

Cabinet Secretary for Justice

HATE CRIME CONSULTATION: GENDER

Purpose

1. To set out analysis of consultation responses and provide initial policy advice on options.

Priority

2. Routine. You are due to meet Ms Campbell and Ms McKelvie on 1 May to discuss this further.

Background

3. As part of his review, Lord Bracadale considered whether offending relating to hostility (or malice and ill-will) based on gender should be covered by new hate crime legislation. He considered both the creation of a gender aggravation (which would apply as an aggravation to existing offences) and the creation of a standalone offence relating to misogynistic harassment. He concluded:

“I think the clearest and most effective way to mark out hate crime is a scheme involving baseline offences and statutory aggravations which reflect identity hostility. That is the underlying philosophy which I have applied throughout the scheme which I am recommending. I would depart from that approach if I felt that it was necessary in order to achieve effective recognition of gender-based hate crime. However, based on the evidence and arguments which I have heard, I do not think there is any real gap in relation to patterns of conduct against women which ought to be criminal but are not. Any new standalone offence would therefore have a considerable cross-over with other existing offences, which risks causing confusion and undermining the aim of collecting reliable data.”

4. Lord Bracadale stated that “there are patterns of offending which relate particularly to the victim’s gender and should be addressed through [hate crime] legislation”. Although this option focuses on gender based hostility, Lord Bracadale stated “that the practical impact of gender-based offending falls almost exclusively on women.”

5. Lord Bracadale recommended that:

“There should be a new statutory aggravation based on gender hostility.

Where an offence is committed, and it is proved that the offence was motivated by hostility based on gender, or the offender demonstrates hostility towards the victim based on gender during, or immediately before or after, the commission of the offence, it would be recorded as aggravated by gender hostility.”

6. However, some stakeholders (particularly Engender, Rape Crisis Scotland, Scottish Women’s Aid and Zero Tolerance) have expressed disappointment by the recommendation made by Lord Bracadale. They have called for the development of a standalone offence for misogyny to tackle the unique features of violence and

harassment against women. Their concerns are that creating a gender aggravation will lead to confusion and a failure to deal effectively with gendered violence. They are not convinced that the hate crime framework provides an appropriate model for dealing with gendered violence.

Consultation

7. On 14 November 2018 we launched a 14 week public consultation where we presented a number of options for how we might tackle gender based prejudice and misogyny. These included:

- Option A - develop a statutory aggravation for gender hostility
- Option B - develop a standalone offence for misogynistic harassment
- Option C - build on Equally Safe to tackle misogyny
- Option D - All of the above

8. The consultation closed on Sunday 24 February 2019 and received 1,173 responses. A full analysis is currently being undertaken. Meantime, we have received an interim analysis report which details responses to the above options

9. It is worth noting that respondents did not necessarily see the four options presented in the consultation paper as mutually exclusive. A number of organisations and individuals opted for both the development of both a statutory aggravation relating to gender hostility (Option A) and a standalone offence for misogynistic harassment (Option B). It was also relatively common for respondents (both organisations and individuals) to indicate support either for Option A or Option B, and for Option C (building on Equally Safe – the non-legislative approach). Further analysis is presented under each of the four options below. See **Annex A** for further details and responses to each option.

Discussion

10. While the consultation shows that there are mixed views on what approach should be taken, there is clear support for a gender aggravation with 60% of organisations in favour. The reasons provided in favour of an aggravation included the need for the justice system to better tackle misogyny; provide victims with increased confidence to report; send a clear message that such behaviour will not be tolerated; and improved statistics.

11. However, key feminist organisations remain opposed to this. They have called for the development of a standalone offence for misogyny to tackle the unique features of violence and harassment against women. These organisations take the view that adding an aggravation for gender hostility will not be helpful in tackling misogynistic harassment and/or abuse. They believe that the development of a specific offence to deal with this would recognise that the reality of violence against women is a complex issue and requires a considered approach.

12. Officials met with COPFS on 23 April to discuss the options as presented at Annex A. Generally, COPFS considers statutory aggravations to be a measure familiar to Scots law and in their experience of prosecuting existing statutory aggravations, they are not aware of any inherent difficulties which would suggest that a new statutory aggravation for gender hostility would not work. This is of course subject to careful drafting and clarity around the context in which the gender hostility aggravation would be applied. As is

normal practice, they are neutral on the adoption of an aggravation for gender hostility but would look to work with us to help shape any legislation to ensure that it could be effectively prosecuted.

13. In relation to the suggestion of developing a specific offence to criminalise misogynistic harassment, COPFS are not aware of existing gaps in the law that prevent the prosecution of misogynistic harassment and consider that further work would be required to identify if there were any gaps requiring legislation, if we were minded to take this forward. Engender et al have also not been able to identify any specific potential gaps. **[redacted]** It has been suggested that the model used to develop the Domestic Abuse (Scotland) Act 2018, where a multi-agency working group was established to consider the types of behaviour complained of and whether these were covered by current criminal law, could be used to explore whether legislation on misogynistic harassment is merited.

14. When considering the advantage of statutory aggravations compared to standalone offences, there is the evidentiary burden. Existing statutory aggravations can be proved by a single source of evidence at trial whereas standalone offences require two sources of evidence (corroboration). Applying this to here, it may be easier to prove a statutory aggravation based on gender hostility compared to any future standalone offence of misogynistic harassment.

15. Engender et al are concerned that a statutory aggravation model whereby 'gender hostility' might be attached to a charge of domestic abuse, rape or sexual assault could potentially undermine the narrative of Equally Safe which recognises that it is societal conditions (rather than individual motivations and thought patterns) that drive gendered violence. **[redacted]**

16. It is also worth noting that the First Minister's National Advisory Council on Women and Girls submitted their report in December 2018. A key recommendation includes to, 'criminalise serious misogynistic harassment, filling gaps in existing laws'. **[redacted]**

17. **[redacted]**

18. **[redacted]**

19. Finally, should a standalone offence be considered there is also the risk that race equality stakeholders will be critical should section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995, covering racially aggravated harassment, be repealed. A separate submission dated 29 April has been submitted seeking views on section 50A.

Gender and Sex

20. It is also worth discussing the use of the terms 'gender' or 'sex' within any new piece of legislation. The term 'gender' is often used interchangeably with 'sex', partly in recognition that much of the inequality between women and men is driven by underlying social and power structures rather than by biological sex.

21. The issues around sex and gender have generated considerable comment in the context of proposals in Scotland and England and Wales to reform the Gender

Recognition Act 2004. Some women’s groups have pointed out, correctly, that the protected characteristic in the Equality Act 2010 is ‘sex’ rather than gender and so legislation should be drafted, and data collected, on that basis accordingly. ‘Gender’ is not defined in law, but is generally understood to be socially constructed roles of women and men and/or an individual’s conception of their identity.

22. Although Lord Bracadale talked about ‘gender hostility’, consideration would need to be given to whether the statutory aggravation, if created, would be based on a person’s ‘sex’. Officials consider that if an offence is aggravated because the perpetrator shows hostility to the victim because she is a woman, then the offence should be treated as aggravated regardless of whether the woman is trans or non-trans. Clearly, if the perpetrator shows hostility to the victim because she is trans, the offence should be aggravated on the basis of the victim’s trans status.

Conclusion

23. It is clear that there are mixed views in regards to which option should be progressed with clear advantages and disadvantages associated with each. There are also risks attached to each of the options outlined and careful handling will be required regardless of approach decided upon, both in terms of how this is presented to the public/stakeholders as well as how this is handled in Parliament as the bill is introduced and progresses through the bill process.

Next Steps

24. A meeting is due to take place on 1 May with the Cabinet Secretary for Communities and the Minister for Equalities to discuss the development of the new hate crime legislation including to seek agreement on next steps in regards to gender.

