

JUSTICE COMMITTEE**HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL****SUBMISSION FROM MURRAYBLACKBURNMACKENZIE**

We are submitting this supplementary note 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.

(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 (attached as an annex). 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

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 want to offer specialist services only to women will 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.

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TRANSACTUAL DEFINITION OF TRANSPHOBIA

1. Attempting to remove trans people's rights.*a) Campaigning to remove rights from trans people.*

In the UK, a number of groups which claim to “protect women’s rights” have campaigned to keep trans women out of women’s toilets, linking this campaign to discussions about the UK’s Gender Recognition Act and ignoring that the [Equality Act \(2010\)](#) protects trans people’s rights access to single sex spaces in line with their self-determined gender (you’ll find more info on the Equality Act [here](#)). There is an allowance within the Equality Act to make exceptions to this, but any exclusion must be shown to be proportionate and justifiable and any exclusion must be made on a case by case basis. None of the national organisations interviewed as part of Stonewall’s [Supporting trans women in domestic and sexual violence services](#) reported having ever applied the exceptions in the Equality Act.

Campaigning against trans people’s human and civil rights constitutes transphobia.

b) Claiming there is a "conflict" between trans people's human rights and those of any other group.

This is the classic tactic of haters, fascists and others and has been throughout history. Often the term "concerns" is a signifier for this. Just because you have "concerns" does not mean those "concerns" are valid. Indeed the fact that the term is being used regularly without evidence to support it suggests they are not. In the UK, people have said they are “concerned” that men might pretend to be trans women in order to gain access to women’s spaces. In the case of this example, campaigners claim that trans women ought to suffer because of the potential actions of cisgender men. There have been no documented cases of men pretending to be a trans woman to access women’s toilets for nefarious purposes.

c) Misrepresenting those who oppose trans people’s human rights.

This is a very common technique employed by transphobic hate groups. They dishonestly claim that the anti-trans “debate” is about a conflict between “women” or “feminists” and trans people. In fact the transphobes represent only a tiny minority of women or feminists and there are plenty of feminists who argue that transphobes are not feminists at all. The voices of cis women who support trans rights are usually ignored or shouted down by the minority of women opposed to trans rights. For example, when all of the women candidates in the 2020 UK Labour Party leadership election stated their support for trans women they were [shouted down](#) at a hustings by a group of transphobic activists. Of course there are also men who are

transphobic. The defining feature that members of these groups have in common is neither their gender nor their (claimed) feminism, it is their transphobia.

d) Encouraging or facilitating proxy violence against trans people.

Whether tacitly, explicitly or through advocating structural oppression. For example campaigning to prevent trans people from using the toilets that match their gender identity and presentation is to attempt to facilitate violence by proxy against trans people by forcing them to out themselves every time they use the toilet or put themselves in dangerous situations where they are likely to be attacked or raped. Spreading fear of trans people so as to increase the likelihood of transphobic attacks is another example of this. This is sometimes known as “stochastic terrorism”. Between 2016 and 2019, [transphobic hate crime](#) rose by 81% This coincided with an increase in transphobic rhetoric in the UK press and online.

e) Ignoring the fact that transphobia is amplified when it is intersectional.

Black trans people, disabled trans people and Muslim trans people for example, often run greater risks from being targeted by transphobia than white middle-class people. The denial of culturally-specific trans identities, in addition to the denial of all trans identities, is both transphobic and racist. Structural oppression in the form of racism, for example, makes it more likely that black and minority ethnic trans women are targeted for violence and murder. In 2019 in the United States, at least [26 trans or gender non-conforming people were killed](#) by violent means – 91% of them were black women.

f) Tacit transphobia is still transphobia.

Actions designed to harm or take away trans people's human rights are still transphobic even when not expressed in explicitly transphobic language, or not expressed in language at all. This tacit transphobia is often referred to as ‘dogwhistle’ transphobia. For example, one UK based transphobic hate group bought a full page advert which read: ‘Woman: an adult human female.’ The statement itself is not transphobic, but when the context for the statement is that the group in question believe that trans women can never be female the transphobic intent is clear. Similarly, when a football ‘fan’ throws a banana at a black player during a match, the racist intent is clear even though bananas are not inherently racist.

g) Attempting to define transphobia as so restricted as to exclude extremely transphobic acts.

Defining transphobia as restricted to name-calling for example, is done with the intention of allowing transphobic groups to get away with transphobic actions like campaigning against trans people's human rights, or spreading fear of trans people, which are both transphobic. Just as white people ought never speak over people of

colour when seeking to define racism, cisgender people ought never to speak over trans people when seeking to define transphobia.

h) Advocating the withdrawal of access, or delay, to transition-related medical treatment for trans people or advocating or facilitating any kind of therapy that has the effect of trying to change anyone's gender identity.

