

Hate Crime and Public Order Bill: Stage 2 Briefing

The need for tailored freedom of expression protection for transgender identity

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This briefing sets out why we believe the risks to freedom of expression involved in legislating for a new offence of stirring up hatred in relation to transgender identity will be heightened by the absence of tailored provision clarifying the intended limits of the law, on the model already used in the Public Order Act 1986 for religion and sexual orientation.

In its Stage 1 report the Committee noted:

“The Bill should not criminalise speech that others may find offensive.... even if such behaviour or speech is insulting, it should not meet the criminal threshold unless it is also threatening or abusive.... Further ...the new offence of stirring-up hatred as regards transgender identity will be committed only if the Crown can prove that the accused acted with the intent to stir up hatred.... Parliament will have to judge whether, in its view, these safeguards are sufficient to ensure that public and vigorous debate on matters such as gender recognition and women’s rights can take place untouched by this Bill.”

The witness for the Scottish Trans Alliance told the Committee:

“It is really important that we focus the conversation on the fact that we are talking about a piece of legislation that talks about the tiny subset of behaviour that elevates to being something criminal.... There has been robust political debate for years and years about the roles that different groups play in society and we would never, ever support any legislation that would put any damper on those discussions ... I have been subject to a fair bit of debate that makes me extremely uncomfortable and which is often very disrespectful of my identity, yet I would not encourage that behaviour to be made criminal.”

The Committee heard concerns that despite these aspirations, in practice the Bill risks having unintended consequences in this area, because of the wide definition now often given to “hate”. The equivalent legislation for England and Wales anticipated that the intended effect of the law was most likely to become controversial *before* cases enter the criminal justice system and formally subjected to the tests applying in law. It included tailored freedom of expression statements for each characteristic, to reduce the risk of unintended consequences. We have argued for the same model here.

This briefing shows why this tailored approach is necessary and why we ask the Committee to support Amendment 82B in the name of Liam Kerr.

We set out forty real-world examples that demonstrate how low the threshold for behaviour or communications considered to be abusive already is. This includes the freedom of expression amendments respectively lodged by Mr Yousaf (Amendment 82) and Mr Kerr, the first of which has already been described as a '[transphobes charter](#)'.

The examples demonstrate how it can be deemed hateful or transphobic to advocate for female-only spaces and services, or to collect data on biological sex. They show that women across the UK have already faced serious consequences for asserting that biological sex matters: they have lost their jobs, faced disciplinary action, been interviewed by the police, and had details recorded on police databases.

While the Justice Secretary has sought to assure MSPs that the Hate Crime Bill would not be used to criminalise the belief that biological sex is immutable, we think the chilling effects of the Bill will be felt at a much earlier stage. We concur with the [Scottish Police Federation](#) that 'people are already frightened to enter the trans debate', and anticipate that the Bill will reinforce the self-censorship and institutional caution that is already evident in this area.

Based on the examples below, we also expect reporting to the police to increase, and that institutions, police, and prosecutors will come under pressure to block, investigate, or prosecute statements advocating for sex-based rights.

It is clear from our examples that a generic freedom of expression (such as the amendment proposed by Liam McArthur MSP (Amendment 103) and supported by the [Equality Network](#)) would not mitigate these risks. Rather we believe that the Bill requires the type of detail that is laid out in Mr Kerr's amendment, and specifically tailored to the exceptional climate around current debates about sex and gender identity.

Defining transphobia

1. The Stonewall [definition](#) of transphobia includes "**denying [someone's] gender identity or refusing to accept it**". This is often read as requiring people to adopt as their own belief another person's declaration that they are a woman or a man (or male or female), or neither, irrespective of their physical sex.
2. In [Campbell vs Dugdale](#), Stonewall Scotland Director Colin Macfarlane stated that misgendering a person, in this instance **referring to a transgender woman as "he", would be regarded as transphobic** ([para. 19](#)).
3. Campaign group TransActual's [definition of transphobia](#) includes "**Claiming there is a "conflict" between trans people's human rights and those of any other group**" ([p.12](#)).
4. A [definition of transphobia](#) published by the University of Edinburgh includes "**disbelief of trans and gender non-conforming people**" within its scope, although disbelief in this context is not explained. It states further:

Some people use the phrase 'reasonable concerns' as a way to limit the rights of and marginalise trans and non-binary people. This is most common in the arguments about the use of female toilets and changing areas by trans women. While concerns for women's safety are valid, there is no evidence that trans women pose any more danger than other women. This type of 'reasonable concern' is used frequently by trans-hostile groups, such as ultra-right wing campaigners and certain feminists. Another 'reasonable concern' is alarm at the increase in gender identity

services for children, despite evidence that early support for individuals reduces psychological problems and suicide in later life. There is considerable misinformation about what happens in gender identity clinics, deliberately circulated to create fear and moral panic. These tactics mirror those used by campaigners against same-sex marriage who cited concerns about how the reform would pose a threat to families. Having said that, it is reasonable, in the face of so much misinformation and hostility, for people to have concerns and to seek information and reassurance. This is different to the use of 'reasonable concerns' by transphobic campaigners where accurate information is rejected or distorted in a similar way to the strategy of Islamophobes and anti-Semites.