Recommendation

25. We invite the Cabinet Secretary to:
- Note the options outlined above
 - Note that a meeting is taking place on 1 May where this can be discussed further.

[redacted]
 Connected Communities
[redacted]
 29 April 2019

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
Cabinet Secretary for Communities and Local Government Minister for Community Safety			x x		

organisational respondents (80%) that a statutory aggravation for gender hostility should be developed.

4. Respondents expressed a range of complex views raised and similar issues, irrespective of whether they answered 'yes', 'no' or 'unsure'. Respondents also often expressed confusion about precisely what a statutory aggravation for gender hostility would entail. The reasons provided in favour of an aggravation included:

- misogyny has long been a serious issue and offences motivated by misogyny are commonplace; the need to address this through legislation, and to provide justice to women is 'urgent';
- addressing a gap in current legislation – separate from that relating to domestic abuse – and it would be consistent with the legislative approach taken in relation to (most) other protected characteristics;
- it would make it more socially and culturally acceptable to object to gender-related hostility – and give victims greater confidence that complaints will be taken seriously by the criminal justice system;
- it would 'send a clear message' that such behaviour is not acceptable and will not be tolerated;
- it would result in better record keeping / statistics relating to these offences, and a more informed, targeted response to offenders;
- a legislative response would be consistent with the UK's international obligations to prevent and protect against discrimination and violence targeted at women and girls.

Option B – develop a standalone offence for misogyny

5. Organisations such as Engender, Rape Crisis Scotland, Scottish Women's Aid and Zero Tolerance have called for the development of a standalone offence for misogyny to tackle the unique features of violence and harassment against women. These organisations take the view that adding an aggravation for gender hostility will not be helpful in tackling misogynistic harassment and/or abuse. They believe that the development of a specific offence to deal with this would recognise that the reality of violence against women is a complex issue and requires a considered approach.

6. At this stage it is not clear what specific conduct a potential standalone offence for misogyny might cover. A potential first step could be to consider the types of conduct experienced by women which could be described as misogynistic behaviour. This would include considering the impact of such conduct on those who experience it and whether such conduct is or is not captured within existing criminal offences. As noted by Lord Bracadale, development of a standalone offence in this way is likely to take a significant amount of time. This approach would likely therefore be a longer term piece of work outwith the development of this hate crime legislation.

7. There were mixed views among respondents about whether a standalone offence should be created for misogynistic harassment. Overall, 24% said 'yes', 58% said 'no' and 19% said 'unsure'. However, individuals were more likely than organisations to say 'no' (61% vs 38%, respectively). Regarding the organisations, there were mixed views among third sector organisations (23% in favour, 23% not in favour and 48% unsure) and public sector / partnership bodies (26% in favour, 39% not in favour and 35% unsure). However, there appeared to more of a consensus among some other organisation types. For example, faith groups and law and justice bodies were unanimously opposed to the creation of a standalone offence (although only 7 and 2 responded respectively), while trade unions were unanimously in favour (although only 2 responded).

8. We do not yet have the qualitative analysis for the responses in regards to the standalone offence.

Option C – build on Equally Safe to tackle misogyny

9. The Scottish Government/COSLA Equally Safe Strategy recognises that violence against women and girls is cause and consequence of gender inequality, and that it can have both an immediate and long-lasting impact on the individuals and families directly involved. Equally Safe articulates a 'continuum' of violence which encapsulates domestic abuse, rape and sexual assault, sexual harassment, commercial sexual exploitation and so called 'honour based' violence. It sets out a shared understanding of the causes, risk factors and scale of gender based violence and highlights the need to prioritise prevention in order to challenge the notion that violence and abuse is inevitable or acceptable. It recognises that this is a systemic issue that requires change in practice and, fundamentally, a change in culture.

10. On this basis, legislation is not always the sole or indeed the correct vehicle to drive this change forward; rather, it is one of a range of interventions we should consider as part of a holistic approach. This option would build on current work to deliver Equally Safe, including a suite of interventions that focus on primary prevention and aim to educate children and young people about 'gender based violence, 'consent' and healthy

relationships. Current and relevant interventions include Rape Crisis Scotland's' Sexual Violence Prevention Programme and the piloting of a 'Whole School' approach to tackling gender based violence. The intention is that we would continue to focus on this preventative work, although that would be subject to future budgets and decisions made by Ministers in the Social Security and Older People portfolio.

11. There were mixed views among respondents about whether they agreed with a non-legislative approach (i.e. building on Equally Safe) to tackle misogyny. However, organisational respondents were more likely than individuals to say 'yes' in answer to Option C (66% vs 19%, respectively). Faith groups (83%), public sector / partnership bodies (74%) and other organisational respondents (75%) were particularly likely to agree that it would be valuable to build on Equally Safe. It is important to note that respondents did not necessarily think that Option C should be pursued in lieu of a legislative approach, but rather alongside a legislative approach.

Option D – All of the above

12. This option would involve taking forward proposals to include a statutory aggravation for gender in the hate crime bill as well as exploring developing a standalone offence for misogyny. This would mean that we would develop a gender aggravation to be included within the new hate crime bill alongside work on a standalone misogyny offence which would be a longer term piece of work.

13. In the short term this would send a clear message to society that gender based prejudice is unacceptable and is being taken more seriously by the justice system, however would also recognise the complexity associated with tackling misogynistic harassment or abuse.

14. Two-thirds of respondents (64%) overall were not in favour of taking forward all three of the previously discussed options. However, views were more mixed among organisations on this question than among individuals. Organisations were more likely than individuals to answer 'yes' (25% vs 15%, respectively) and 'unsure' (28% vs 18%, respectively). There were mixed views among third sector organisations and public sector / partnership bodies, whereas faith groups and law and justice bodies were unanimously not in favour of taking forward all three options.

15. Respondents did not necessarily think that Option C should be pursued in lieu of a legislative approach, but rather alongside a legislative approach.

[redacted]

Cabinet Secretary for Justice
Cabinet Secretary for Communities and Local Government
Minister for Older People and Equalities

HATE CRIME BILL: OPTIONS FOR FLEXIBLE INCLUSION OF GENDER

Purpose

1. To note options for the inclusion of gender as a characteristic in the new hate crime bill, plus an additional option where gender as a characteristic is considered outwith the hate crime bill.

Priority

2. **Routine.** However, it may be useful to be aware of this advice in advance of Mr Yousaf and Ms McKelvie meeting women's groups on 19 December.

Background and discussion

3. Ministers asked for advice on options which would allow the more flexible inclusion of gender as a characteristic in the new hate crime legislation. We have considered both legislative and non-legislative options, which could be utilised as the Bill is introduced to Parliament and/or as the Bill progresses through the bill parliamentary process.

4. We have considered four legislative and one non-legislative options. Further information on how each option would work is set out in the annexes to this note as follows:

- Annex A – sunset provisions
- Annex B – review provisions
- Annex C – adding characteristics via regulations
- Annex D – stage 2 amendment
- Annex E – Working Group to consider (non-legislative)

5. There are a number of risks and handling issues associated with each of these options as summarised below.

Sunset provisions

6. In relation to sunset provisions, the main concern is that this would lead to specific issues with the effective repeal of criminal offences. This is because the sunset clause may lead to the removal of an offence or statutory aggravation once an individual has already been convicted, which could result in individuals serving a sentence for something that is no longer a criminal offence or being convicted of an aggravated offence where the aggravation is no longer statutory. On this basis, if, as a matter of criminal law policy, there is uncertainty about the merits of legislating in a manner which can lead to a person either being imprisoned (e.g. in the case of stirring up hatred on gender grounds offence) or being imprisoned for longer than they otherwise would (e.g. in the case of the gender aggravation), then it would be best not to legislate, rather than to criminalise behaviour for a temporary period or require consideration of an additional punishment for a temporary period.

