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Reform of Hate Crime Laws - Consultation Response to the Law Commission

by Dr Kim Barker & Dr Olga Jurasz

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QUESTION 1

Yes. This approach would bring much desired clarity and order to otherwise fragmented and dispersed legislation concerning hate crime. It would also align with the legislative approach taken in Scotland.

QUESTION 2

Yes, we agree with this suggestion.

QUESTION 11

We agree that gender should be a protected characteristic for the purposes of hate crime laws. Our analysis of this issue and arguments supporting such a development are examined at length in our book *Online misogyny as a hate crime: a challenge for legal regulation*.¹

This addition would enable the criminal justice system to adequately capture and record crimes committed with prejudice and/or hostility and/or bias towards a person on the ground of their gender. Whilst adding gender would extend to protecting not only women, this addition would particularly enable women to report crimes committed against them because they are women – something that has been omitted from the legislation in England & Wales, Scotland, and Northern Ireland thus far.²

The exclusion of gender from the list of protected characteristics has practical implications – not only from the perspective of punishment and redress but also for the way in which hate crime is conceptualised and understood. In particular, it results in the production of an incomplete picture and knowledge concerning hate crime and its gender dimension. Through the elimination of gender-based hostility, prejudice or bias from hate crime legislation, hate victimisation of women due to their gender is effectively “stricken off the record,” making the gender aspect of hate crime effectively invisible – both in hate crime discourse and in practice.³

We do not support gender-specific carve outs, as posed in the consultation question. These offences / categories of offences should not be presumed to automatically fall within the hate crime framework, unless hate motivation on the basis of sex or gender (if either one/both are included in the reformed legislation) can be demonstrated. Whilst offences outlined in the question may amount to gender-based violence, it is not automatic that they are motivated by hostility based on the victim’s gender. It is also worth noting that there are specific legislative provisions under the law of England & Wales which address these offences.

¹ Kim Barker & Olga Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (2019).

² Kim Barker & Olga Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (2019) 100-104.

³ Kim Barker & Olga Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (2019) 101.

QUESTION 12

Both categories suggested here – sex and gender – are inclusive of men and women. The category of gender (as a socio-cultural rather than biological construct) is even broader and, at the very least, includes women and men.

We acknowledge concerns expressed to the Law Commission by some stakeholders concerning women being disproportionately affected and victimised by gender-based violence and domestic abuse. However, we advocate that acts of violence against women and girls (VAWG), gender-based violence (GBV), and domestic abuse should be addressed thoroughly – and separately – within the criminal law framework, with due consideration and implementation of the UK’s international obligations.⁴ Whilst some acts of gender-based violence may be motivated by gender-based hate, we are of the view that not all acts of VAWG, GBV, and domestic abuse are motivated by such hate.

QUESTION 13

Misogyny in itself does not amount to a hate crime,⁵ and furthermore, there is no legal definition of either misogyny, or of behaviour that is regarded as misogynistic.⁶ Gender is a preferable characteristic here and we suggest that it should be included in the hate crime legislation in order to capture (and prosecute, where applicable) instances of misogyny (both on and offline).⁷

QUESTION 14

We disagree with this suggestion. Sex and gender are not interchangeable concepts, and the new legal provisions should reflect that.⁸

QUESTION 24

Yes.

⁴ For instance, see: Olga Jurasz, ‘The Istanbul Convention: a new chapter in preventing and combating violence against women’ (2015) 89(9) *Australian Law Journal* 619-627.

⁵ Even within the proposals in Scotland, there is no suggestion that misogyny is a hate crime. See: Kim Barker and Olga Jurasz, ‘Misogynistic Harassment: Advancing Scots Criminal Law?’ Public Policy Blog (27 January 2020) <https://policyblog.stir.ac.uk/2020/01/27/misogynistic-harassment-advancing-scots-criminal-law/>.

⁶ For a critique of proposals suggesting adding misogyny as a protected characteristic, see: Kim Barker & Olga Jurasz, ‘Why misogyny and hate crime reforms need more than slick campaigns’, *The Conversation*, 26 March 2020, <https://theconversation.com/why-misogyny-and-hate-crime-reforms-need-more-than-slick-campaigns-134265>

⁷ Kim Barker & Olga Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (2019), Chapter 5.

