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FREEDOM OF EXPRESSION AND THE HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL: THE DISCUSSION INSIDE AND OUTSIDE HOLYROOD ON 10 MARCH 2021

The Stage 3 debate on the Hate Crime and Public Order Bill, and the overnight reaction to it, has put beyond doubt, that the Act will cement the chilling effects that are already evidence in relation to the debate on sex and gender identity.

Amendment 11B, lodged by Johann Lamont, sought to put on the face of Act, a short list of items that, in themselves, would not be viewed as criminally abusive or threatening, including the fact that sex is a physical binary characteristic that cannot be changed. Amendment 11G by Joan McAlpine sought to clarify that where the Bill provides that “discussion or criticism” cannot by itself be criminally abusive or threatening, that includes any discussion and criticism which may be perceived as offensive, reflecting rights under the European Convention on Human Rights.

Johann Lamont

11B As an amendment to amendment 11, line 10, at end insert—

- <() asserting, or advancing or rejecting any proposition which follows from, the view that—
- (i) sex is a physical, binary characteristic that cannot be changed,
 - (ii) that the terms “woman”, “man” and related terms refer to sex as such a characteristic,
 - (iii) that a person’s sex may be relevant to that person’s experience or relevant to other persons.>

Joan McAlpine

11G* As an amendment to amendment 11, line 5, after <criticism> insert <, including that which may be perceived as offensive,>

In response to amendment 11B, both the Cabinet Secretary for Justice Humza Yousaf MSP, and the Justice Committee convener Adam Tomkins MSP dismissed the need for such an approach, while Green MSP John Finnie described the approach as “entirely wrong” and “an attack”.

“I do not think that there is a need to include a laundry list of specific wording, as is suggested.” (Humza Yousaf MSP)

“So much fear has been stoked in relation to those matters ... The specific examples of speech that ought to be permitted that are in Johann Lamont’s amendment will not need to be written into the law. ... There is nothing threatening or abusive in anything that anyone has said here”. (Adam Tomkins MSP)

“As the Equality Network said, “to add into legislation a list of ‘approved’ statements that include attacks on the fundamental rights of one group of people is entirely wrong.” I agree.” (John Finnie MSP)

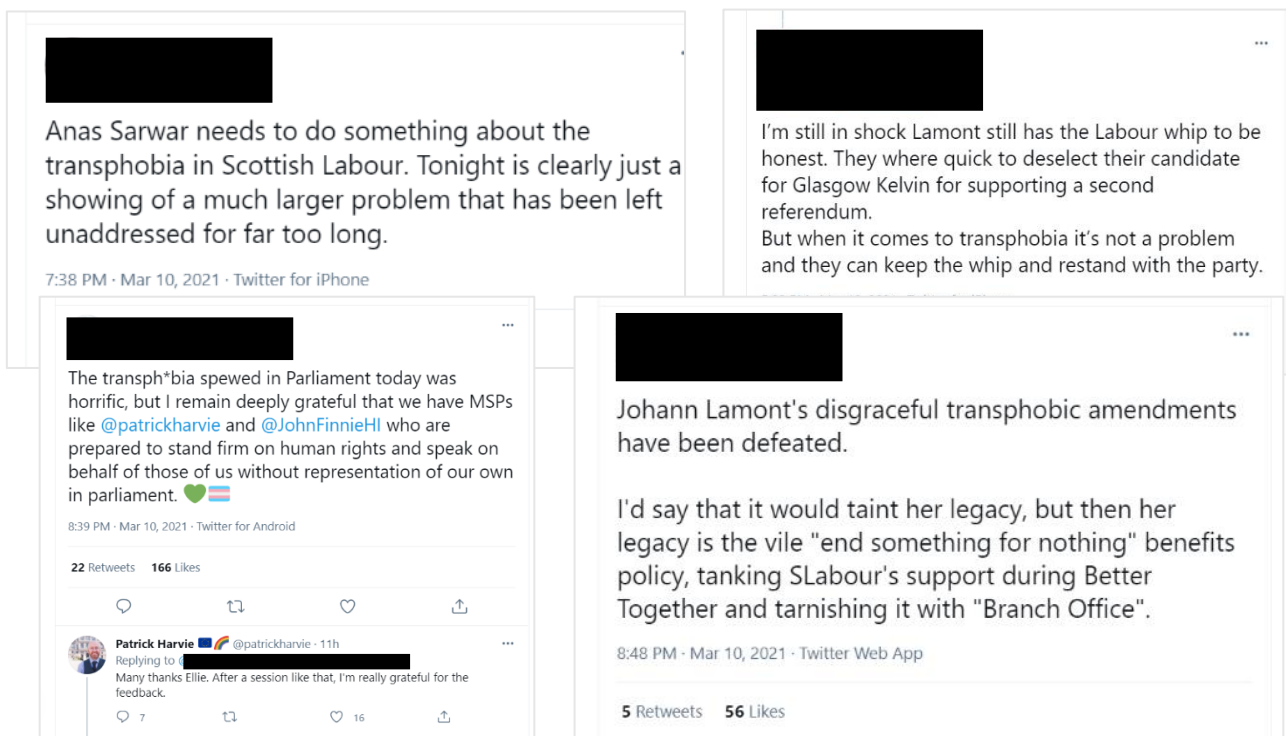
The approach taken in the amendments put forward by Johann Lamont and Joan McAlpine follows the model recommended by Lord Bracadale, and used in the Bill for religion, for clarifying the line in law between what is criminal and what is not. These amendments were rejected, however, in favour of a more indirect recognition in the Bill of the qualified right under ECHR to “offend, shock and disturb”.