When trans people are unable to access transition-related medical treatment, their bodily autonomy is undermined. Advocating to remove or delay access to transition-related medical treatment needs to be regarded as proxy violence, as transition-related care has been shown to improve life outcomes for trans people. The Endocrine Society state that it ['is critical that transgender individuals have access to the appropriate treatment and care to ensure their health and well-being.'](#)

Some transphobic campaigners use graphic images of transition related surgery and scars from transition-related surgery as “evidence” that a trans person, often a trans man or a non-binary person, has “mutilated” themselves. The use of this language impacts the mental health and well-being of trans people, often making them more conscious of their scars than they had previously been.

Conversion therapy is not deemed acceptable for lesbian, gay or bi people, nor should it be deemed acceptable for trans people. [Research has shown](#) that conversion therapies kill and traumatise, whether they are labelled as ‘conversion therapy’ or not.

i) Deliberately endangering the lives of trans children and young people.

Advocating an end to acceptance of trans children and young people in their identified genders, claiming that trans children and young people are only "going through a phase", attempting to deny medical support to trans children and young people and failing to protect trans children and young people from bullying and the consequences of media and hate-group misrepresentation. Using terms such as "contagion" constitutes exclusion bullying by proxy.

In the UK during the 1980s and 1990s, [Section 28](#) outlawed the ‘promotion of homosexuality’ in schools. This law was seen to be a means of ‘protecting children’ from ‘homosexual propoganda’. The law was repealed in 2003 (2000 in Scotland) and schools are now free to teach in an LGBT inclusive manner. The rhetoric used about trans inclusive schools today strongly echoes that of the rhetoric used by those in favour of Section 28.

[Research](#) has shown that trans children and young people who are well supported at home and at school experience better mental health outcomes than those who aren't supported. The use of misinformation and scare mongering has the potential to discourage parents and teachers from offering that crucial support.

2. Misrepresenting trans people

a) Misrepresenting trans people.

Whether by misuse of statistics, research, history or the law, presenting false images of trans people as a group. This includes presenting trans people one-dimensionally and intentionally ignoring positives. Ignoring evidence from other countries that supports trans rights is also profoundly transphobic. For example, transphobic activists in the UK claim that changing the law to allow trans people to change their birth certificate by signing a statutory declaration is an issue for women's rights. However evidence from Ireland, whose [2015 Gender Recognition Act](#) allowed trans people to do just this, demonstrates that there has been no such issue.

b) Portraying trans people as a "threat".

This is what homophobes did in the 1980s to LGB people. Endlessly debating trans people in the media in their absence and prohibiting a right of reply is the way this manifests itself all too often. This can often be seen in the press by the use of words which imply a threat of violence or intimidation such as "ordered to...", "feared being labelled transphobic", "towering", "powerful".

c) Taking one or two trans people to represent the entire community.

This is a textbook definition of prejudicial discrimination. Holding all trans people to account for the crimes of one or two individuals is like saying that every white cis woman should have to answer for the crimes of Rose West.

d) Denying trans people the right to their own language to talk about their situations.

Using terms such as "trans identified males" to mean trans women, not only has the impact of misgendering trans women but it also makes it harder for trans people to explain their identity to others. For example, when a trans man tells somebody that he is a trans man, he often has to explain his identity to avoid being mis-identified as a trans woman. The use of "trans women" ensures that trans is correctly used as an adjective in a similar way to the use of "gay women". "Gaywomen" without a space could indicate that lesbians were not included in that person's definition of who gets to call themselves a woman. "Transwomen" has the same impact.

"Cisgender" is neither an insult nor an identity, it is a word used to identify people who aren't trans whilst avoiding the use of stigmatising language such as "normal". Denying trans people access to non-stigmatising language to describe people who don't share their identity acts to further stigmatise them.

The denial of self-determination more widely also constitutes transphobia. For example the denial that trans women are women, trans men are men and that non-binary people's identities are valid and should be respected. Identity denial is a particular problem for non-binary people, who are often told that their identity is "a trend" or "made up" despite evidence of non-binary people having existed across time and [cultures](#).

e) The omission of trans men and non-binary people.

Transphobic rhetoric regularly ignores trans men and non-binary people. This is often because the existence of trans men, in particular, would act to undermine the arguments being made against trans women. For example, campaigners who claim that trans people should use the toilets that align with the sex they were assigned at birth in case a cisgender man pretends to be a trans woman to access women's toilets ignore the fact that if trans men are forced to use women's toilets, it would be easier for cisgender men to also access women's toilets by just pretending to be a transgender man.

f) Using biological essentialism to try and delegitimise trans people.