⁸ For further details, please see: Kim Barker and Olga Jurasz, ‘Response to One Scotland Consultation on Amending Scottish Hate Crime Legislation’ (February 2019); <http://oro.open.ac.uk/66207/>; Kim Barker and Olga Jurasz, ‘Submission of Evidence to Scottish Government Independent Review of Hate Crime Legislation (Bracadale Review) (November 2017) <http://oro.open.ac.uk/52612/>; Kim Barker and Olga Jurasz, ‘Scottish Parliament Justice Committee Hate Crime and Public Order (Scotland) Bill Call for Views – Response (June 2020) <http://oro.open.ac.uk/71006/>; Kim Barker and Olga Jurasz, ‘Northern Ireland Independent Review of Hate Crime Consultation Response’ (2020) <http://oro.open.ac.uk/71520/>; Kim Barker and Olga Jurasz, ‘Misogynistic Harassment: Advancing Scots Criminal Law?’ Public Policy Blog (27 January 2020) <https://policyblog.stir.ac.uk/2020/01/27/misogynistic-harassment-advancing-scots-criminal-law/>.

QUESTION 25

Yes. We are of the view that there should be no hierarchy within the protected characteristics. The aggravated offences ought to be applied equally to *all* protected characteristics.⁹ The categories of protected characteristics operate in recognition of the fact that there are particular vulnerabilities attached to groups of people with certain features. Whilst there are historical and social reasons for the existing hierarchy, the only way to equalise this is to ensure that the aggravated offences are extended to cover all protected characteristics.

QUESTION 27

We agree that communications offences with increased maximum penalties should be introduced, especially for potential acts of – for example – online misogynistic abuse,¹⁰ or online violence against women,¹¹ including online violence against women in politics.¹²

However, we do not agree that these communications offences should be introduced within reformed hate crime laws. The communications offences should have higher tariffs and should operate in conjunction with hate crime offences – from separate legislation – where there is an underlying hate-based motivation that has been disseminated through a communications offence. The communications offences should operate as underlying offences to which hate crime provisions could apply.

In addressing gender-based hatred in online situations:

“two-stage law reform is needed in order to adequately address, punish, and combat misogynistic online abuse, first by adding gender as a protected characteristic under hate crime legislation in England & Wales and second, by creating new offences committed on or using social media.”¹³

⁹ Kim Barker & Olga Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (2019) 98-104.

¹⁰ Kim Barker and Olga Jurasz, ‘Online Misogyny as a Hate Crime: #TimesUp’ in I Zempi and J Smith (eds), *Misogyny as Hate Crime* (forthcoming, Routledge 2021). Pre-proof chapter available from authors on request; Kim Barker and Olga Jurasz, ‘Why misogyny and hate crime reforms need more than slick campaigns’, *The Conversation* (26 March 2020) <https://theconversation.com/why-misogyny-and-hate-crime-reforms-need-more-than-slick-campaigns-134265>.

Kim Barker and Olga Jurasz, ‘Submission of Evidence to Scottish Government Independent Review of Hate Crime Legislation (Bracadale Review)’ (2017) <http://oro.open.ac.uk/52612/>. See also: Kim Barker and Olga Jurasz, ‘Reform of the Communications Offences – Consultation Response to the Law Commission’ (December 2020).

¹¹ Kim Barker and Olga Jurasz, ‘Submission of Evidence on Online Violence Against Women to the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, Dr Dubravka Šimonović’ (2017) <http://oro.open.ac.uk/52611/>.

¹² Kim Barker and Olga Jurasz, ‘Violence Against Women in Politics (#VAWP) – The Antithesis of (Online) Equality’, Scottish Policy and Research Exchange (10 May 2020) <https://spre.scot/violence-against-women-in-politics-online/>; Kim Barker and Olga Jurasz, ‘Gendered Misinformation & Online Violence Against Women in Politics: Capturing legal responsibility?’ Co-Inform (18 March 2020) <https://coinform.eu/gendered-misinformation-online-violence-against-women-in-politics-capturing-legal-responsibility/>.

¹³ Kim Barker and Olga Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (Routledge, 2019), 125.

QUESTION 29

We agree that aggravated versions of offences against the person in s16 OAPA 1861 should not be introduced into reformed hate crime laws.

However, we disagree with not introducing an aggravated version of e.g. s16 threats to kill. There should be an aggravated version of this offence introduced in legislation falling outside of hate crime reform which deals with threats to kill where those threats are motivated by hatred, especially where those threats are motivated by a hatred based on gender, and those threats to kill are communicated via social media. As we note elsewhere,¹⁴ where there are elements of hatred, and serious threats to kill are communicated via social media, these are rarely dealt with under s16 OAPA. We therefore disagree with not implementing an aggravated version of this provision.