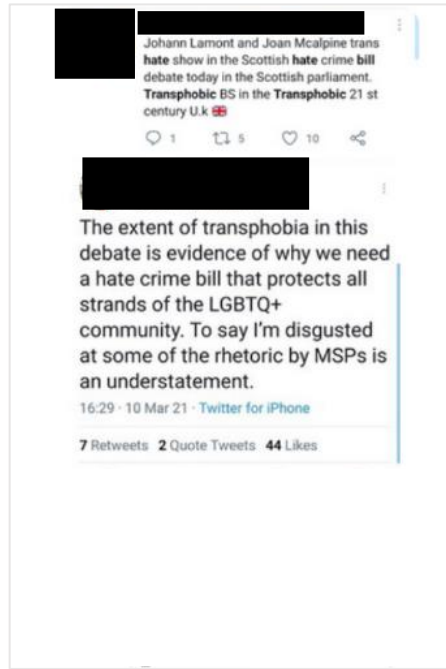
The strength of the reaction to these amendments, and the women who spoke in favour of them, both within the Chamber and on social media, shows why the more direct approach is needed.

During the Stage 3 debate, Patrick Harvie MSP described the amendments as legitimising attacks on trans rights:

“... among other troubling amendments, amendment 11B seeks specific legal protection for the expression of three beliefs, which, taken together, represent a position that is incompatible with the Gender Recognition Act 2004 in any form. ... amendments that seem to legitimise attacks ... I hope that the Parliament will reject the hostile amendments in this group.”

Johann Lamont also put down amendments to add sex as a protected characteristic, on the language used in the Bill on sex (to clarify that it is binary), and to challenge the inclusion of occasional cross-dressers in the group protected under transgender identity. The following tweets are a selection of the reaction online overnight. They include ones by prospective parliamentary candidates, party office bearers, current or former party staff and activists, and staff in LGBT organisations. They show what happens when people, including MSPs, assert that in some contexts, sex matters.





During the Stage 3 debate, female MSPs made the following arguments:

“... there is one way of making it clear in law that it is entirely reasonable for anybody to make these points, and that is to put it into the law. The only reason why I am asking for it to be put into the law is precisely because folk have complained that they are hate speech. Frankly, it is not a comfort for me to know that I am going to have a good case when I get to the court. I would quite like to be told that I am allowed to say that without any danger of being reported to the police.” (Johann Lamont MSP)

“Adam Tomkins’s amendment might offer a defence in court, which is welcome, but it will not necessarily prevent arrests, accusations or investigations. Both amendments fall short of implementing Bracadale’s recommendation that there need to be clear lines in law between what is criminal and what is not There is absolutely no doubt in my mind that the individuals who have no-platformed, bullied and tried to silence respected men and women will use hate crime legislation against them—and in doing so they will consider themselves to be perfectly reasonable. Many will be in influential senior positions in public bodies.” (Joan McAlpine MSP)

“Women are particularly concerned that the Government’s amendments will not be enough to prevent the chilling effect on women’s ability to discuss and debate their rights.... I have to say that I am now extremely careful about what I say about rights that I have taken for granted in the past... I am conscious that any reference to sex-based rights, sex discrimination and sexism—not gender—will immediately attract accusations that I am being hateful or transphobic... the amendments from Johann Lamont and Joan McAlpine will give clarity to those, including the police, who will have to interpret the legislation.” (Elaine Smith MSP)

“I will draw to a close by saying that, in such an atmosphere, anything short of a provision that puts beyond doubt that basic statements about sex are not of themselves abusive under the bill will leave women exposed to unpredictable judgments by front-line police officers and the courts, and, before that, maybe even their employers. The only safe option for women will be constant self-censorship, which will have an invisible corrosive effect that is antithetical to healthy democratic debate. The Parliament should not be so complacent about setting up such a situation.” (Jenny Marra MSP)

Should the bill pass today, it is clear that people, particularly women, risk being reported under it to the police *simply* for asserting the reality and importance of biological sex. The Bill as it stands leaves those people without the type of direct means recommended by Lord Bracadale for resisting such complaints, and threats of complaints, and the police without a straightforward way to resist pressure to investigate them. As discussed in the yesterday’s debate, convictions may be unlikely. But the chilling effect on ordinary Scottish citizens that will result from the reality or threat of being reported to and investigated by police is unmistakable.

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