Criminal Justice System contact

5. In 2019, a transwoman (Miranda Yardley) was [prosecuted](#) in England by the Crown Prosecution Service for harassment. Yardley maintains that the complaint was driven by opposition to Yardley's view that a person cannot alter their sex, regardless of how they identify or what physical interventions they undertake. The case was dismissed by the judge on the first day of the hearing reportedly on the basis that there was no case to answer. Yardley has described the year proceeding the hearing as "hell".
6. Devon and Cornwall Police [confirmed](#) that they spoke to a woman about "**potentially hateful**" stickers which stated "Modern Day Witch Hunts I Refuse to Bow Down" and "Don't flush our rights down the toilet. Protect single sex spaces."
7. In October 2019 the [Telegraph](#) reported that Thames Valley Police had described stickers in Oxford city centre that stated "Woman: noun. Adult human female" and "Women don't have penises" as serious, and put out an appeal for witnesses.
8. Barrister Sarah Philimore was placed on a [Wiltshire police database](#) for posting tweets that the police recorded as 'non-crime hate incidents'. Ms Philimore was not informed of this, and given no opportunity to challenge it. Wiltshire Police later agreed that no offence was committed, but have refused to delete the records.

Scottish and UK Parliament

9. In February 2018 a mailshot on GRA reform by the Equality Network/Scottish Trans Alliance stated:

*'Over the last few weeks and months we have seen anti-trans articles in the media ranging from frustratingly ignorant to outrageously hostile. **Anti-trans forces within and outside Scotland are mobilising intensively to try to block progress**'. The mailshot also referred to a 'horrible sustained campaign of misinformation and incitement to moral panic' ([document 31](#)).*
10. Female MSPs Joan McAlpine, Jenny Marra, Johann Lamont and Elaine Smith and MP Joanna Cherry have been subject to accusations of transphobia and hatred for supporting discussion of the impact on women of plans to reform the Gender Recognition Act.
11. In 2019 a [full-page advert](#) placed in The Herald called on Joan McAlpine and Jenny Marra to resign for "**emotional abusive gaslighting**" against the trans community. The advert was placed in response to a Scottish Parliament event organised by the two MSPs to discuss why women need rights which recognise them as a group defined by having a shared sex.

12. Reactions to the event from Scottish Government funded organisations, as reported on the [Common Weal website](#), include the following:

Engender: *“While Engender will always support the principle of women meeting to discuss their views on women’s rights, **this particular event seems to be solely focused on the stigmatisation of trans people.**”*

Scottish Women’s Aid: *“We are immensely saddened that the Scottish Parliament, an institution we value and care so much about, would be used by those seeking to stigmatise and discriminate against trans women, especially on Transgender Day of Remembrance. **We are worried that some of the debate around trans inclusion has blurred the line between free speech and hate speech.**”*

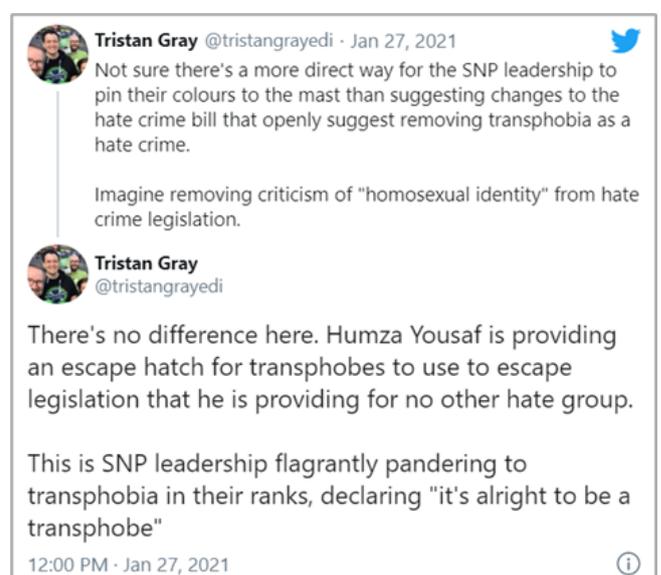
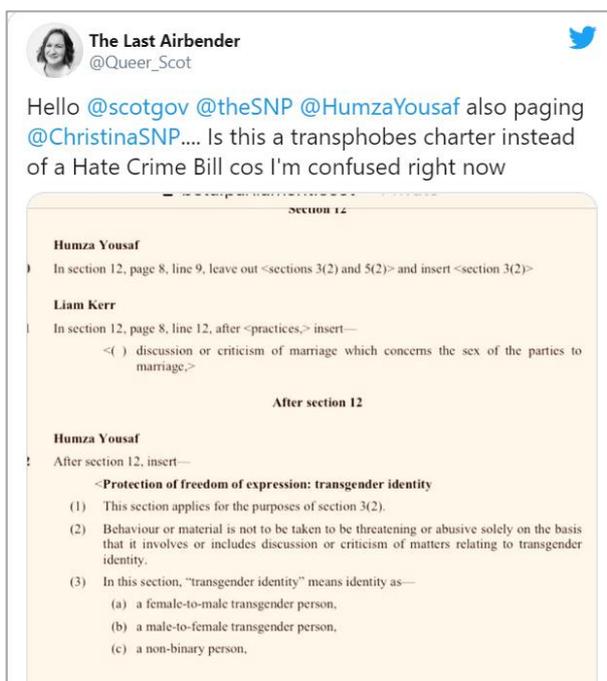
Zero Tolerance Co-Director: *“**a false and harmful narrative [is] being created around trans rights.**”*

