

Scottish Human Rights Commission Briefing: Response to Scottish Government proposals to add 'sex' as a protected characteristic to the Hate Crime and Public Order (Scotland) Act 2021

Introduction

1. The Scottish Human Rights Commission ("SHRC") is a public body created by the Scottish Commission for Human Rights Act 2006.
2. We are an independent, expert body that works with and for the people of Scotland; we monitor, listen, speak up for all of our rights and respond when things go wrong.
3. The SHRC is also part of the international human rights system. It is accredited by the United Nations as its trusted organisation to provide impartial evidence on the enjoyment of human rights in Scotland.
4. The SHRC is independent of Government. We are accountable to the people of Scotland via the Scottish Parliament.

Summary

5. Violence against women and girls is recognised by human rights bodies as a pervasive violation of rights and leads to unequal enjoyment of many interconnected human rights standards and principles. The SHRC is supportive of proposals to take legislative steps to address misogyny and misogynistic hate crime in Scotland. Taking such steps is required by the Scottish Government's international human rights obligations.
6. However, in relation to these specific proposals the SHRC recommends careful consideration of two key points:

- a. The risks of insufficient Parliamentary scrutiny posed by proposals to make potentially significant changes to policy and practice with respect to hate crime and misogyny using secondary legislation;
- b. Whether a 'gender-neutral' approach to hate crime, in which the law applies in the same way to men and women, can adequately consider the nature of misogyny as a specific form of discrimination. This is required as part of Scotland's obligations under international human rights framework to take a gendered approach to policy and practice and to address the specific issue of violence against women and girls.

Human Rights law with respect to violence against women and girls (VAWG)

7. The rights of women as a group are specifically protected under two human rights treaties: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Council of Europe Convention on preventing and combating violence against women and domestic violence, known as "The Istanbul Convention". The UK is a party to both of these treaties. The Scottish Government is required to comply with the international obligations under these treaties by the Scotland Act 1998.
8. There is no equivalent treaty for the rights of men and boys.
9. Violence against women and girls is a pervasive and deeply rooted human rights violation. The Istanbul Convention defines such violence as "violence that is directed against a woman because she is a woman or that affects women disproportionately". Violence against women and girls reinforces women and girls' lesser access to power, security and socio-economic opportunities, leading to multifaceted threats to rights.
10. Violence against women and girls - which includes harassment and other forms of hate crime - engages a number of human rights principles:

11. While human rights law is primarily focused on the actions of State bodies towards individuals, this includes the measures that States put in place to prevent, prosecute and punish acts of harm perpetrated by private people towards other people.¹
12. Gender-based violence undermines core human rights principles such as human dignity and equality.²
13. The right to equality and non-discrimination - both a cross-cutting principle of human rights law and a specific provision in human rights treaties - requires the State to pay particular attention to certain groups of people and respond to the reasons their rights might be more at risk compared with other groups.³
14. The violence itself could cause harm that is incompatible with the right to be free from torture or inhuman or degrading treatment or punishment, or even the right to life. If public bodies knew or ought to have known about the risks and did not take appropriate steps to prevent it this may lead to a violation.⁴
15. The real or perceived threat of violence can lead women and girls to change their lifestyles or patterns, undermining their enjoyment of other rights such as to work, education or healthcare or to assemble or express their views.⁵
16. The specific provisions in the Istanbul Convention relevant to these proposed measures include:
 - Article 5 – State obligations and due diligence: "Parties shall take the necessary legislative and other measures to exercise due diligence to

¹ [Osman v United Kingdom \(87/1997/871/1083\)](#)

² [Committee on the Elimination of Discrimination Against Women General recommendation No. 19: Violence against women](#)

³ [Opuz v Turkey \(Application no. 33401/02\)](#) paragraph 200

⁴ [Opuz v Turkey \(Application no. 33401/02\)](#)

⁵ Women's Aid England have published a webpage on the impacts of domestic abuse which includes a long list of impacts for women, children and society: [The impact of domestic abuse - Women's Aid](#) (webpage)

prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors."