7. Such an approach would also show a lack of confidence on the part of the Scottish Government in terms of how it approaches development of the criminal law. There is a clear expectation that criminal law policy to be contained in legislation should be ready through the policy development process. A sunset provision would, in simple terms, very publicly suggest the criminal law policy is not ready to be included in legislation. As set out in Annex A, this general position is supported by a former Lord Advocate.

Review/reporting provisions

8. Review/reporting provisions have less serious consequences than sunset provisions because they do not automatically lead to provisions being removed from legislation. Furthermore, in considering the requirements of any such review within criminal law, the reporting requirements included in the Domestic Abuse (Scotland) Act 2018 could provide a useful starting point.

9. This mechanism in the 2018 Act requires certain information to be collected and published by the Scottish Government in the period 3 years after implementation. This information is largely quantitative, but also includes some qualitative information.

10. There is no specific legislative purpose to the production of this report by the Scottish Government, but the discussion in Parliament when the relevant provisions were being considered was to ensure the Scottish Government prepared a report containing information that would be helpful in informing discussion about the success or otherwise of the 2018 Act. It is important to note, therefore, that the 2018 Act is not a review provision as such, but rather a provision that requires a report to be prepared and published which would then inform an informal review through debate, discussion etc.

11. It would of course be possible to develop both a reporting mechanism and a review provision of some sort. However, if this was to be progressed consideration would need to be given to the scope of any review provision, the review methodology and how best to evaluate the effectiveness of new provisions (e.g. low numbers could automatically be taken to indicate a lack of success, although this may more accurately reflect under-reporting). Inclusion of a review provision without a clear plan as to the methodology and on how to appropriately evaluate the provisions could cause issues down the line.

12. There also remain a number of risks in this general area, including that review and/or reporting provisions on introduction may invite unwelcome calls for a sunset provision to be added to strengthen that review. For instance, if the review suggested or concluded that the provisions were not effective a sunset clause could, depending how it was framed, mean that the declared ineffective provisions would not continue to have effect. In addition, review provisions specifically for the gender characteristic included on introduction may also face attempted amendments to extend that to the other characteristics, such as age which is also new, or calls to review (and/or sunset) the extension of the stirring up of hatred offences beyond race.

13. There is also an option to utilise review provisions at Stage 2 as part of Scottish Government amendments to introduce gender as a characteristic, particularly if some stakeholders continue to have concerns about including gender as a characteristic within

hate crime legislation. However, this would bring similar risks to those identified for review provisions included on introduction.

14. Alternatively, if gender has been included as a characteristic on the face of the Bill as it is introduced, then utilising review provisions at Stage 2 could be used as a concession in the face of unwelcome amendments and thus a useful mechanism for retaining gender as a characteristic. Using the review provisions in this way would bring fewer risks to the Bill than the use of sunset provisions, and fewer risks than the use of review provisions on introduction.

Adding characteristics via regulations with an enabling power taken on introduction or at Stage 2

15. Adding characteristics via regulations on introduction or at Stage 2 could provide an opportunity to include gender as a characteristic at a later date while providing further time to refine policy and consider handling. For example, this could be presented as reserving our position to enable the inclusion of gender as a characteristic following the findings from the wider work being undertaken on consideration of the law on misogynistic harassment.

16. However, how that approach were to be presented to Parliament would need to be carefully handled. There are presentational risks to this approach with potential challenge from those who are opposed to gender as a characteristic, as well as from those who do support the inclusion of gender as to why this hasn't been included on the face of the Bill.

17. The scope of the power would need to be kept narrow at introduction. However, even if this was done, there is a risk that the scope of the power would be subject to amendment to provide that other characteristics are capable of being included within the hate crime legislation. For instance, the enabling power could be amended to allow characteristics which Lord Bracadale rejected to be added, such as political views. There is also a risk that the power might also enable, or be amended to enable, the removal of characteristics from the Bill. Furthermore, given that there is not a SG majority in either the whole Parliament or on the Justice Committee, it may be the case that, even if these powers remained within the Bill as it progressed through the parliamentary process, the Scottish Parliament could demand that regulations are subject to at least the affirmative procedure or a form of super affirmative procedure, which is a resource intensive mechanism that may have limited likelihood of being passed through Parliament. It is also not clear if stakeholders would be any more supportive of proposals at a later date than they are currently.

Stage 2 amendment

18. A Stage 2 amendment could be used in two ways:

- if gender is introduced as a characteristic on the face of the Bill, then Stage 2 amendments could be used to remove it if required.
- if gender is not introduced as a characteristic on the face of the bill, but there was support for inclusion of gender at the end of Stage 1, then there would be an option to do so via Stage 2 amendment.

19. Both options could involve the creative use of the policy memorandum to allow Parliament, and stakeholders more broadly, to consider the inclusion of gender from a

more informed basis. For example, if the decision is taken to include gender on the face of the Bill, then the narrative in the policy memorandum would set out the reasons why gender has been included as a characteristic, but would also recognise that some stakeholders have concerns with this proposal. If Parliament did not support gender as a characteristic then Stage 2 amendment could be used to remove these provisions. This approach gives Scottish Government control over how the inclusion of gender in hate crime legislation is presented to Parliament, which could in turn influence how it is both perceived and potentially supported by stakeholders. However, although the narrative would publicly recognise that some stakeholders have concerns with this approach, careful handling would be required to ensure the narrative lands appropriately with as many stakeholders as possible, as the Bill is introduced and as it progresses through the bill process.

20. Alternatively, if the decision is taken not to include gender as a characteristic on the face of the Bill, then the policy memorandum could be utilised as the Bill is introduced to Parliament to set out why this is the case, but also to outline the potential benefit to be gained from the inclusion of gender and to describe the potential provisions that could be included at Stage 2 if that approach were to be supported by Parliament. This approach would minimise reputational risk associated with introducing gender on the face of the Bill and then having these provisions removed. However, this approach could also be taken as an indication of a lack of confidence in the potential content of hate crime legislation, which may, in itself, have wider repercussions for the Bill.

Working Group to consider all aspects of gender/sex in the area of misogynistic harassment

21. A final option could be to progress work in the area of how the criminal law deals with the issue of behaviour which, in itself, might be said to constitute harassment (i.e. consideration of a misogynistic harassment offence) or which constitutes other types of criminal behaviour motivated by hostility on the basis of gender/sex (e.g. consideration of whether a statutory aggravation is appropriate) all under the auspices of a working group.

22. By establishing such a working group, this would mean the issue of gender/sex would not be progressed through the Hate Crime Bill, but rather would be for consideration following the next Scottish Parliamentary elections in May 2021 informed by the working group's recommendation. It could be prioritised in terms of legislation, assuming the working group were to recommend legislation, early in the next Parliament.

23. **[redacted]** In addition, this approach aligns with the recommendation on criminalising misogynistic harassment made by FM's National Advisory Council on Women and Girls, and extends ownership of this activity to sit more broadly with stakeholders as opposed to solely with Scottish Government, which is likely to lead to greater engagement and buy in to any identified legislative solutions.

24. If this option is preferred, further advice could be provided on the resource implications and where the lead for this work should sit within the Scottish Government. Further advice would of course be provided on a potential remit and membership for the working group.

Recommendation

25. Ministers are asked to note the five options (and their respective benefits and risks) as outlined above and offer views on any preferred approach.

