

# The ‘ordinary meaning’ of words: a reassurance that does not reassure

## MBM Hate Crime Briefing 7

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### 1. Background

Discussing the Hate Crime and Public Order (Scotland) Bill at the Justice Committee on [24 November](#), the Cabinet Secretary Humza Yousaf argued that he did not think a person would be committing a criminal offence in stating that sex is immutable (or arguing that ‘woman’ is a description related to sex rather than identity), as long as they do so in a way which is non-threatening, non-abusive and not intended to stir up hate. This briefing argues that such reassurance is not reassuring.

The issue here is not threatening or abusive behaviour directed at individuals: this would already be caught under s38 of the Criminal Justice and Licensing (Scotland) Act 2010 Act, and potentially subject to the aggravators in Part 1 of the Bill. The issue is quite specifically in what circumstances making *general* statements would be criminalised, or open to allegations of criminality which could not simply be dismissed out of hand.

### 2. The ‘ordinary’ meaning of words

As well as there being a profound conflict over what should be treated as “hateful” in this context, it is unclear what it would take for a general statement in this area to be deemed abusive. The Scottish Government has said that it wishes to rely on the “ordinary meaning” of abusive and that the term will be understood by the courts (and by extension others) based on its use in other existing legislation. However, it is not immediately obvious how clearly existing precedent on the meaning of that word developed in other legal contexts would apply here.

The Cabinet Secretary suggested that campaigning would have to be “aggressive” to qualify. “Aggressive” is itself a term open to subjective interpretation. Further, the [case successfully prosecuted in England](#) cited during evidence hearings (which related to stirring up hatred based on sexual orientation) strongly suggests that a statement does not need to be made in way which is itself aggressive. Conduct was reportedly deemed to be “threatening and abusive”, the test under English legislation, purely on the *content* of a leaflet distributed door to door.

The government has promised to amend the bill to require intent. However, once the contents of a statement are deemed to be hateful, it remains unclear whether it is enough of a defence to demonstrate that a person themselves rejects that the statement is hateful, and therefore denies that they intended to stir up hate. That is, in the matter of intent to stir up hatred, does it matter that *you* do not believe the view *you agree you intentionally promoted* was hateful, if others can convince the relevant authorities that it was?

## Hypothetical example

To take a hypothetical example: a local women's rights campaign group which believes that women should be able to be certain that they will only encounter female people in single-sex spaces, or doing certain jobs, puts leaflets through the doors of all the houses in several streets. They do not target specific individuals. Their explicit concern is the right of women in vulnerable situations to set boundaries in relation to any male people, regardless of how they identify. They are worried about policies being adopted by the local council. They sincerely believe that that their position is grounded in fact and not motivated by hate or any desire to encourage hate.

Their leaflet says:

"Women are adult human beings of the female sex. Men are adult human beings of the male sex.

Human beings cannot change sex.

So men cannot become women, even if they change their name, how they dress and perhaps even their bodies.

Women should be able to know that single sex spaces will not include men, even ones who want to be treated as women. This includes places like women-only changing rooms, hospital wards and dormitories, and rape crisis centres, shelters and prisons.

Women should be able to know that jobs the law says can be women-only will not be done by men, even ones who want to be treated as women. This includes jobs like intimate care for elderly women and body searches for women who have been arrested, and rape counselling.

Women who under the law are allowed to offer specialist services only to women should not be forced to provide these to men, even ones who want to be treated as women. This includes things like Brazilian waxing.

Stand up for single sex services. What women want matters. Sex matters."

Statements like this are regularly described as transphobic and specifically hateful, by organisations and individuals with standing. It is not obvious why this content would not also be regarded as abusive by those who find these statements hateful. Such organisations and individuals might add that some of those receiving the leaflet might be transgender and some (even if not all) such people might feel abused by the content.

However, it is also a plain English explanation of the issues, from the perspective of people who want to preserve the use of man/woman as nouns clearly defined by sex, and who think sex is a fundamental, unchangeable characteristic of human beings that matters in some circumstances. It does not advocate any form of violence, uses no terms which are

derogatory in themselves, and does not make negative claims about the nature of people with transgender identities.

Many major public and private organisations, including some which might be involved in making decisions about legal proceedings, have adopted internal policies for staff in recent years which would make it a disciplinary matter to make these statements, in these terms.

At least one UK political party would expel members for making statements in these terms. In England in 2018, a judge [denied a woman compensation](#) after being assaulted because he felt her use of her assailant's preferred pronouns in court had been too halting and grudging. Also in England in 2019 an [employment tribunal](#) found a woman who had lost her job for asserting that humans cannot change sex held beliefs which are 'not worthy of respect in democratic society' (she has been granted leave to appeal). In both these cases, the decisions of the court appeared to have been influenced by official guidance and training on transgender issues provided to the judiciary.

At the moment it is not obvious on what basis people planning to put round a leaflet like the one above could be confident that it would not be deemed at least prima facie abusive by the authorities, and that promoting these opinions would not be held to be intentionally stirring up hate, opening the way to possible investigation, and even prosecution, under Part 2.

**Conflict over the “ordinary meaning” of words is right at the heart of this. The idea of people being able to rely on “abusive” or “hate” having an “obvious” or “ordinary” meaning provides little comfort in this particular context.**

Notwithstanding some of the evidence presented to the committee, anyone following this debate at all closely will be aware that there are individuals and groups who would welcome Part 2 having the effect of deterring a campaign group from putting round leaflets like these, and potential prosecutions for those who do. The question is whether this is an effect MSPs want to achieve?