- Article 6 – Gender-sensitive policies: "Parties shall undertake to include a gender perspective in the implementation and evaluation of the impact of the provisions of this Convention and to promote and effectively implement policies of equality between women and men and the empowerment of women."
- Article 11 – Data collection and research: "Parties shall undertake to... collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence covered by the scope of this Convention;"
- Article 14 – Education "Parties shall take, where appropriate, the necessary steps to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education."
- Article 16 – Preventive intervention and treatment programmes " Parties shall take the necessary legislative or other measures to set up or support programmes aimed at teaching perpetrators of domestic violence to adopt non-violent behaviour in interpersonal relationships with a view to preventing further violence and changing violent behavioural patterns."

17. In light of these international human rights obligations, the Scottish Human Rights Commission supports the Scottish Government taking steps to address violence against women and girls, following its decision not to bring forward its previous proposals to legislate through a Misogyny Bill. The SHRC recognises that the measures now proposed have the intention of addressing some of the issues which would have been covered by that legislation, and as such are intended to meet the State's obligations under the Istanbul Convention and the ECHR to take appropriate steps to prevent violence, and to promote the right to equality and non-discrimination.

18. However, while this intention is, in principle, in line with human rights obligations, those obligations are also clear that States should take specific action to consider the reasons why the rights of particular groups may be more at risk compared

with others. Article 6 of the Istanbul Convention, alongside General Comments 19⁶ and 35⁷ made by the Convention for the Elimination of Discrimination and Violence Against Women (CEDAW) Committee, reflect the importance of a specifically gendered approach to policies, legislation and practice. This means consideration of the specific reasons why women and girls may suffer harassment, violence or discrimination, and taking measures to address this. These proposals by the Scottish Government do not do this. Instead, the proposals take a 'gender-neutral' approach to hate crime, meaning the law applies in the same way to men and women. These proposals therefore do not fully consider the nature of misogyny as a specific form of discrimination.

19. While such gender-neutral approaches are not prohibited by international human rights standards, they are also unlikely to meet the requirements on States to consider the specific need to prevent, at an individual and a systemic level, violence against women because they are women.
20. The SHRC notes that this concern was also raised by the Kennedy Review, which recommended that for this, among other reasons, adding the characteristic of 'sex' to the Hate Crime and Public Order Act is not the appropriate vehicle by which to address misogyny.

Proposals to address sex-based hate crime through secondary legislation

21. These proposals would represent a significant change to the way Scots law deals with sex-based violence and harassment against women and girls. It is clear from the Scottish government's proposed approach that the intention of this SSI is to

⁶ [CEDAW General Recommendation No. 19: Violence against women | Refworld](#)

⁷ [General recommendation No. 35 \(2017\) on gender-based violence against women, updating general recommendation No. 19 \(1992\) | OHCHR](#)

go some way towards achieving the intended outcomes of the previously proposed Misogyny Bill.

22. In light of that, the SHRC is concerned that secondary legislation is not the appropriate context in which to make such a potentially impactful change to the law, and that making such changes in this way risks undermining the voice of Parliament. The SHRC recommends that the Scottish Government considers carefully how to ensure sufficient time and awareness available for adequate Parliamentary scrutiny. This is paramount to provide assurance that the potentially significant societal and implementation implications of this measure have been adequately considered.
23. In general, the SHRC's view is that any change to the law which materially affects the way in which human rights are upheld in Scotland merits full Parliamentary scrutiny through the primary legislative process.
24. The need for thorough scrutiny of this proposal is highlighted by concerns raised about the potential unintended consequences of similar proposals in the English and Welsh context. The Law Commission's December 2021⁸ review of hate crime legislation in England and Wales consulted on proposals to add sex or gender to hate crime laws. This review highlighted significant concerns regarding the difficulty of proving a misogynistic motive for certain crimes; and raised concerns about the risk of creating a perceived 'hierarchy' of sexual or domestic violence, with offences where a misogynistic motive can be proven being considered more serious than those where it cannot.
25. The risk of unintended consequences from legislation of this significance underscores the need for sufficient scrutiny of these measure to ensure they are

⁸ [Hate-crime-report-accessible.pdf](#)

not, as the Law Commission concluded in its review, 'the wrong solution to a very real problem'.

26. Related to this point, the Scottish Government should also consider whether the proposed approach is compliant with the PANEL principles. This is a framework for a human-rights based approach. Part of this is Participation in policymaking, which the SHRC considers in this case would mean ensuring measures taken to prevent misogynistic hate crime are developed alongside, and informed by, the lived experience of those affected by this. This should include children pursuant to Article 12 of the UNCRC.

