

WHRC Submission on the Commission Proposal to include hate speech in EU crimes

April 20th 2021

The Women's Human Rights Campaign is an international organisation which exists to promote the sex-based rights of women as set out in the Convention on the Elimination of all Forms of Discrimination against Women adopted by the United Nations General Assembly on 18 December 1979 (CEDAW), further developed in the CEDAW Committee General Recommendations, and adopted, *inter alia*, in the United Nations Declaration on the Elimination of Violence against Women 1993 (UNDEVW).

We are concerned that any action taken by the EU Commission to expand the list of EU crimes to include hate speech and hate crime on the Roadmap's identified grounds of sex, sexual orientation, disability and age should clearly define sex and sexual orientation, as distinct from the amorphous concept of 'gender identity' with which both sex and sexual orientation are sometimes conflated. We are also concerned that the Commission's Roadmap does not define what it means by hate crime and hate speech.

Sex is defined by the UN Women's Gender Equality Glossary as "the physical and biological characteristics that distinguish males from females." The Glossary defines gender as "the roles, behaviours, activities, and attributes that a given society at a given time considers appropriate for men and women... These attributes, opportunities and relationships are socially constructed and are learned through socialization processes."

Relatively recent changes replacing references to the category of sex, which is biological, with the language of 'gender', which refers to stereotyped sex roles, in United Nations and European Commission documents has led to confusion which ultimately risks undermining the protection of women's rights. Women's rights, which have been achieved on the basis of sex, are now being undermined by the incorporation into international documents of concepts such as 'gender identity' and 'Sexual Orientations and Gender Identities (SOGIES)'.

While the phrase 'SOGIES' is now well established, it is important to acknowledge its origins in the Yogyakarta Principles. Before these principles were formulated the only concept known to international law was sexual orientation. From the *Toonen* decision of the UN Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights, to the aborted Brazil resolution of the Human Rights Council in 2003, the language used was 'sexual orientation.' The concept of 'gender identity' found its way into the Yogyakarta Principles due to the sustained advocacy of LGBT advocates from the global North. One of the signatories to the Principles, Professor Robert Wintemute, has recently said of the drafting that "Women's rights were not raised".

Principle 31 (A) of The Yogyakarta Principles plus 10 calls on States to "...end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality." In other words, the ultimate aim of the Yogyakarta Principles is the complete elimination of all sex and gender markers from the law. In the meantime, those who lobby for the Principles advocate for the inclusion of 'gender identity' within legal and social definitions of sex. This would have significant negative implications

for women's rights to political participation on the basis of sex, for the development of measures aimed at the elimination of violence against women (which depend on the ability to collect sex-disaggregated data), for women's rights to freedom of peaceful assembly and association in single sex groups, and potentially for the rights to freedom of opinion and freedom of expression. It also has negative implications for lesbians and gay men, whose sexual orientation is based on same sex attraction and not on 'gender identity.'

Our concerns about freedom of opinion and freedom of expression arise in part from the lack of a clear definition of 'hate speech' in the Roadmap.

We note that Article 1 (2) of the *Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*, which the Roadmap appears to view as a model, states that:

"For the purpose of paragraph 1, Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or **insulting**. (Emphasis added).

We are very concerned that speech which may be perceived as 'insulting' may potentially be included in the expanded list of EU crimes, due to the potential chilling effect on freedom of expression of the use of such subjective and amorphous criteria for establishing a criminal offence. In the UK, people who have expressed opinions which are critical of the concept of 'gender identity' on social media are frequently reported to the police for alleged hate speech. The police investigation of such a report was the subject of a judicial review in the case of *R (Miller) v College of Policing and Another* [2020] EWHC 225 (Admin), in which the judge stated,

"The effect of the police turning up at his place of work because of his political opinions must not be underestimated. To do so would be to undervalue a cardinal democratic freedom...Warning the Claimant that in unspecified circumstances he might find himself being prosecuted for exercising his right to freedom of expression on Twitter had the capacity to impede and deter him from expressing himself on transgender issues. In other words, the police's actions, taken as a whole, had a chilling effect on his right to freedom of expression." (paras. 259-261)

Jodie Ginsberg, who is the CEO of the UK organisation Index on Censorship, which monitors freedom of expression, made a statement in evidence in this case in which she stated,

"The confusion of the public (and police) around what is, and what is not, illegal speech may be responsible for artificially inflating statistics on transgender hate crime. Police actions against those espousing lawful, gender critical views – including the recording of such views where reported as 'hate incidents' – create a hostile environment in which gender critical views are silenced. This is at a time when the country is debating the limits and meaning of 'gender' as a legal category. It has been reported that the hostile environment in which this debate is being conducted is preventing even members of parliament from expressing their opinions openly..." {para. 249)

The concept of 'gender identity', and the degree to which it should be recognised in law, is currently the subject of public debate in many EU member states. We are very concerned that any expanded list of crimes to include hate speech should not prevent or have a chilling effect on legitimate public debate in this area.

The EU Commission aims to expand the list of EU crimes to include hate speech and hate crime.

Our freedom of expression may be at risk through the inclusion of “gender identity”.

Everyone’s freedom of expression may be at risk through the inclusion of “gender identity”.

Women who are concerned about gender identity ideology only became aware of this initiative very recently.

“Its objective is to have hate speech and hate crime identified as ‘other areas of crime’. Both are particularly serious crimes, which can spread across borders. Developments in crime also justify their inclusion on this list.”