13. In June 2019 Scottish Green Party MSP Patrick Harvie [stated](#) that the Scottish Parliament has been **“used as a platform for transphobic hatred and bigotry”**, in reference to an event held the previous month at which Canadian feminist campaigner Meghan Murphy spoke about her belief in sex-based rights.
14. In July 2020 Labour MP Nadia Whittome stated that to debate issues around trans rights is a **“foot in the door for doubt and hatred”**.
15. Labour affiliated group LGBT+ Labour Scotland submitted a formal complaint against Labour MSP Jenny Marra for sharing tweets which **“promote fear and discrimination”** against trans people after she questioned the terminology used by NHS Lanarkshire in a policy document.



16. The passing of the amendment to the Forensic Medical Services (Scotland) Bill, which replaced 'gender' with 'sex' in s9 of the Victims and Witnesses (Scotland) Act 2014, was [described](#) by a group of SNP activists as a '**dog-whistle**' for '**anti-trans campaigners**'.
17. The freedom of expression amendments for transgender identity lodged by Mr Yousaf and Mr Kerr to the Hate Crime Bill have both been described as transphobic. [Pink News](#) reported:

*“The Scottish government has been accused of turning a hate crime bill into a **“transphobes’ charter”** after a move to exempt “criticism of matters relating to transgender identity” under sustained pressure from anti-trans activists.*
18. The magazine [Scene](#) reported on the government amendment with the headline **“Scottish Bill to allow anti-trans speech”**.



Employment

19. A transwoman [was accused of hate speech](#) for wearing a T-shirt stating “Trans women are men. Get over it!”, and faced disciplinary action, with the threat of expulsion, from the LGBT+ committee of the Trades Union Congress. In a complaint to the TUC General Secretary, the Committee stated: Ms Hayton had **“gone beyond discourse, and the expression of alternative viewpoints, and is now propagating hate speech against the trans community.”**
20. Maya Forstater [lost her job](#) after posting a series of tweets that critiqued government plans to introduce statutory gender self-declaration, and asserting that people cannot change their biological sex. In an employment tribunal, which Ms Forstater lost, the judge stated that her views were **“not worthy of respect in a democratic society”** (the case is going to appeal).

21. A cartoonist for the Morning Star was subject to a [disciplinary hearing](#) after activists complained that a satirical cartoon about single-sex spaces was transphobic. **The cartoon was also reported to Avon and Somerset Police and recorded as a non-crime hate incident.**
22. Criminal defence barrister Allison Bailey was [investigated by her chambers](#) for her role in founding and promoting the launch of the LGB Alliance, which advocates for lesbian, gay and bisexual rights. On her account:

I was informed that a complaint had been received from Stonewall and that this was now under investigation.

