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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Hate Crime and Public Order (Scotland) Bill: Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- (c) general questions relating to powers to make subordinate legislation;
- (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;
- (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;
- (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meeting on 25 August 2020, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Hate Crime and Public Order (Scotland) Bill ("the Bill") at Stage 1.
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of the Standing Orders.
3. The Scottish Government has provided the Parliament with a Delegated Powers Memorandum ("DPM") on the delegated powers provisions in the Bill.

Overview of the Bill

4. This Scottish Government Bill was introduced by the Cabinet Secretary for Justice, Humza Yousaf MSP, on 23 April 2020. The lead committee is the Justice Committee.
5. The Bill implements recommendations made by Lord Bracadale in his 2018 review to modernise, consolidate and extend hate crime legislation in Scotland.
6. Part 1 makes provision relating to the aggravation of existing statutory offences by prejudice and Part 2 creates offences relating to the stirring up of hatred against particular groups. The Bill also abolishes the common law offence of blasphemy.

Delegated Powers

7. The Committee received two submissions from stakeholders to inform its consideration of this Bill. These have been included in Annex A for the lead committee's attention in its consideration of these powers from a policy perspective.
8. The Committee considered each of the delegated powers in the Bill and whether they are framed appropriately (for example, the power being conferred is not too broad) and that the Parliament is afforded sufficient scrutiny of the exercise of this power.
9. The first power in Section 15 of the Bill provides that the Scottish Ministers may, by regulations, add the characteristic of sex to the list of characteristics to which the Bill applies. The DPM explains that the Scottish Government is establishing a working group to consider whether a standalone offence for misogynistic harassment should be created outwith hate crime legislation or whether this should be encompassed within this Bill. The DPM also notes that, while the term "gender" was used in these discussions, the term "sex" has been used in this Bill in order to remain consistent with the Equality Act 2010. The power in Section 15 will therefore allow the characteristic of "sex" to be added after consideration of this issue by the working group, if this is determined to be preferable to a standalone offence.
10. The Committee is content with this power in principle and that it is subject to the affirmative procedure, giving the Parliament a high level of scrutiny.
11. The Committee also considered the delegated powers in the following provisions and determined that it did not need to draw them to the attention of the Parliament:
 - Section 17 – Ancillary provision
 - Section 20 – Commencement
12. The Committee therefore reports that it is content with the delegated powers provisions contained in the Bill.

Annex A: Submissions received

Submission from For Women Scotland received 23 August 2020

Dear Mr Bowman and Committee Members,

Ahead of the meeting of the Committee on 25th August we would like to raise a concern regarding the delegated power to add the characteristic of sex to the Hate Crime and Public Order (Scotland) Bill.

While we argued in our submission to the Justice Committee's Call for Views that sex should be added to Part I of the Bill, this was on the basis that the Policy Memorandum stated that "Although Lord Bracadale used the term 'gender', the term 'sex' is being used within the Hate Crime Bill, in order to remain consistent with the Equality Act 2010".

However, we note that Section 15 of the Delegated Powers Memorandum allows for the affirmative procedure to add sex at a later date, and also covers the proposal for an "interpretative provision relating to the characteristic of sex".

In light of the significant public concern regarding the change in the definition of 'woman' in the Gender Representation on Public Boards (Scotland) Act 2018 from that given in the Equality Act 2010, on which Aidan O'Neill QC has proffered the opinion that the Scottish Government has exceeded its competence, we would be extremely alarmed if any change in the definition of 'sex' was decided upon without full public or Parliamentary scrutiny, or any opportunity to amend.

In order to guard against this we would suggest that any secondary legislation for the Hate Crime Bill should be limited to using the definition of sex in the Equality Act.

Kind regards,

Trina Budge

For Women Scotland

Submission from MurrayBlackburnMackenzie received 24 August 2020

Delegated Powers and Law Reform Committee: Hate Crime and Public Order (Scotland) Bill

Submission by MurrayBlackburnMackenzie

Introduction

1. We welcome the opportunity to submit evidence to the Committee and apologise for not having identified the need to do so sooner.
2. The annex provides a note about who we are and how we are funded.
3. Our comments relate to the regulation-making power in section 15, relating to the characteristic of "sex".

Including "sex" as a protected characteristic by secondary legislation

4. In our submission to the Justice Committee on the Billⁱ we express concern that the Bill as introduced deepens the existing hierarchy in hate crime legislation between those characteristics that enjoy legal protections, and those that do not. We argue that 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.

5. The Scottish Government proposes remitting this issue to a working group and that 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. 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.

6. We suggest one alternative here would be to add sex as a further specific aggravator category in the current Bill, rather than to delay. Another would be to adopt the more open-ended forms of legislation found in some other jurisdictions, which do not limit protection to a defined list of characteristics.

7. We note that the Faculty of Advocates has arguedⁱⁱ that the decision on the inclusion of sex is so significant that it should be taken by the Parliament as part of the main Bill process and not remitted to a working group, with any further action by secondary legislation. We agree with this position. The inclusion of the amending power in the Bill leaves the way open too easily for a decision being deferred for a long period, during which current messages about sex being seen as a less serious basis for hate would be strengthened. There would be no requirement for further parliamentary scrutiny, if a decision was taken to do nothing, or a decision never taken at all.

8. We note that some women’s groups are concerned that including sex is a difficulty because of the scale of domestic abuse and of sexual abuse more generally. Those groups have argued 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.

9. We have suggested to the Justice Committee that the Parliament should consider whether any special provision needs to be made so that, for example, where the existing separate domestic abuse aggravator is held to apply, a sex-based hate crime aggravator cannot also be applied, and possibly that certain types of offence should not be open to the application of a sex-based hate crime aggravator. We do not believe these options have yet been considered. While we understand that on further investigation they may not be deemed acceptable ways to facilitate the inclusion of sex as a characteristic, **we are concerned that the simple included/excluded approach to which the regulation-making power is limited precludes the Parliament from considering these options at**

ⁱ The full submission is available at <https://murrayblackburnmackenzie.org/2020/08/01/mbm-submission-on-the-hate-crime-and-public-order-scotland-bill/>

ⁱⁱ **In its evidence on the Bill (paras 99-100), available at <http://www.advocates.org.uk/news-and-responses/news/2020/aug/faculty-publishes-response-to-the-hate-crime-and-public-order-scotland-bill>**

all, as a way of making it possible to include sex as a protected characteristic, in at least some circumstances.

Defining “sex” in secondary legislation

10. We note that section 15(2) appears to enable the Scottish Government to put forward a bespoke definition of “sex” for this purpose. We think maintaining a consistent definition in law of “sex” as a characteristic is valuable, and specifically that it would be inappropriate to use ministerial regulation-making powers to depart from the well-established Equality Act definition of “sex”. We see no persuasive argument for that being necessary in this context. **If the regulation-making power is retained, it should be restricted to using the definition of “sex” in the Equality Act 2010.**

11. Relevant to this point, Committee members may wish to be aware that a special definition of “woman” agreed uniquely for use in the Gender Representation on Public Boards (Scotland) Act 2018, during Stage 2 of the relevant Bill, is facing a possible judicial reviewⁱⁱⁱ.

Annex

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.

iii Further background here: <https://forwomen.scot/31/07/2020/news-release-pre-action-letter/> Based on a legal opinion from Aidan O’Neill QC, the provision is argued to be outside devolved competence based on incompatibility with the Equality Act. We understand that the Scottish Government responded to the pre-action correspondence on 19 August rejecting this position and that the complainants are now moving to seek leave to appeal. <https://twitter.com/ForwomenScot/status/129712733297745925?s=20>