It adds however that

“It does not prejudge the final decision of the Commission on whether this initiative will be pursued or on its final content”

This appears to be an attempt to restrict the right to freedom of speech/expression. It will damage associated rights such as freedom of association, assembly, belief and religion.

Further response:

Point one - Lack of awareness of this initiative

Art 19 of the UN Universal Declaration on Human Rights says that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Eight weeks is far too short as a consultation period for the public to make their views known on such a fundamental and serious encroachment on our freedom of expression. Only eight (8) people or organisations had provided feedback up to a week ago which confirms our belief that this consultation has not been widely disseminated.

- We were not made aware of this consultation or proposal to criminalise hate speech.
- What other forms of consultation have been held?
- We strongly object to this extension of power over speech and serious inroads into freedom of expression without adequate demonstration of the need for same in particular with regard to “gender identity”.

Point two -This roadmap confuses existing terms such as “sex” and “gender” and “gender identity”

- How can stakeholders such as citizens of the EU be consulted on this initiative if there is no adequate definition for “gender identity”?
- The Supreme Court in the USA pronounced on ‘gender identity’ in a case recently, and the Court was completely unable to give a definition of what it meant. This will lead to chaos in the US, we do not want this here in Europe too.
- What is meant by “sex characteristics”? Can sex characteristics be explained without reference to sex? Does it mean sex-stereotyped clothing or behaviours, which under the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) or the Istanbul Convention States Parties are committed to removing?

- How can States which are party to these Conventions make law on the basis of “sex characteristics”?

Point three - Women are adult human females and are oppressed on the basis of our sex

'This initiative will complement the work on a legislative proposal on preventing and combating gender-based violence against women and domestic violence that the Commission plans for end 2021, as announced in Commission Work Programme 2021, by creating an additional legal basis for addressing those specific forms of serious gender-based violence that can also be defined as hate speech or hate crime on grounds of gender.'

- Why is the term ‘gender’ used here? The appropriate term is sex or women and men in the UN CEDAW.
- Why this switch from the wording in these legally binding international texts in parts of this document?
- Consultation papers need to be understandable to those who read them.
- The appropriate term is “sex”, or women and men, in the UN CEDAW, which all EU countries are bound by as a signatory, and in the Istanbul Convention which the EU is committed to being party to.
- It is crucial that laws, particularly criminal laws, make sense to the general public, who are supposed to comply with them.

Point four - Freedom of Expression

Article 10 of the European Convention on Human Rights explicitly refers to three components:

1. The freedom to hold opinions, which is a prior condition to the other freedoms guaranteed by Article 10 and enjoys an absolute protection in the sense that the possible restrictions set forth in Article 10 (2) are inapplicable to it. In substance it means that the State must not try to indoctrinate its citizens and that the State may not distinguish between those holding specific opinions and others.
2. The freedom to receive information and ideas which includes the right to gather information and to seek information through all possible lawful sources. Even if Art. 10 does not guarantee a general right of access to information, the European Court of Human Rights has consistently recognised that the public has a right to receive information of general interest and that particularly strong reasons must be provided for any measure limiting access to information which the public may receive.
3. Freedom of Expression includes the freedom to impart information and ideas, which is of the greatest importance for the political life and the democratic structure of a country.

These principles must be fully set out and incorporated into any future EU discussions internally and externally on this topic.

Point five - Consultation with citizens and stakeholders

“The specialised data and information that can enable an assessment of whether hate speech and hate crime meet the criteria of Article 83(1) TFEU can only be provided by public

authorities and key organisations working in this area, and not by individuals. Moreover, in the case of hate crime/speech, it is relevant to measure their impact on the groups that experience such conducts, and such impact is measured in dedicated surveys such as those carried out by the Fundamental Rights Agency (FRA). These reasons warrant conducting targeted consultations of stakeholders – rather than an open public consultation.”

An extension of EU crimes to include "gender identity" in hate speech law risks adversely affecting women's rights to freedom of expression.

How are 'key organisations' working in this field defined and identified?

How are 'stakeholders' for this hugely important set of proposals defined and identified?

This needs to be answered, bearing in mind the very limited notification of this consultation.

In particular, how are women, 52% of the EU population going to be consulted adequately? Will adequate funding be provided to representative groups to enable women to be consulted fully, and on the basis of full understanding of the law and implications of such enormous changes?

The WHRC has issued a Declaration on Women's Sex-Based Rights:

The shortest summary

We re-affirm the sex-based rights of women and girls.

- We reaffirm motherhood as an exclusively female status.
- We reaffirm women's and girls' rights to physical and reproductive integrity and oppose their exploitation through surrogacy and related practices.
- We reaffirm women's rights to freedom of opinion and expression, peaceful assembly and association, and political participation.
- We reaffirm women's rights to fair play in sports.
- We reaffirm the need to end violence against women and girls, and to protect rights of children.

We oppose all forms of discrimination against women and girls that result from replacing "sex" with "gender identity" in law, policy, and social practice.

The full text is available here:

<https://www.womensdeclaration.com/en/declaration-womens-sex-based-rights-full-text/>

It has been signed by people from 132 Countries in collaboration with 335 Organizations

WHRC has organisations in the following European countries:

- Croatia
- Denmark
- France
- Germany
- Iceland
- Ireland
- Italy
- Malta
- The Netherlands
- Norway
- Portugal
- Serbia
- Slovakia
- Spain
- Sweden
- Switzerland
- Turkey
- Ukraine
- United Kingdom