Higher education and publishing

23. In January 2019 it was [reported](#) that stickers had been seen on the University of Edinburgh campus, with slogans such as “Female is a biological reality”. The university principal stated those responsible would be traced and disciplined, and that Police Scotland had been contacted.
24. In May 2019, a member of Edinburgh University Press staff [sought](#) to prevent publication of our article in the journal Scottish Affairs, based on an accusation of transphobia. The only evidence offered was an objection to our use of the word ‘woman’ to describe biological women.
25. In June 2019 a University of Edinburgh event to discuss sex-based rights prompted a [petition calling for its cancellation](#) on the grounds that it afforded “**credibility in an academic context to views expressing hate and phobic sentiments towards members of the University community**”, put “**trans and non-binary colleagues and friends at risk of physical and psychological harm**” and “**provides material support to speakers with a transphobic agenda**”.
Edinburgh University's Students' Association Liberation group [said](#) that in holding the discussion the university was “**stirring up transphobia**”. Following the event, the University’s Staff Pride Network (SPN) committee resigned after accusing the university authorities of “**failing to take a stand against transphobic hate on campus**”. The event went ahead with exceptionally tight security measures and was attended by several MSPs.
26. In November 2019, a University of Edinburgh research seminar on transgender identity and schools was postponed due in part to a social media backlash, and an attempt to sabotage the booking system. The University Staff Pride Network [claimed](#) the speakers had a “**history of transphobia**”
27. The University of Edinburgh publishes on the Equality and Inclusion section of its website the document “[What is Transphobia?](#)”. This sets out a wide-ranging definition, including “**disbelief**” that a person is a woman, man or non-binary, if that is their self-declared gender identity.
28. Bristol University Feminist Society [stated](#) that the views expressed at a meeting to discuss GRA reform “**amount[ed] to hate speech**” and endangered transwomen.
29. In a collection of case studies compiled by Professor Kathleen Stock, a senior male academic made the following comments:

*During the GRA consultation I retweeted a piece from WPUK that condemned silencing women. A research student mailed me to explain WPUK was a hate group, and my retweeting concerned them. **They could not believe I might read the WPUK website and not see it as inciting***

hate. . . . Colleagues have signed petitions to ban speakers I have been keen to hear. Our student union says opinions like mine, that female liberation is as urgent as ever, are forbidden hate speech. (Case study 21)

30. Alistair Bonnington, a former honorary professor of criminal law at Glasgow University, received a [disciplinary letter](#) from the Open university, having posted in an online forum that the Hate Crime Bill “would make it a crime for anybody to deny that a ‘trans’ woman (i.e. a man) was a real woman” and that “It looks like feminists in Scotland can look forward to incarceration. Poor JK Rowling may need to become an exile like Voltaire.” His comments were deleted by moderators. The Open University stated: **“We will not allow views to be presented in a way that is hostile or degrading to others”**.
31. The publisher [Freedom Press](#) described the feminist campaign group Woman’s Place UK, which advocates for women’s sex-based rights, as a **“transphobic hate group”** that **“propagates violent anti-transgender rhetoric”**.
32. As we noted in our recent Scottish Affairs [article](#), an article submitted to an peer reviewed academic journal was rejected, with one reviewer describing the analysis as transphobic. The reviewer’s comments including the following:

‘using the term opposite biological sex is not only sexist, homophobic and transphobic, it is biologically incorrect.’

‘Putting biologically male and biologically female next to transgender is transphobic. It should read, ‘assigned male/female at birth.’

‘male bodied people is incorrect and transphobic. Transgender women are women and their bodies are either transgender bodies or female bodies (depending on their own preference) because they exist in them.’
33. In January 2021 the student campaign group Teach the Future revoked a speaking invitation to Joan McAlpine MSP “because we do not believe her views on transgender rights align with our views on equality”.

Commenting on the disinvitation on Twitter, the Co-Chair of the University of Edinburgh Staff Pride Network stated that Ms McAlpine had **“all the hallmarks of the insidious transphobia that the hate crime amendment is attempting to allow “**



Data collection

34. Joan McAlpine MSP was subject to multiple accusations of [hatred and transphobia](#) when she challenged plans to conflate the long-standing “sex” question in the next census with self-declared gender identity.
35. In February 2020 the Equality Network [described](#) those arguing for a separate sex and gender identity question in the census as “**anti-trans lobbyists**”.

Single-sex spaces

36. In April 2019 Glasgow Life was [reported](#) as telling staff they could report as hate incidents complaints about who its trans policy allows in women-only spaces, including males who “feel more comfortable expressing themselves in feminine clothing”.

J K Rowling

37. The charity Mermaids [stated](#) that to share JK Rowling’s blog “mightn’t necessarily be treated as a deliberate act of transphobia”, but if shared it “**in a deliberate act of aggression and cruelty, then surely that should be treated as a severe case of harassment**”.
38. In July 2020 [complaints](#) were made to Network Rail that a poster at Edinburgh’s Waverley Station stating “I [heart] JK Rowling” was transphobic and the company should remove it. The poster was duly removed “owing to its political nature”.
39. A billboard stating ‘I [heart] JK Rowling’ in Vancouver was removed the next day following complaints. [City councillor Sarah Kirby-Young claimed](#) that the billboard’s “**clear, intentional messaging**” was “**meant to stoke hate, exclusion and division**”.

Public opinion

40. A [poll taken in Scotland](#) found that 21% of people agree with the statement “It should be a criminal offence to say that someone born biologically male cannot become a woman” (48% disagree, 28% neither agree nor disagree, 4% don’t know.) This proportion rose to 40% among 16 to 24 year olds.