[redacted]

Connected Communities

[redacted]

16 December 2019

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
Cabinet Secretary for Social Security and Older People			X		
Minister for Community Safety					X
Minister for Parliamentary Business and Veterans			X		
Lord Advocate			X		
Solicitor General			X		
Perm Sec DG Education, Communities and Justice Stephen Gallagher Director of Justice Neil Rennick Robert Marshall [redacted] [redacted] [redacted] [redacted] Willie Cowan [redacted] [redacted] [redacted] Lisa Bird [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] John McFarlane Jeanette Campbell Communications Justice Communications CSSE Legal Secretariat to the Lord Advocate (DLPCEALSLA@gov.scot)					

HATE CRIME BILL: OPTIONS FOR FLEXIBLE INCLUSION OF GENDER

OPTION A – SUNSET PROVISIONS

What is a sunset provision?

1. A “sunset provision” is a provision of an Act which provides for the Act to cease to have effect. A sunset provision could apply to a whole Act or to specified provisions of the Act.
2. A bare provision might be that the Act ceases to have effect on a specific date or on the expiry of a specified period following commencement e.g. two years after commencement.
3. It is also possible to place conditions on the expiry of the Act. A condition can be positive or negative i.e. that the Act will expire if a triggering event occurs or that it will expire unless a “saving” event occurs.
4. One obvious condition would be the making of regulations to trigger, delay or cancel the expiry. Triggering the expiry means that the provisions continue in force unless and until regulations are made. Delaying the expiry means that the provisions continue in force for an additional period but will expire eventually (with the sunset provision setting out whether there it can be a one time delay or whether there can be continual delays). Cancelling the expiry means that the legislation will continue in effect indefinitely unless repealed by other legislation in the future.
5. The procedure for any such regulations would depend on the level of scrutiny that it is thought appropriate in the circumstances.
6. Another trigger might be that the Act expires if an event does not occur – for instance, section 71 of the Criminal Justice (Scotland) Act 2016, which provided for the sunseting of section 70 of that Act if no regulations under section 70 were made within a certain period. This was inserted into the Bill for that Act at Stage 2.

Main Risks

Sunset provisions are relatively rare and we are unaware of any instance where they have been included on introduction to the Parliament. Such clauses are usually only put in by the Government where there is strong possibility of the Parliament not agreeing to the Bill provisions. therefore this will likely be seen as an early concession by critics of the Bill.

There could be calls to sunset the extension of the stirring up of hatred offences beyond race. There could even be calls to sunset the whole Bill, based on the fact that there is vocal opposition to hate crime laws. This could lead to the new hate crime provisions (i.e. the new characteristics, and the extension of protections for existing characteristics) contained within the Bill being removed from the statute book; but also the current hate crime provisions, which the Bill will be consolidating, being removed from the statute book. This may be a hypothetical risk but it is one that should be considered.

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However, the main risk is that sunset provisions can lead to specific issues with the effective repeal of criminal offences. This is because the sunset clause may lead to the removal of an offence or statutory aggravation once an individual has already been convicted.

During the passage of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 ("the 2012 Act") there was discussion as to whether a sunset provision should be inserted. In giving evidence to the Justice Committee, the then Lord Advocate stated:

"There is no tradition or history of sunset clauses in legislation on criminal offences. In fact, the only one of which I am aware is section 23 of the Terrorism Act 2006, which extends the maximum period of detention without trial for terrorist suspects.

"As the minister said, sunset clauses cause problems in relation to criminal offence. ... The difficulty is caused when a sunset clause kicks in after someone has been convicted and, for example, has received a sentence of imprisonment. That person would be serving a sentence of imprisonment for something that, because of the sunset clause, was no longer an offence. As a criminal lawyer, I would be against sunset clauses in relation to any criminal offence."

The introduction of a sunset clause for criminal law provisions could threaten overall credibility of the Scottish Government and our confidence in being able to propose new developments in criminal law in Parliament.

[redacted]

HATE CRIME BILL: OPTIONS FOR FLEXIBLE INCLUSION OF GENDER

OPTION B – REVIEW PROVISIONS

What is a review provision?

1. A “review provision” is a provision of an Act which requires someone (invariably the Scottish Ministers) to conduct a review into the operation of the Act following its enactment.

How does a review provision work?

2. A review provision will specify who the review is to be conducted by and will usually provide a date after/ by which the review must be undertaken.

3. Some review provisions will also set out additional requirements for the review. These might include that:

- certain aspects of the Act must be reviewed against certain criteria,
- certain people must be consulted as part of carrying out the review,
- a report must be prepared setting out the findings of the review,
- that such a report must be laid before the Scottish Parliament,
- that such a report must be published,
- that the report should contain information, for instance statistics on the number of prosecutions of an offence created by the Act.

4. Examples of review provisions are:

- Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, section 11,
- Alcohol (Minimum Pricing) (Scotland) Act 2012, section 3,
- Land Reform (Scotland) Act 2016, section 124.

5. Each of those was added during the amending Stages rather than being included on introduction.

6. A review provision is not necessary to enable a review to take place, but is necessary to *compel* a review to take place. The reasons for compelling a review to take place might be:

- to ensure that, notwithstanding any Ministerial commitments, that a review takes place and that a report is published,
- to bind future administrations to conduct a review – this is particularly relevant if the Act is passed close to the end of a Parliamentary session or if the review period goes beyond the life of a Parliament e.g. 5 years,
- to enable a degree of Parliamentary control over the nature of the review, what it will encompass, how it will be undertaken and its form and manner of publication,

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- to smooth the passage of the Bill in the face of opposition or scepticism as to the effectiveness of its provisions, including as a possible concession in the face of more problematic calls for amendments

Main Risks

Including a review clause on introduction may invite unwelcome calls for a sunset provision to be added to strengthen that review. For instance, if the review suggested or concluded that the provisions were not effective the absence of a sunset clause would mean that the declared ineffective provisions continue to have effect.

A review provision specifically on one characteristic included on introduction may face attempted amendment to extend that to the other characteristics - for instance age, which is also new.

There is also a risk that the inclusion of a review provisions may draw attention away from properly implementing the provisions.

Finally, inclusion of a review provision without a clear plan as to the methodology and on how to appropriately evaluate the provisions could cause issues down the line.

HATE CRIME BILL: OPTIONS FOR FLEXIBLE INCLUSION OF GENDER

OPTION C – ADDING CHARACTERISTICS VIA REGULATIONS

What would adding characteristics via regulations involve?

1. An option that has been mentioned is that the Bill does not contain provisions on gender but instead contains provision which would enable the Scottish Ministers to add gender to hate crime laws by regulations made after the passage of the Bill.
2. Put simply, there is no legal barrier to this. There is no specific limit on the extent of powers to make secondary legislation that can be conferred by the Scottish Parliament – other than that such powers cannot enable the making of secondary legislation outwith the legislative competence of the Scottish Parliament. It is for the Scottish Parliament to decide on a Bill by Bill basis what powers it considers appropriate to confer. The Scottish Parliament closely scrutinises the conferral of powers to make secondary legislation. The more controversial the power the closer the scrutiny and the more that will be needed to justify the conferral.
3. The scope of the power should be considered. For instance, the Bill could specify narrowly that gender can be added to hate crime laws or it could more widely permit any characteristics to be added. If the latter approach is taken that could open the door to characteristics being added in the future that were rejected by Lord Bracadale and by the current administration e.g. political affiliation or subcultures. Of course the decision to make secondary legislation would be for the Scottish Ministers but the possibility of such legislation being made could result in frequent calls from different groups to be included. It may be possible to identify policy criteria that limits the range of characteristics that are capable of being added. The power might also enable, or be amended to enable, the removal of characteristics, with similar issues arising in that there could be repeated calls to remove characteristics from the Bill.
4. The procedure would also have to be carefully considered. We imagine that Parliament would demand that a power to add gender and potentially other characteristics be subject to **at least** the affirmative procedure. There may also be calls to make such a power subject to a form of super affirmative procedure. This is sometimes applied to controversial powers, and tends to take the form of requiring prior consultation and various reports and statements being laid before the Scottish Parliament before draft regulations are laid.
5. The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (“the 2012 Act”) contained powers to amend the offences under section 1 and 6 to add or remove characteristics and to amend the definitions of the characteristics. These powers were added at Stage 2 in response to suggestions from the Justice Committee that age and gender be added to the Bill for that Act. Following Stage 2, the Subordinate Legislation Committee (“SLC”) (the predecessor of the current Delegated Powers and Law Reform Committee (“DPLRC”)) held an evidence session with Scottish Government officials in response to the introduction of these powers. It is relatively unusual for the SLC/DPLRC to hold evidence sessions, and the [Official Report](#) of the session suggests that at least some members of the Committee was sceptical of the extent of the

powers taken, with suggestions that the exercise of the powers be subject to a form of super affirmative procedure. However, a commitment to consult prior to exercising the power seems to have smoothed handling in relation to the procedure for the secondary legislation.