"Man", "Woman" and "Non-binary person" are social/cultural statuses. Trans people have existed for millennia throughout [history](#) and in every part of the [world](#). Consequently, trans people have as much right to claim their genders based on biology or otherwise as cis people do. [The Endocrine Society](#) states that there is "a durable biological underpinning to gender identity". That being said, bio-essentialism plays into the hands of extreme right-wing ideologies.

3. Forms of Abuse

a) Physical assault or abuse

Physical assault or abuse motivated by the fact that the victim of that abuse is trans, is an act of transphobic violence. This disproportionately affects some sections of the trans community, [black trans women](#) and non-binary femmes in particular.

b) Harassment

Harassment can take place online, through the posting of photos of trans people without their consent, spreading rumours or sending hateful messages or encouraging others to do the same. Galop's [Online Hate Crime Report](#) found that trans people are more likely to experience online harassment than cis people. Offline harassment might include deliberate misgendering, spreading rumours,

sending offensive letters, stalking or otherwise making somebody feel intimidated. If this harassment is motivated by the fact that someone is trans, this is transphobic harassment. Stonewall's [Trans Report](#) found that 44% of trans people avoid certain streets because they don't feel safe.

c) Ostracism

Ostracising somebody from a community, place of worship or family because they are trans is transphobic. The threat of ostracism might be used to prevent a trans person from coming out or living a fulfilled life.

d) Deliberate misgendering

This is abuse. Calling trans women, "men" or trans men "women", or non-binary people "men" or "women" is transphobia. Using the wrong pronouns, such as "she" for trans men and "he" for trans women is misgendering. Not using "they/them" (or similar) pronouns for non-binary people is transphobic as is using these terms for binary trans people.

Treating trans people any differently from those who are also the same gender is transphobia. For example, treating trans women as different from cis women is discrimination and has been defined as such in the UK's [Equality Act \(2010\)](#).

e) Expecting trans people to participate in "debates" about their right to exist.

Gladiatorial media debates are designed to obscure what trans people need to communicate and prevent trans people from raising awareness of important issues affecting the community. Being forced to "debate" your existence is a form of abuse. Just as a Jewish person should not have to justify their right to live a life free from anti-semitic discrimination, a trans person should not have to justify their right to live a life free from transphobic discrimination.

Trans people being allowed to publish single-person authored articles arguing against the transphobes is different and rarely, if ever, allowed by the media.

4. Systematically excluding trans people from the media and discussions about issues that directly affect them.

a) Systematically preventing trans people from engaging fully in media "debates" about transphobia and trans rights.

A good example of this is [The Guardian's coverage](#) following the publication of the Labour Declaration of Trans Rights. The Guardian has effectively demonstrated an editorial policy aimed at defending accusations of transphobia. Trans people and

allies who campaign for trans rights are not being included in the debate, for example by being allowed to contribute articles opposing those published by this media platform. Selection bias also constitutes transphobia when editors publish only elements of the news that might be supportive of the transphobes' arguments while excluding those that do not.

b) Accusing trans people as "silencing" transphobes or "shutting down debate" when the opposite is happening.

In the UK there has been a systemic, and almost total, exclusion of trans people from the mainstream media, who campaign against transphobic hate groups. Meanwhile, people with transphobic views are consistently invited to comment on trans related issues in the media, regardless of their qualifications to do so. For example, when a sculptor with no experience of teaching in schools is asked to comment on trans inclusive practice in schools. People with no qualifications in education or in history would not be invited to talk to the media about history teaching in schools, so unqualified people should not be invited to talk about trans inclusion in schools either. Denying trans people a right to reply on the same terms and with the same prominence and regularity is the real "silencing" and "shutting down debate".

c) Expecting trans people to respond calmly to transphobic material or claims, whether explicit or covert.

We don't dispute that it's best to respond calmly to transphobia, however many transphobes continually aim to anger trans people to provoke trans people into a reaction that is used against trans people in the media. This is often called "Provoke and Publicise", and was a technique employed by anti-desegregationists in Southern states in the US in the 50s and 60s. The symbolism of this is significant.

5. Other forms of discrimination

a) Employment discrimination

Transphobic employment discrimination may come at the recruitment process, where a trans person's application is rejected because they are trans. In the workplace, this may come when a trans person is treated less favourably or unfairly because they are trans. This might result in a trans person being able to progress in their career or even in a hostile, uncomfortable working environment.

b) Refusal of access to goods and services

This could include being refused entry to an event, being turned down or asked to leave rented accommodation, or restricted access to healthcare based on a trans person's identity. Many trans people choose not to disclose that they are trans in certain circumstances for fear of this type of discrimination. Discrimination by a letting agent can result in homelessness.