QUESTION 36

Yes. We agree that the enhanced sentencing model remains a component.

QUESTION 40

Yes. We agree that the stirring up offences should be expanded to all written material. We suggest that this extension should include social media so as to capture the full range of potential behaviour here.¹⁵ It is particularly important to capture threats and stirring up offences related to the making of threats.¹⁶

QUESTION 43

We do not find agreement with the suggestion that online platforms should be held criminally liable for dissemination unlawful material that they host.¹⁷ The proposition is misleading because it refers to both dissemination and hosting, but these are not interchangeable. We have three specific concerns in respect of Question 43:

¹⁴ Kim Barker & Olga Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (Routledge, 2019), 48.

¹⁵ Kim Barker & Olga Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (Routledge, 2019).

¹⁶ Kim Barker and Olga Jurasz, 'Online Harms White Paper Consultation Response (June 2019) <http://oro.open.ac.uk/69840/>. See also: Kim Barker and Olga Jurasz, 'Reform of the Communications Offences – Consultation Response to the Law Commission' (December 2020).

¹⁷ Kim Barker & Olga Jurasz, *Online Misogyny as a Hate Crime: A Challenge for Legal Regulation?* (Routledge, 2019); Kim Barker and Olga Jurasz, 'Online Harms White Paper Consultation Response (June 2019) <http://oro.open.ac.uk/69840/>. See also: Kim Barker and Olga Jurasz, 'Reform of the Communications Offences – Consultation Response to the Law Commission' (December 2020).

- a) What is meant by unlawful here? There is a need to distinguish between criminally harmful and therefore illegal, and merely harmful (and therefore not illegal) content.¹⁸ How is unlawful being conceived in respect of online platforms here? It is unclear what is being suggested as an expectation of unlawful, but also of the responsibilities of the online platforms. If the suggestion is that online platforms should have specific responsibilities in respect of hateful content, that needs unpacking and much greater consideration.
- b) The current liability shields in operation in respect of hosting content operate to ensure that platforms do not become de-facto content manipulators.¹⁹ Platforms operate (currently) as mere conduits until they have actual knowledge. This should not change on an ad-hoc basis for hate crime reform – to implement a change here for the purposes of hate crime provisions will cause problems, especially in respect of enforcement.
- c) It is unclear how this proposition fits into the Communications Offences Law Reform Project, and to the wider Online Harms proposals.

It is our position that while there is a need for ‘joined-up’ thinking between hate crime provisions and Communications Offences, we disagree with the proposition here. It needs further exploration and consideration, not least in respect of its potential workability.

QUESTION 49

Yes. We agree that the stirring up offences be extended to cover sex or gender. We reiterate that gender is the preferable option, rather than ‘sex or gender’.²⁰

QUESTION 62

No. We disagree. We have serious reservations about the role and scope of this proposed role given the limitations of other Commissioners e.g. Commissioner for Victims. If the Hate Crime Commissioner is introduced on a similar basis, and without powers, we see only very limited potential value in such a post being created.

¹⁸ Kim Barker and Olga Jurasz, Submission of Evidence to Australian Government Online Safety Charter Consultation (April 2019), 5 <http://oro.open.ac.uk/61470/>; Kim Barker and Olga Jurasz, ‘Online Harms White Paper Consultation Response (June 2019) <http://oro.open.ac.uk/69840/>.

¹⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (‘Directive on Electronic Commerce’) [2000] OJ L178/1, Art 12-15.

²⁰ Kim Barker and Olga Jurasz, ‘Response to One Scotland Consultation on Amending Scottish Hate Crime Legislation’ (February 2019); <http://oro.open.ac.uk/66207/>; Kim Barker and Olga Jurasz, ‘Submission of Evidence to Scottish Government Independent Review of Hate Crime Legislation (Bracadale Review) (November 2017) <http://oro.open.ac.uk/52612/>; Kim Barker and Olga Jurasz, ‘Scottish Parliament Justice Committee Hate Crime and Public Order (Scotland) Bill Call for Views – Response (June 2020) <http://oro.open.ac.uk/71006/>; Kim Barker and Olga Jurasz, ‘Northern Ireland Independent Review of Hate Crime Consultation Response’ (2020) <http://oro.open.ac.uk/71520/>; Kim Barker and Olga Jurasz, ‘Misogynistic Harassment: Advancing Scots Criminal Law?’ Public Policy Blog (27 January 2020) <https://policyblog.stir.ac.uk/2020/01/27/misogynistic-harassment-advancing-scots-criminal-law/>.