6. The [Committee's report](#) following that session concluded that in the end it was content with the powers taken and content that these were subject to the affirmative procedure. However, the report specifically mentions that this was a majority view and that a minority on the Committee would have preferred to halt the progress of the Bill to allow for consultation or to make further primary legislation after the fact and following a consultation.

Main risks

The scope of the power would need to be tightly defined, otherwise there will be a risk of calls from different groups for other characteristics to be added in the future. In the same way, the power might also enable, or be amended to enable, the removal of characteristics, resulting in repeated calls to remove characteristics from the Bill.

The 2012 Act is useful in being an example of a similar power having been conferred on the Scottish Ministers. However, the 2012 Act was passed at a time when there was a majority administration, including a majority of the governing party on the SLC. The policy context surrounding gender is also very different and could be particularly heated. There is therefore a risk that Parliament demands that regulations are subject to at least the affirmative procedure if not a form of super affirmative procedure. It could also mean that there are demands from the Parliament to remove any such powers from the Bill.

HATE CRIME BILL: OPTIONS FOR FLEXIBLE INCLUSION OF GENDER OPTION D – STAGE 2 AMENDMENT

What would a stage 2 amendment involve?

1. A Stage 2 amendment could be used in two ways:
 - if gender is not introduced as a characteristic on the face of the Bill, but there was support for inclusion of gender at the end of Stage 1, then there would be an option for Scottish Government to do so via Stage 2 amendment.
 - if gender is introduced as a characteristic on the face of the Bill, then Stage 2 amendments could be used to remove it if required.
2. In both cases, the change would be taken forward in line with the routine process for Stage 2 amendments. Both options could also involve the creative use of the policy memorandum to allow Parliament, and stakeholders more broadly, to consider the inclusion of gender from a more informed basis.

Main risks:

If Parliament did not support gender as a characteristic then Stage 2 amendment could be used to remove these provisions. This approach gives Scottish Government control over how the inclusion of gender in hate crime legislation is presented to Parliament, which could in turn influence how it is both perceived and potentially supported by stakeholders. However, although the narrative would publicly recognise that some stakeholders have concerns with this approach, careful handling would be required to ensure the narrative lands appropriately with as many stakeholders as possible, as the Bill is introduced and as it progresses through the bill process.

Alternatively, if the decision is taken not to include gender as a characteristic on the face of the Bill, then the policy memorandum could be utilised as the Bill is introduced to Parliament to set out why this is the case, but also to outline the potential benefit to be gained from the inclusion of gender and to describe the potential provisions that could be included at Stage 2 if that approach were to be supported by Parliament. This approach would minimise reputational risk associated with introducing gender on the face of the Bill and then having these provisions removed. However, this approach could also be taken as an indication of a lack of confidence in the potential content of hate crime legislation, which may, in itself, have wider repercussions for the Bill.

Using the policy memorandum to include both sides (i.e. if the decision is taken to include gender on the face of the Bill, then the narrative in the policy memorandum would set out the reasons why gender has been included as a characteristic, but would also recognise that some stakeholders have concerns with this proposal and vice versa) it may result in a perception of a lack of confidence in the legislation which may, in itself, have wider repercussions for the Bill.

However, to include gender as a characteristic at Stage 2 would minimise reputational risk associated with introducing gender on the face of the bill and then having these provisions removed.

**HATE CRIME BILL: OPTIONS FOR FLEXIBLE INCLUSION OF GENDER
OPTION E – WORKING GROUP ON MISOGYNISTIC HARASSMENT**What would this option involve?

1. This option would be to progress work in the area of how the criminal law deals with the issue of behaviour which, in itself, might be said to constitute harassment (i.e. consideration of a misogynistic harassment offence) or which constitutes other types of criminal behaviour motivated by hostility on the basis of gender/sex (e.g. consideration of whether a statutory aggravation is appropriate) all under the auspices of a working group. In so doing, there would be no provision made in the Hate Crime Bill at all in relation to these areas, nor in relation to any sort of enabling power etc.
2. The remit of the working group would be to progress this issue, including consideration of the need for greater clarity on what actually amounts to misogyny, including a clear definition of this, in order to then consider how the criminal law works in appropriately criminalising behaviours, including misogynistic harassment and other types of behaviour motivated by hostility, and whether there is a gap in legislation.
3. Consideration can then be given to what, if any, criminal law policy solutions are required, including the potential for a gender/sex statutory aggravation and/or a stirring up hatred offence on the grounds of gender/sex into the existing hate crime legislative framework; and/or a standalone misogynistic harassment offence.
4. Academics Olga Jurasz (Open University) and Kim Barker (Stirling University) have already undertaken some of this analysis with respect to the law of England and Wales, specifically in considering the basis for legal regulation around online misogyny. It is understood that they are also currently undertaking a similar exercise around Scots law which could usefully inform this work.
5. By establishing such a working group, this would mean the issue of gender/sex would not be progressed through the Hate Crime Bill, but rather would be for consideration following the next Scottish Parliamentary elections in May 2021 informed by the working group's recommendation. It could be prioritised in terms of legislation, assuming the working group were to recommend legislation, early in the next Parliament.

Main risks:

There may be criticism from some stakeholders and Parliament that we are not taking the opportunity provided by the hate crime bill to take action to tackle gender based prejudice and misogyny, particularly following Lord Bracadale's recommendation to do so. Although due to strong stakeholder support in this area, alongside support to progress this option, this risk is minimal.

There is also the risk that the group could identify that there isn't a gap in the law and that the existing law works, but that a statutory aggravation would, in fact, be beneficial. If a gap is identified, there may not be a legislative vehicle available to implement any legislative solutions identified.

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In addition, should this option be progressed, significant resource would be needed to service the working group and to progress any required consultation and/or analysis. This is currently an un-resourced pressure.

Cabinet Secretary for Justice
Cabinet Secretary for Communities and Local Government
Cabinet Secretary for Social Security and Older People
Minister for Older People and Equalities

HATE CRIME LEGISLATION: ADVICE ON APPROACH FOR GENDER AND HATE CRIME LEGISLATION

Purpose

1. To provide advice ahead of the meeting with women's organisations on 19 December where the inclusion of gender within the hate crime bill will be discussed.

Priority

2. **Routine.** Although, following the meeting with women's organisations on 19 December an **immediate** decision is required by 20 December in order to proceed with Cabinet Consideration in advance of the Cabinet discussion on 14 January.

