

Supplementary evidence on the Hate Crime and Public Order (Scotland) Bill: the meaning of transphobia

MBM Hate Crime Briefing 8

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Background

On 29 November 2020 we submitted supplementary evidence to the Justice Committee in the light of (a) an open letter currently circulating which has been signed by a number of parliamentarians and others (b) the Cabinet Secretary's comments at the Justice Committee hearing on 24 November and (c) responses to stickers appearing in Edinburgh this week. The evidence focuses on the meaning of 'transphobia' and shows how broadly this is interpreted. This note reproduces our submission

a) Open letter asking political parties to adopt the Transactual definition of transphobia

We would like to supplement our evidence on the deeply contested nature of "hate" in relation to transgender identity by drawing to the Committee's attention to a multi-signatory [open letter](#) that is currently in circulation addressed to political parties in Scotland. At the time of writing, the signatories include two MSPs (Alex Cole-Hamilton MSP and Patrick Harvie MSP), as well as a number of prominent activists (Christine Burns MBE is the lead signatory), councillors, journalists, academics and other public figures.

Leaving aside any questions about the general content of this letter, it is particularly relevant to the Committee's current work because it argues that all Scottish political parties must adopt a specific [definition of transphobia](#) as published by the campaign group Transactual.

Under this definition, transphobia includes in effect any departure from expressing or following the belief that "trans women are women, trans men are men and that non-binary people's identities are valid". For example, this embraces "claiming there is a 'conflict' between trans people's human rights and those of any other group". We would ask the Committee to read the document in full, to understand the breadth of beliefs and behaviours which are held by those signing the current open letter to be, specifically, transphobic (which we take to be synonymous with hateful). The letter also defines "abuse" specifically to include choices in relation to pronouns, and what meaning is attached to the words "man" and "woman".

We would be grateful if the Committee would take this development into account, as it considers what it would mean to legislate for stirring up hate in relation to transgender identity in the current climate, and to note the seniority and potential influence of some of those subscribing to the letter.

b) Justice Secretary's comments

On 24 November, the Cabinet Secretary for Justice Humza Yousaf was asked whether the Bill could be used to criminalise the expression of the opinion that biological sex is

immutable. Although the Cabinet Secretary's immediate response was that it could not, he added that "If it is proved beyond reasonable doubt that the behaviour that accompanies that expression was intended to stir up hatred and was also threatening or abusive, a person may well face a criminal sanction". He also said that this "would follow an objective analysis by the courts" and "if someone is campaigning in a non-threatening and non-abusive manner, without the intent to stir up hatred, I do not see how that would be captured as an offence under the bill."

The government therefore appears to accept that under the Bill as drafted saying that sex is an immutable human characteristic or, using an example the Cabinet Secretary gave, "saying that a trans woman is not a woman" could legitimately be construed as stirring up hate, and that the only protection against that would be the courts' assessment of intent and whether an action was abusive or threatening.

This appears to confirm that if the Bill is passed as drafted anyone who wishes to argue, for example, that access to any services, jobs and spaces which are provided separately for women should be regulated by sex rather than identity would now have to consider the risk that expressing their views might place them in breach of the law in ways that someone arguing the opposite case would not.

The Cabinet Secretary also appeared to suggest that the assessment of being abusive would depend on the way in which a campaign was conducted. That reading is not supported however by the limited directly relevant case law in other contexts where stirring up hate has been prosecuted. In [one case](#), behaviour was deemed to be threatening and abusive, based purely the *content* of a leaflet.

Given the current climate, we do not believe it is reasonable to ask those who advocate for women having certain rights based on their sex to have to anticipate how the police, prosecutors and courts will interpret what is hateful or abusive in this context and to risk, at minimum, being subject to an investigation into their intent.

We would invite the committee to consider as 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, who are worried about policies being adopted by the local council. They distribute a leaflet to local households. 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 sincerely believe that that their position is grounded in fact and not motivated by hate or any desire to encourage hate, and they want to communicate the arguments in plain language.

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."

Under the Bill, we are not clear on what basis such a group could be confident that, if their leaflet were reported to the police as intended to stir up hate, the allegation would be dismissed out of hand, with no further enquiries, in a broader climate where we believe investigating authorities would be under pressure to regard the views in the leaflet as expressions of transphobia/hate and abusive, and not to assume absence of hateful intent. Unless and until case law establishes otherwise, it is also unclear on what basis they could be confident that an investigation would not lead to charges being brought and a case being pursued. This week's open letter is an example of that dynamic in relation to political parties.

c) Stickers on the University of Edinburgh campus

The reporting to the police of stickers at the University of Edinburgh was touched on at the 17 November evidence session. In response to further stickers appearing in the past week, the Trans and Non-Binary Liberation Officer of the [Edinburgh University Student Union](#) associated the stickers with 'hate campaigns' and encouraged people to report the stickers to the police. Commenting in the Edinburgh University student newspaper, the EUSA officer stated: "*It's really disappointing and frustrating. However it is not surprising, with the recent goings-on in Parliament and continued hate campaigns in the press. Anyone who sees stickers like this should send photos to campus security, so they can be included in ongoing hate crime statistics that are reported to the police.*" The student newspaper report notes that the stickers say: "Seahorses are horses Hotdogs are dogs There is NO DEBATE #waronwomen" and "I [heart] JKR". As with the previous example, we would ask the Committee to note the specific use of hate in describing these statements, and the encouragement of their reporting to the police on that basis.