

**JUSTICE COMMITTEE**

**HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL**

**SUBMISSION FROM THE EQUALITY NETWORK**

Please accept this short supplementary evidence, which responds to questions raised in this morning's Committee meeting.

**Definition of the transgender identity characteristic**

The definition of the transgender identity characteristic in section 14(7) of the bill closely aligns with the definition that has been in place for over a decade, in section 2(8) of the Offences (Aggravation by Prejudice) (Scotland) Act 2009. The scope of the definition remains the same, but with updated language.

In particular, "a person who cross-dresses" replaces "transvestism" in the 2009 Act. This does not change the scope of the definition, but clarifies it, and replaces an outdated term. Cross-dressing / transvestism has been included in hate crime law for a decade. Both women and men cross-dress, and hate crime law provides protection for both.

The inclusion of cross-dressing also covers a potential loophole. Without it, any person charged with a crime against a trans woman, for example, which included the use of transphobic language, would be able to claim that they presumed the victim was a cross-dressing man, and did not presume that they were a male-to-female transgender person. If that claim as to motive was accepted, a transgender identity aggravator that did not include cross-dressing would not be able to be applied. For these reasons we are strongly of the view that cross-dressing people should continue to be included in the definition.

In the definition in section 14(7), "a non-binary person" has replaced "any other gender identity that is not standard male or female gender identity" in the 2009 Act. In our view, the term non-binary has become well-known over the past decade, and the more 'explanatory' definition in the 2009 Act is no longer needed.

We are strongly of the view that non-binary people should continue to be included in the definition – they face hate crime because of their gender identity just as other trans people do, and the protection in place for the past decade should continue. We also note that non-binary people are protected as trans people by equality law, under the Equality Act 2010 (see Taylor v Jaguar Land Rover 2020).

**Definition of the sexual orientation characteristic**

We agree with the Justice Secretary's response this morning on the use of the term "persons of a different sex" in the definition of the sexual orientation characteristic

in section 14(6) of the bill. “Different sex” is the term that has been used in Scottish Parliament legislation for the past decade, to distinguish mixed-sex from same-sex relationships.

For example, marriage law, as amended by the Marriage and Civil Partnership (Scotland) Act 2014, uses the terms “marriage to a person of a different sex” and “marriage to a person of the same sex”, in multiple places (see for example section 4(6) of the 2014 Act).

The Civil Partnership (Scotland) Act 2019 uses the same language, referring to civil partnerships between persons of the same sex, and those between persons of different sexes (see for example section 1).

We agree with the Justice Secretary that it is also important to use “different sex” rather than “opposite sex”, in the context of this bill, to ensure that those who are in a relationship with a non-binary person are not excluded from protection.

For example, if a man is in a relationship with another man, and his neighbour knows that and vandalises his property because of prejudice against the relationship, the motive is malice and ill-will towards people whose sexual orientation is “towards persons of the same sex”.

If a man is in a relationship with a non-binary person, and his neighbour knows that and vandalises his property because of prejudice against the relationship, the motive cannot be described as malice and ill-will towards people whose sexual orientation is “towards persons of the same sex”. Nor can it be described as malice and ill-will towards people whose sexual orientation is “towards persons of the opposite sex”. But it is malice and ill-will towards people whose sexual orientation is “towards persons of a different sex”. It is important to note that what matters here is the motive of the neighbour, not the legal status of the couple. The use of “opposite sex” in place of “different sex” would run the risk that the neighbour’s motive would not fall within the scope of the sexual orientation aggravator.

Equality Network

24 November 2020