Background and next steps

3. Following a meeting held between the Cabinet Secretary for Justice, Minister for Older People and Equalities and the Cabinet Secretary for Social Security and Older People a decision was made to postpone the Cabinet discussion on the new hate crime bill until a decision had been reached on whether or not gender should be included as a characteristic.
4. Although, Lord Bracadale recommended introducing a statutory aggravation for gender and a stirring up of hatred offence for gender within hate crime law, the national women's organisations (Engender, Scottish Women's Aid, Zero Tolerance, Rape Crisis Scotland) in particular feel that adding gender would be detrimental. Therefore Ministers are keen to meet with both the national women's organisations and those in support of an aggravation for gender in order to reach consensus on a way forward. The meeting is due to take place on 19 December following which Ministers are asked to make a decision in regards to whether gender should be included in the bill. In order to support that discussion Annex A sets out the options for consideration.

Discussion

5. The options outlined at Annex A include:
 - Option A - introducing a statutory aggravation and a stirring up of hatred offence for gender,
 - Option B - not including gender within the hate crime bill and progress with the work to establish a working group on misogynistic harassment.
6. Although the majority of organisations who responded to our consultation supported the introduction of a statutory aggravation and stirring up offence for gender, the main national women's organisations remain opposed. It is very unlikely that these organisations will change their view, and including gender as a characteristic within the hate crime bill would be challenging without their support.

7. Establishing a working group to consider whether there are any gaps in the law in terms of misogynistic harassment has support of the national women's organisations as well as the First Minister's National Advisory Council on Women and Girls who recommended 'criminalising serious misogynistic harassment, filling gaps in existing laws'.
8. As well as giving consideration to the broader criminal law, the working group's remit could also include consideration of the potential for a statutory aggravation and/or a stirring up hatred offence on the grounds of gender within the existing hate crime legislative framework. If this was recommended by the working group, this would ensure that there was broader support for such an approach.
9. We therefore recommend that Option B is progressed as there is stronger stakeholder support with fewer risks in terms of how a gender characteristic would be handled as part of the bill (including whether this would be framed in terms of sex or gender) and fewer risks in relation to the Bill's passage through Parliament. **[redacted]** The meeting on 19 December should be used as an opportunity to ensure there is broad support for this approach.

Next steps

10. The Cabinet paper is due to be discussed at Cabinet on 14 January therefore a decision following the meeting on 19 December will be required by 20 December in order for the paper to progress.

Recommendation

11. We invite Ministers to:

- Note options outlined at Annex A
- Agree recommendations outlined at paragraph 7-9
- Note a decision is required by 20 December.

[redacted]

Connected Communities

[redacted]

16 December 2019

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Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
Minister for Community Safety Minister for Parliamentary Business and Veterans Lord Advocate Solicitor General			X X X		X
Perm Sec DG Education, Communities and Justice Stephen Gallagher Director of Justice Neil Rennick Robert Marshall [redacted] [redacted] [redacted] [redacted] Willie Cowan [redacted] [redacted] [redacted] Lisa Bird [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] John McFarlane Jeanette Campbell Communications Justice Communications CSSE Legal Secretariat to the Lord Advocate (DLPCEALSLA@gov.scot)					

**HATE CRIME LEGISLATION: ADVICE ON APPROACH FOR GENDER AND
HATE CRIME LEGISLATION
OPTIONS FOR GENDER AND HATE CRIME**

1. One of the most contentious issues in relation to the content of this Bill is in relation to our approach for tackling gender based prejudice and misogyny. This is a complex and highly emotive area and there are advantages and disadvantages of including legislative solutions in this area. The meeting on 19 December will provide an opportunity to discuss key issues and concerns where Ministers can present a number of options including:
 - Option 1 - introducing a statutory aggravation and a stirring up of hatred offence for gender
 - Option 2 - not including gender within the hate crime bill, but progressing with the work to establish a working group on misogynistic harassment.

Option 1 – including gender as a characteristic within hate crime law (statutory aggravation and stirring up of hatred offence)

A statutory aggravation for gender

2. A statutory aggravation ‘attaches’ to an offence in certain circumstances based on the conduct or motivation of the offender. In order for an aggravation to attach, there needs to be an underlying piece of criminal conduct i.e. a baseline offence committed. The court is required to record the statutory aggravation and take it into account when determining an appropriate sentence.
3. Generally, COPFS considers statutory aggravations to be a measure familiar to Scots law and in their experience of prosecuting existing statutory aggravations, they are not aware of any inherent difficulties which would suggest that a new statutory aggravation for gender hostility would not work. This is of course subject to careful drafting and clarity around the context in which the gender hostility aggravation would be applied.
4. Existing statutory aggravations can be proved by a single source of evidence at trial whereas standalone offences require two sources of evidence (corroboration). Applying this to here, it may be easier to prove a statutory aggravation based on gender hostility compared to any future standalone offence of misogynistic harassment.
5. Engender et al are concerned that a statutory aggravation model whereby ‘gender hostility’ might be attached to a charge of domestic abuse, rape or sexual assault could potentially undermine the narrative of Equally Safe which recognises that it is societal conditions (rather than individual motivations and thought patterns) that drive gendered violence. **[redacted]**

6. We are also aware of concerns raised by Engender in particular about the lack of international evidence for justifying the inclusion of gender within hate crime law. Although there is limited evidence of its effectiveness where jurisdictions have included gender within hate crime law, there is evidence from a number of academics who suggest it would be beneficial. For example, Austin-Walters and Tumath¹ suggest that gender 'hostility' should be included within hate crime legislation because it would help recognise, and additionally combat, the biased nature of various forms of violence against women and girls. In addition, Maher et al² argue that aggravating sentences offers a 'valuable opportunity to contest gendered violence' and that gender within hate crime would make, 'gender hatred and its consequences more visible and inform public conversation in a positive way'. Both articles highlight cases where 'gender hostility' was clear.
7. Finally, Engender have suggested that there is no evidence to suggest that adding a statutory aggravation for gender into hate crime law will advance women's equality and rights. It should be made clear that the purpose of the hate crime aggravation model is not to specifically advance equality and rights, but to recognise where criminal offences have taken place because of the prejudice or hostility the perpetrator has towards certain groups of people. This therefore sends a clear message to society that certain behaviour will not be tolerated.

Stirring up of hatred offence for gender

8. Currently there are offences relating to the stirring up of racial hatred which captures actions that are threatening, abusive or insulting, with the intention of stirring up racial hatred, or which, having regard to all the circumstances, are likely to stir up racial hatred. We are proposing to introduce a stirring up of hatred offence for each of the protected characteristics within hate crime law.
9. We propose that the threshold for stirring up of hatred offences should be 'threatening or abusive' behaviour (with the exception of race where we propose to retain the word 'insulting'). Should gender be introduced as a statutory aggravation, there would also be an intention to introduce a stirring up of hatred offence for gender.

10. [redacted]

11. [redacted]

Option 2 – Working group on misogynistic harassment

12. This option would be to progress work in the area of how the criminal law deals with the issue of behaviour which, in itself, might be said to constitute harassment (i.e. consideration of a misogynistic harassment offence) or which

¹ Mark Austin Walters and Jessica Tumath, 2014 "Gender 'Hostility', Rape, and the Hate Crime Paradigm"(2014)

² JM Maher, J McCulloch and G Mason, "Punishing gendered violence as hate crime: aggravated sentences as a means of recognising hate as motivation for violent crimes against women" (2015)

constitutes other types of criminal behaviour motivated by hostility on the basis of gender/sex (e.g. consideration of whether a statutory aggravation is appropriate) all under the auspices of a working group.