Freedom of expression

27. Freedom of expression, protected by Article 10 ECHR, extends to ideas that may shock, disturb or offend the deeply held beliefs of others. Freedom of expression is not absolute and may be limited in certain circumstances in line with Article 10 ECHR. For children, freedom of expression is also protected by Article 13 of the UNCRC.

28. Restrictions on expression must be:

- In accordance with the law
- Pursuant to a legitimate aim
- Necessary and proportionate to the legitimate aim pursued.

29. The SHRC considers that the prevention of violence against women, including sex-based harassment that restricts women's access to and use of public space, would likely be considered a legitimate aim under Article 10.

30. However, the SHRC also notes the potential risks of undue limitation of freedom of expression in the implementation of hate crime legislation. If the proposal to extend hate crime offences to the characteristic of sex is taken forward, the SHRC agrees with the proposal to extend the requirement for a court to have particular regard to the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) when considering whether a behaviour or communication was reasonable.

31. Additionally, it would be important to ensure clear operational guidance to law enforcement on the interaction between Article 10 and hate crime. While the police already enforce existing law on hate crime, it is noted that there is a clear body of evidence, including the Kennedy Report cited in the policy notes for this proposal, setting out that misogyny is extremely prevalent in society. Further to this, women are not a minority. This means that the extension of hate crime offences to cover sex would be likely to lead to a significant increase in the volume of reported hate crime offences, which in turn creates a clear need for a consistent, proportionate approach from law enforcement, as well as a consideration of appropriate resources to ensure equitable treatment between this type of hate crime and those relating to other characteristics.

Interpretive provision on the characteristic of sex

32. The SHRC recognises that the interpretative provision is designed to align with the Equality Act 2010, per the judgment of the Supreme Court in April 2025 with respect to the definition of the protected characteristic of 'sex' in the Act. It is noted that the application of the statutory aggravation to the perpetrator's perception of the victim's identity, as well as the separate provision of protection under hate crime law for people with transgender identity, ensures that there is unlikely to be a gap in protection for any particular groups or individuals with two or more characteristics.

33. However, the SHRC notes that on this particular matter, there is likely to be a need to put appropriate guidance in place for law enforcement and for the police on how this definition would affect the enforcement of the law in practice. This will be particularly important to protect the dignity and privacy of victims of hate crime on the basis of sex and/or transgender identity.

Data collection

34. Article 11 of the Istanbul Convention requires that States "collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence

covered by the scope of [the] Convention." This means that there is a requirement to collect data specifically on violence against women and girls.

35. The SHRC therefore considers if the proposed measures are brought forward, the collection of data broken down by the sex of the victim, as well as whether the hate crime was committed on the basis of sex as a characteristic, will be necessary as a minimum to ensure compliance with Scotland's international human rights obligations to take steps to promote equality for women and girls and to prevent gender-based violence.
36. The SHRC is supportive of steps to improve data collection and quality on this matter. This aligns with the report we submitted to inform the most recent monitoring of compliance with the Istanbul Convention.
37. Scottish Government should also consider how to ensure sufficient data on other relevant protected characteristics of the victim is collected, including transgender status, disability and ethnicity. This will be necessary to ensure the State has appropriate data regarding gender-based violence, including instances where an individual is a victim of a hate crime based on the perception that they are a woman, but whose sex may be legally recorded as male. It will also enable analysis of the intersectional impacts of sex-based hate crime. This will be important to enable the State to meet its non-discrimination obligations under Article 14 of the ECHR.

UN Convention on the Rights of the Child (UNCRC)

38. In principle, this proposed measure would support the requirements under Article 19 of the UNCRC to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence.
39. The UNCRC also contains various other provisions relevant to violence against children. Therefore, such a measure could, in principle, also positively impact on other rights, such as:
 - A child's right to life, survival and development (Article 6 UNCRC)

- The child's right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment (Article 37 UNCRC)
- The obligation on the state to ensure the child has such protection as is necessary for their wellbeing (Article 3 UNCRC).
- The obligation on the state to ensure that the child is protected against all forms of discrimination (Article 2 UNCRC)

40. However, paragraph 72b of the Committee on the Rights of the Child's General Comment No. 13 (2011) on the right of the child to freedom from all forms of violence reflects with respect to "the gendered dimensions of violence against children" [that] "States parties should ensure that policies and measures take into account the different risks facing girls and boys in respect of various forms of violence in various settings". Scottish Government should carefully consider whether its proposals meet these obligations.