nottinghamshire Pilot has stated ‘The primary objective of the policy change was never to see hundreds of prosecutions, it was to let people know that this behaviour isn’t acceptable and will not be tolerated in Nottinghamshire’, we are not convinced that the concept of misogyny in itself, sends a clear message, and we think the limited number of cases reported and pursued under the pilot as ‘misogynistic’ supports that.

A stand-alone approach would differ from the way in which existing hate crime law is framed in that it is not an identity characteristic, but rather an example of a form of prejudice. Commenting on this difference, the Law Commission (England and Wales) consultation on hate crime stated: ‘Recognising specific prejudice rather than groups or characteristics would constitute a significant shift in legal approach and create inconsistency within hate crime laws’ ([2020: 276](#)).

It is not clear how a stand-alone approach is intended to distinguish between criminal and non-criminal behaviour. Even if 'misogyny' as a term did not have the problem of lack of familiarity identified in the Nottinghamshire pilot, we would have strong reservations about seeking to criminalise all behaviour which might be described as misogynistic.

It is also unclear how, under this model, the possibility of offending motivated by prejudice in private spaces would be recognised, as is done for other characteristics.

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, as discussed below.

The proposal as framed therefore also fails to address the substantial question of communications-related offences, again discussed below.

6. Do you think that the characteristic of 'sex' should be added to hate crime legislation in Scotland?

Yes.

Empirical evidence

Decades of research show that women suffer discrimination and disadvantage based on their sex. The extent of violent and sexualised abuse on social media platforms directed at women is widely documented, while sexual harassment is overwhelmingly experienced by women and girls ([Women and Equalities Committee, 2018](#)). Research by Baele et al. ([2019: 20](#)) has documented an extremist online 'incel' (involuntary celibate) community that 'is part of a broader misogynistic movement that already regularly defends crimes on women', and highlights the 'role of the Internet in enabling the formation and radicalization of this community through echo-chamber dynamics' (Ibid.). There is also increasing evidence of a link between terrorism and domestic abuse perpetrated against women ([2019: Smith, Joan](#) 'Home Grown: How Domestic Violence Turns Men Into Terrorists'). The 2019/2020 Scottish Crime and Justice Survey (SCJS) reported that 16.2% of women in Scotland have experienced at least one of incident involving indecent exposure, sexual threats, and/or sexual touching since the age of sixteen, compared to 3.6% of men ([2020: Table 7.01a](#)).

We note that of the six specialist local providers of services to women suffering abuse who met the Scottish Government or responded to consultation on the Bill, five favoured introducing an aggravator which would cover hatred against women, with or without developing a standalone offence separately (see: [Legislating for hatred against women: the view from the coalface](#) 2020).

Public understanding and education

The omission of sex in the Hate Crime and Public Order (Scotland) Act, the deferment of decision-making in this area, and its delegation to the Working Group, has already sent a strong signal that hatred towards women is less important than

hate directed at the other protected groups covered by the Act. This message is strengthened by the annual Scottish Government 'Dear Haters' campaign and local anti-hate initiatives, which refer only to the hate crime characteristics protected in law. That the debate about whether to include women in hate crime laws dates back over a decade and a half exacerbates this message further.

Rectifying this situation and sending a clear signal that hate directed at women matters may also help to improve under-reporting to the police, particularly in relation to crimes that are disproportionately experienced by women, for which reporting levels are low.

Data recording

The ongoing exclusion of sex means that Scotland continues to have no statistics on offences motivated by prejudice based on sex on its own or intersecting with other characteristics. The addition of sex as a hate protected characteristic will allow for data collection to assess the scale and nature of this problem, and to develop policies accordingly.

Tracking cumulative effects

We have concerns about the governance of the recording and retention of non-crime hate incidents at present. However, we recognise that there is a place for tracking the cumulative effects of seemingly low-level incidents, and identifying repeat targeting, which is cited as the rationale for retaining data on non-crime hate incidents. Police Scotland explain:

'While it is accepted that not every hate report will amount to criminality, officers are required to take preventative and protective measures even when a non-criminal offence is apparent. Seemingly low level or minor events may in fact have a significant impact on the victim... Repeated targeting of a person, whether by the same perpetrator or not, can lead to what is known as the 'drip drip' effect i.e. although seemingly minor incidents, the repeated nature could affect the person's ability to cope.' ([2018: para. 4.2](#))

Incidents against women motivated by prejudice against sex are currently excluded from this system.

Differences in the threshold for investigation

We are concerned that the likelihood of investigation of possible offences may be affected by whether an aggravator based on prejudice is raised in the initial report to the police. While Scottish Crime Recording Standard (SCRS) principles set out a 'record to investigate' approach,¹ it is unclear whether *in practice*, the likelihood of investigation is greater when a hate aggravator is cited.

¹ SCRS state 'All reports of incidents, whether crime related or not, will result in the creation of an incident report which is auditable; Following initial registration, an incident will be recorded as a crime

We note for example, the very strong emphasis placed on the perception of the complainer when an aggravator is raised. Specifically, Police Scotland state that for the purposes of recording, ‘the perception of the victim or any other person is the defining factor in determining whether an incident is a hate incident or in recognising the malice element of a crime’, and that evidence of malice and ill-will is not required.

‘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: para. 5.5.1](#))

Nothing equivalent appears to exist for women.

We want to highlight that this discrepancy may be leaving women less well able to interest the police when they are singled out as the target of offending behaviour because of their sex, compared to those with protected characteristics. This includes abusive, threatening, or obscene communications, for example under s127 of the Communications Act 2003. The Group will be aware that such communications have become a serious problem for women, with adverse impacts both on their private lives and their participation in public life.