13. In so doing, there would be no provision made in the Hate Crime Bill at all in relation to these areas, nor in relation to any sort of enabling power etc.
14. The remit of the working group would be to progress this issue, including consideration of the need for greater clarity on what actually amounts to misogyny, including a clear definition of this, in order to then consider how the criminal law works in appropriately criminalising behaviours, including misogynistic harassment and other types of behaviour motivated by hostility, and whether there is a gap in legislation.
15. Consideration can then be given to what, if any, criminal law policy solutions are required, including the potential for a gender/sex statutory aggravation and/or a stirring up hatred offence on the grounds of gender/sex into the existing hate crime legislative framework; and/or a standalone misogynistic harassment offence.
16. Academics Olga Jurasz (Open University) and Kim Barker (Stirling University) have already undertaken some of this analysis with respect to the law of England and Wales, specifically in considering the basis for legal regulation around online misogyny. It is understood that they are also currently undertaking a similar exercise around Scots law which could usefully inform this work.
17. By establishing such a working group, this would mean the issue of gender/sex would not be progressed through the Hate Crime Bill, but rather would be for consideration following the next Scottish Parliamentary elections in May 2021 informed by the working group's recommendation. It could be prioritised in terms of legislation, assuming the working group were to recommend legislation, early in the next Parliament.

Cabinet Secretary for Justice
Cabinet Secretary for Communities and Local Government
Minister for Older People and Equalities

HATE CRIME BILL: OPTIONS FOR INTRODUCING A FEMALE ONLY CHARACTERISTIC WITHIN THE HATE CRIME BILL

Purpose

1. To provide advice for the inclusion of a female-only characteristic within the new hate crime bill.

Priority

2. **Routine.** However, it may be useful to be aware of this advice in advance of Mr Yousaf and Ms McKelvie meeting women's groups on 19 December.

Background

3. Ministers asked for advice on options which would allow the more flexible inclusion of gender as a characteristic in the new hate crime legislation (for both stirring up of hatred offence and the statutory aggravation). This advice was provided in **[redacted]** submission dated 16 December.

4. At the FM's National Advisory Council on Women and Girls Accountability Session on 6 November, which was chaired by Ms McKelvie, officials were also asked to consider the feasibility of including a female-only characteristic as opposed to a gender neutral characteristic as a potential option as part of the new hate crime legislation.

5. It should also be noted that **[redacted]** separate submission includes as an option work that would progress policy out with the Hate Crime Bill in the area of misogynistic harassment and how gender/sex is catered for within the criminal law. It may be the case that this issue is raised again as part of that agenda.

Discussion

6. From a purely legal perspective there are no insurmountable barriers to including a female-only characteristic, as opposed to one focused on gender. However, this approach is not straightforward, and brings significant risk to the hate crime bill. Our consideration of this issue is set out in further detail below, and in the attached annex.

7. Discussion on hate crime tends to be in terms of the protection of minority groups, or historically marginalised groups. However, as a matter of law, Scottish hate crime legislation is not framed in terms of the protection of minority or marginalised groups but is presented in a "neutral" way. This is consistent with the principle of equality before the law, which has been set out by the Organisation for Security and Co-operation in Europe as meaning that "hate crime laws do not and should not protect one group over another". This does not, however, mean that the characteristics protect everyone in society, but refers to the fact that all aspects within the characteristic are covered. Some characteristics do apply to everyone in society, for example, everyone has a race and a sexual orientation. However, others don't apply to everyone, for example, not everyone

has a disability (but this characteristic does apply across the different aspects of this characteristic such as mental and physical disability), and not everyone has a trans identity.

8. Generally speaking, this neutral approach is adopted in the Scottish Parliament in all modern Bills. For example the Domestic Abuse (Scotland) Act 2018 is expressed in a gender neutral manner even though Scottish Government policy recognises that domestic abuse disproportionately involves behaviour carried out by men and directed against women. This means that the law both applies equally and provides protection in the relatively fewer cases in which the victim of domestic abuse is male.

[redacted]

9. **[redacted]**

10. **[redacted]**

11. **[redacted]**

12. **[redacted]**

13. **[redacted]**

14. **[redacted]**

15. **[redacted]**

Conclusion

16. Policy advice is not to progress with the development of a female-only characteristic for inclusion in the hate crime bill **[redacted]**

Recommendation

17. Ministers are asked to:

- note the advice on the potential for the inclusion of a female-only characteristic within the new hate crime bill
- agree not to progress with a female-only characteristic within the hate crime bill noting concerns highlighted above.

[redacted]

Connected Communities

[redacted]

16 December 2019

Copy List:	For Action	For Comments	For Information		
			Portfolio Interest	Constit Interest	General Awareness
Cabinet Secretary for Social Security and Older People Minister for Community Safety Lord Advocate Solicitor General Minister for Parliamentary Business and Veterans			X		x
Perm Sec DG Education, Communities and Justice Stephen Gallagher Director of Justice Neil Rennick Robert Marshall [redacted] [redacted] [redacted] [redacted] Willie Cowan [redacted] [redacted] [redacted] Lisa Bird [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] John McFarlane Jeanette Campbell Communications Justice Communications CSSE Legal Secretariat to the Lord Advocate					

FEMALE ONLY AGGRAVATION**Gender Neutrality**

1. Discussion on hate crime tends to be in terms of the protection of minority groups, or historically marginalised groups. In practice it is likely that the complainant in a case in which a hate crime has been reported will be a member of a minority or marginalised group. However, as a matter of law, Scottish hate crime legislation is not framed in terms of the protection of minority or marginalised groups. Rather, the law is “neutral” – in that it applies to protected characteristics generally rather than to particular minority or marginalised groups.
2. This is consistent with the views of the Organisation for Security and Co-operation in Europe, which states that:

The principle of equality before the law means that hate crime laws do not and should not protect one group over another. For instance, if a hate crime law includes ethnicity as a characteristic, it does not specify a particular one; under such a law a victim could be of any ethnicity, including a majority one.

3. For instance, “racial group” in section 96 of the Crime and Disorder Act 1998 is not expressed in terms of animus toward particular named minority racial groups but rather toward any racial group. In a significant proportion of cases we have reviewed (both Scottish and English and Welsh cases) the complainant is a member of a minority ethnic group. In the Scottish context there are a number of cases in which an offence has been racially aggravated where the conduct is sectarian in nature, as opposed to animus toward a minority ethnic group. Furthermore, the murder of Kriss Donald is an example that statutory aggravations can be applied in the context of racially aggravated offending against a member of a majority ethnic group by members of a minority ethnic group.
4. Other protected characteristics are also “neutral”, for example sexual orientation in section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009, which is framed in terms of the sexual orientation (or presumed sexual orientation) of the victim. The definition of “sexual orientation” in section 2(7) is attraction to the same sex, the opposite sex, or both. Accordingly, in addition to the more common scenario where the statutory aggravation applies where there is animus directed toward a person because they are e.g. gay, the aggravation also applies in the (likely less frequent) scenario where there animus directed toward a person because they are straight.
5. Although legislation has been framed in a “neutral” way, it is recognised that in practice the majority of instances will likely involve minority and marginalised groups. We note that this is the approach taken in other policy contexts. For instance, the offence set out in section 1 of the Domestic Abuse (Scotland) Act 2018 is expressed in a gender neutral manner whereas the Scottish Government policy discourse recognises that domestic abuse disproportionately involves behaviour carried out by men and directed against women. This means that the law both applies fairly and is available in the relatively fewer cases in which the victim is a member of the majority (or less marginalised) group.

Recent sexual offences legislation

6. The Sexual Offences (Scotland) Act 2009 was progressed in a gender neutral approach. That Act repealed a number of common law and statutory sexual offences and provided a new statutory framework for sexual offences in Scots law. The result being that offences are committable against, and by, either gender.
7. The Scottish Law Commission report on Rape and Other Sexual Offences¹, which lead to the 2009 Act, recommended a gender neutral approach to sexual offences as far as possible.

Factors influencing the approach – International standards

8. One of the factors that influenced the approach in the domestic abuse legislation was the Istanbul Convention (“the Convention”)². In short, this is a Council of Europe Convention on protecting and combatting violence against women and domestic violence. Although this has not yet been ratified by the UK Government, various steps have been taken by both the Scottish and UK Government to ensure that its respective legislation is generally compliant with the convention for the purposes of ratification in the future. It is our understanding that ratification of the Convention is being treated as priority.
9. The requirements in article 4 of the Convention resulted in provisions in the UK Government Domestic Abuse Bill, relating to certain offences, being drafted in gender neutral terms. Somewhat similar to these circumstances, this was despite most of the offences being likely to be committed against females.
10. When ratified, the Convention requires relevant states to ensure that legislative or other measures are in place to ensure that certain types of conduct are criminalised. More specifically for our current consideration, in relation to the required approach to compliance with the Convention, article 4(3) & (4) provides that:

4(3) - The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.

4(4) - Special measures that are necessary to prevent and protect women from gender- based violence shall not be considered discrimination under the terms of this Convention
11. The Bill is not a matter of compliance with the Convention and we are not required to adopt the approach in Article 4(3). We do however believe that the approach required by the Convention is worth considering.

¹ Available here: <https://www.scotlawcom.gov.uk/files/4712/7989/6877/rep209.pdf>

² <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>

Coherence of the bill

12. Our current approach to hate crime legislation has so far been to adopt a 'neutral' neutral approach to the characteristics for the Bill . When we say that the characteristics are 'neutral', this does not mean that they are neutral in the sense that they protect everyone in society. Some of the characteristics have this effect and apply to everyone in society, for example, everyone has a race and everyone has a sexual orientation. However, some of the other characteristics don't apply to everyone and simply couldn't apply this way. For example, not everyone has a disability and not everyone has a trans identity. Clearly then, these characteristics can't apply in the same way
13. This does not mean however that the disability and trans identity characteristics are not being applied in a 'neutral' sense. Instead, what is meant here is that the neutrality refers to the fact all aspects within the characteristic are covered by the Bill.
14. With regards to the characteristic of race, this would not simply include some racial groups but would instead cover all racial groups. On this basis, the approach to the characteristic of race is described as 'neutral'.
15. In regards to disability, hate crime law does not, for example, make a distinction between different types of physical disability or make a distinction between a physical and a mental disability. Ultimately the intention is to capture all aspects of 'disability' and offer similar protection to all within that definition, for the purposes of hate crime in Scotland. On this basis, the approach to the characteristic of disability is described as 'neutral'.
16. Consideration of the potential impact of adopting a gender specific approach to the other characteristics in the Bill must be undertaken, in terms the coherence of the Bill as a whole. Adopting a gender specific approach may lead to calls to only protect specific groups within each characteristic of the Bill.
17. [redacted]
18. [redacted]
19. [redacted]
20. [redacted]
- [redacted]
21. [redacted]
- [redacted]
22. [redacted]
23. [redacted]

24. [redacted]

25. [redacted]

26. [redacted]

27. [redacted]

28. [redacted]

From: [redacted]

Sent: 22 January 2020 14:38

To: Cabinet Secretary for Justice <CabSecJustice@gov.scot>

Cc: Permanent Secretary <PermanentSecretary@gov.scot>; Gallagher S (Stephen) <Stephen.Gallagher@gov.scot>; Rennick NS (Neil) <Neil.Rennick@gov.scot>; [redacted]; [redacted]; [redacted]; [redacted]; Marshall R (Robert) <Robert.Marshall@scotland.gsi.gov.uk>; Bird L (Lisa) <Lisa.Bird@gov.scot>; Cowan WJ (Willie) <Willie.Cowan@gov.scot>; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]

Subject: RE: Call with SWA - Briefing

[redacted]

Following the call with the Cabinet Secretary this morning, we thought it would be worth providing some additional detail before the meeting with Engender in relation to the new compromise approach that is being considered. Our understanding is that a compromise would be to seek to ensure the characteristic of gender/sex is included in some way in the Bill but the eventual inclusion of gender/sex as part of the hate crime legislative regime is only decided at a later date. This would allow the work of the Working Group to proceed to help inform this future decision.

Delayed Commencement of Gender

One new approach would, as the Cabinet Secretary suggested, focus on including, but delaying commencement of gender provisions in the bill. Our understanding is that this would involve including gender as a characteristic on introduction of the bill, accompanied with an additional provision which would delay commencement of gender as a characteristic for a set period of time. If commencement did not occur within this period, the gender provisions would automatically repeal before they have commenced. **If this is not what was meant then please let us know if we have misunderstood.**

There is scope to take this approach, however it is novel and there are risks with this, as follows:

- This would remove the control over commencement of the provision from Parliament and the Scottish Government. The working group's would have the control if we are suggesting it was dependant on their recommendations as the determining factor if commencement was to take place. As a result, Parliament may feel they have no control whatsoever in the commencement process and may therefore press for parliamentary procedure to attach to commencement. This would be a very unhelpful precedent for SG legislation as commencement normally has no parliamentary procedure attached to it.
- It may show a lack of confidence on the part of the Scottish Government in terms of how it approaches development of the criminal law. There is a clear expectation that criminal law policy to be contained in legislation should be ready through the policy development process. This approach would, in simple terms, very publicly suggest the criminal law policy is not ready to be included in legislation.
- It may set a precedent and impact on the creation of new offences going forward which would include the use of amendments to change commencement dates or impose requirements on commencement

- If gender is included at introduction, there is likely to be further debate **[redacted]** in relation to whether to define this characteristic in relation to 'sex' or 'gender'

Enabling Power

An alternative way to ensure gender/sex was in some way reflected in the Bill on introduction would be to develop an enabling power. As you will recall, the note to FM on 15 January set out a hierarchy of options, which included Option C: to include an enabling power on introduction which would enable gender to be added at a later date. There are different approaches that could be taken as to the width of the enabling power: it could only allow gender/sex to be added to the list of characteristics at a future date or it could be wider and allow other characteristics to be added while making clear, either on the face of the Bill and/or in the accompanying documents, that the enabling power would most likely be used to add gender/sex. So this would involve setting out in the Policy Memorandum that we are open to including gender at a later date if this is the will of Parliament and/or recommended by the Misogynistic Harassment Working Group; and an overview of policy in relation to including gender as a characteristic.

Although we highlighted the risks of this approach:

- There may be calls to include such powers for additional characteristics (accepting of course that risk exists in any event to a certain extent given we have a list of characteristics within the draft Bill)
- Including a power on introduction may be taken more generally as an indication of a lack of confidence in the potential content of the legislation (though perhaps less so than including a delayed repeal provision under the option above).

However, this approach would provide a number of the benefits over the option of introducing gender with a delayed commencement date. Primarily, it would ensure control of using this power lay with the Parliament and the Scottish Government. It would also allow Parliament to consider and agree the inclusion of gender at a later stage (as the enabling power would carry with it parliamentary procedure), along with an outline of what inclusion of gender would look like which would meet the needs of those supportive of the inclusion of gender, but with potential for the enabling power not be used unless certain conditions are met, therefore providing reassurance to stakeholders that the enabling provision would not necessarily be utilised.

Conclusion

In light of the above handling risks, we continue to recommend that Option A (not including gender at introduction, but use the Policy Memorandum to set out the policy intention of including gender as a characteristic at stage 2) has many benefits, and as discussed with FM, may be the best approach. However, should Ministers' be minded to include gender in some form at the bill's introduction we recommend that it would be preferable to use the enabling power at stage one over the delayed commencement of a characteristic .

The risks outlined above in regards to the delayed commencement of a characteristic outweigh the limited benefits of including gender at introduction.

[redacted]

[redacted]

Connected Communities

[redacted]

[redacted]