Table 1 summarises what appear to be differences in how Police Scotland approach s127 of the Communications Act, depending on whether a hate aggravator is invoked. These observations are based on our first-hand experience of attempting to report what we believed to be clearly threatening and obscene electronic communications to Police Scotland, directed at a third party rather than ourselves. We are seeking to establish if our experience reflects policy, but have been unable to do that within the deadline set by the Group. We believe the Group should investigate this point as a critical issue: we think it may be a substantial reason for including an aggravator.

in all cases if: the circumstances amount to a crime defined by Scots Law or an offence under statute; and there is no credible evidence to the contrary; Once recorded, a crime will remain recorded unless there is credible evidence to disprove that a crime had occurred’. ([2020: 7](#))

Table 1. How the investigation of possible offences under s127 of the Communications Act 2003 varies: aggravator vs non-aggravator

	Initial report to Police Scotland	
	Aggravator raised	Aggravator not raised
Alleged victim must raise or confirm report.	No	Yes ¹
Incident must be reported to the relevant provider (e.g., Twitter) before police will consider	No	Yes
Incident must be investigated	Yes	No
If no evidence of criminality is found, incident will be recorded as a non-crime hate incident	Yes	No

¹: The SCRS allows for third-party reporting, as such it is unclear where this discrepancy arises: ‘In circumstances where a third party reports a crime to police and the victim refuses to engage with police to provide sufficient details to confirm the crime, no crime should be recorded, notwithstanding the need to record the details in an incident record. However, if sufficient details are reported by an apparently reliable witness who is of the opinion that a crime has been committed, a crime will be recorded e.g. a reliable witness reports one person being assaulted by two others on a public street.’ ([2020: 44](#)).

Differences in sentencing practices

If an offender is found guilty, the court must take the aggravation into account when determining the sentence ([Scottish Government, 2021](#)). The Scottish Government cited a lack of consistency in sentencing as part of its rationale for reforming hate crime legislation ([2020: para.4](#)). The continued omission of sex as a protected characteristic means that this inconsistency remains in relation to criminal charges where hate was directed at a female complainant, with offenders held to different standards for the purposes of sentencing.

Rebuttals to the exclusion of sex

Lastly, we are not convinced by arguments put forward by some women’s groups as to why sex should not be included as a protected characteristic. These arguments, and our response are discussed below.

Argument against inclusion: Including sex is difficult because of the scale of domestic abuse and of sexual abuse more generally. It is undesirable to identify some such cases as being more motivated by hatred based on sex than others.

We recognise that these are substantial points but are concerned that this argument implies that women may not suffer from or need protection from hate-based crimes that do not fall into either of these categories. One option would be to disapply a sex-aggravator for certain categories of offence. For example, the Nottinghamshire Pilot did not include domestic abuse within its category of misogyny ([2019: 14](#)).

Argument against inclusion: A sex aggravator would be used by perpetrators of domestic violence against women.

This appears to suggest that domestic abusers will only accuse women of, for example, a general offence of assault because of the existence of the sex aggravator. We are not aware of any compelling evidence to support this argument.

If there is a concern about women being subject to non-crime incident reports, this is an argument for robust screening of hate crime allegations, with procedures in place for weeding vexatious or unfounded complaints. It is not an argument for the omission of sex as a protected characteristic.

If evidence not shared during the passage of the Hate Crime and Public Order (Scotland) Act is available to the Group which means these concerns remain, the option remains of excluding offences under Domestic Abuse (Scotland) Act 2018 from the aggravator, as above.

Argument against inclusion: A symmetrical or 'gender neutral' approach to incidents of violence against women is likely to harm women.

This argument can be applied to other protected characteristics in hate crime legislation and seems unconvincing. For example, the Hate Crime and Public Order (Scotland) Act protects those who are White, under racial hatred, and people who are heterosexual, under 'sexual orientation'. The provision for 'Sex' in the Equality Act 2010 protects both men and women. The flagship Domestic Abuse (Scotland) Act 2018 is also gender neutral and protects both men and women.

Argument against inclusion: In giving evidence to the Scottish Parliament, Marsha Scott (Scottish Women's Aid) stated: "If we introduce sex as an aggravation and do nothing else, there is a strong possibility that a lot of folk will tick the box and will say that they have added gender to the aggravation and so do not have to worry about women or the fact that it is theoretically impossible to put the aggravation in place in the context of their deeply safe policy" ([Scott, 2020 col. 4](#)).

Legislating to protect women under hate crime laws is not a panacea. We are not at all convinced that legislating in this area will detract from other policy initiatives or other non-legislative interventions, for example, in relation to health, employment or education.

7. Do you think that there should be an offence of stirring up of sexual hatred added to hate crime legislation in Scotland?

During the passage of the Hate Crime and Public Order (Scotland) Act 2021 we expressed serious concerns about the framing of Part 2 of the Act and its implications for freedom of expression, where it extended beyond the previously existing law.

Adding sex as a characteristic would deal with the current imbalance in the law between groups for 'stirring up'. However, using the existing power simply to add 'sex' to Part 2 raises similar concerns to those we raised about the lack of sufficient clarity in the Act regarding the protection of freedom of expression for the characteristics already added. We think the question for the Group is what evidence before it suggests the need for new legislation specifically dealing with incitement to commit acts of violence, abuse, or discrimination towards women based on their sex, and how best to frame any new legislation there.

In our view, however, in relation to the Hate Crime and Public Order (Scotland) Act, the priority is to make sure the law recognises that women can be vulnerable to offending behaviour motivated by prejudice in the same way as the other groups protected under Part 1 of the Act, which consolidates well-established legislation.