

## **Hate Crime and Public Order (Scotland) Bill - Call for Views**

### **Response from Labour Women's Declaration Working Group, 24/07/20**

#### **Context: The Labour Women's Declaration**

The Labour Women's Declaration, launched in November 2019, is part of an ongoing campaign for women's sex-based rights led by women Labour Party activists. Our declaration has been signed by almost 5,000 Labour Party members and supporters, including 300 founding signatories amongst whom are three Scottish Labour MSPs<sup>1</sup>. Our working group has members from across the UK, and this response has been led by our Scottish-domiciled members.

This response concentrates on the potential impact of the proposed legislation on women's rights and freedoms as set out in the Labour Women's Declaration, and focuses on questions 2, 6 and 8. The following clauses in the Declaration are particularly relevant to our response and have guided it:

1. Women and girls are subject to discrimination and oppression on the basis of their sex.
2. Women have the right to freedom of belief, freedom of expression and freedom of assembly (Articles 18, 19 and 20 of the UN Declaration of Human Rights).
3. Women have the right to discuss policies which affect them, without being abused, harassed or intimidated.
6. Women have the right to organise themselves, as a sex, across a range of cultural, leisure, educational and political activities.

The current, bitter, discussion forming the backdrop to our formation is most commonly referred to as a dispute over "trans rights". This is not a helpful way to think about it: the discussion is over women's rights, who should hold them, and on what basis.

Some (not all) transactivists take the view that biological sex is no longer relevant as a protected category, and that gender identity (an individual's inner sense of maleness or femaleness) should be the only means by which they are categorised in law and policy as a man, woman or another gender. We will refer to this in our submission as "gender identity ideology". It is subjective and has no basis in science. We have never sought to prevent anyone from advocating peacefully for this ideology.

We maintain that women's rights are held on the basis of sex, and we think it is imperative that women be included in the discussion any proposed changes to legislation and policy which could affect women's sex-based rights. We believe it is

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<sup>1</sup> <https://www.ipetitions.com/petition/labour-womens-declaration>

possible to reach solutions that balance rights pertaining to sex, and rights pertaining to gender reassignment, through respectful, evidence-based discussion. We do not seek to undermine or curtail the rights of transgender people or any other protected group.

## **Question 2: Consolidation**

*Summary: We think sex should be included in the present legislation; we think the list of characteristics covered in the legislation should be the same as the protected characteristics in the Equality Act (2010), and the same definitions should be used.*

We welcome the principle of consolidating hate crime legislation. We think this has the potential to clarify laws relating to prejudice and discrimination, and resolve inconsistencies in the way different protected groups are treated.

We are disappointed that sex has not been included in the list of characteristics mentioned in Section 1 (2). We think it is a positive step that 'sex' and not gender appears in Section 15, clearly separating sex and 'gender identity' in keeping with the Scottish Government's recent commitment to avoid conflating the two. However, we think the inclusion of sex in the present Bill is vital in order to address the increasing levels of male violence against women and girls, and to signal that the Scottish Government takes such violence seriously. It should not be the case that women and girls are afforded less protection in hate crime legislation than other protected groups, and it is not acceptable to leave sex as a possible add-on for consideration at a later (as yet unspecified) date.

We do not support the proposal to set up a working group to consider the establishment of a standalone crime of misogyny. This would delay protections for women and girls that could be afforded by the present legislation, and, were the offence to be established, would have the effect of keeping women and girls out of the hate crime framework. Should the Scottish Government wish to pursue the matter of establishing a working group to consider ways to address misogyny, we suggest that its composition extend well beyond the government-funded lobby groups who tend to be included in such work, in order to allow the widest possible representation of women and girls. Such a working group should be additional to the inclusion of sex in the current legislation, rather than substituting for it: we understand Lord Bracadale has warned that it could take several years for the new standalone offence to reach the statute books, and certainly could not be achieved in the current parliamentary term.

We suggest that the list in Section 1 (2) should consist of the protected characteristics as set out in the Equality Act (2010), which include sex. We also think that the definitions used in the Hate Crime and Public Order Act should be the same as those in the Equality Act. To do otherwise is to risk anomalies and inconsistencies arising in reconciling the two pieces of legislation, which could lead to legal and practical difficulties.

We do not support the re-definition of sexual orientation set out in Section 14 (6) as “orientation towards persons of the same sex, persons of a different sex, or both persons of the same sex and persons of a different sex”. This gives the incorrect impression that there are multiple sexes, so should be brought back in line with the definition in the Equality Act.

We do not support the inclusion of “gender identity” in place of “gender reassignment” in Section 14 (7). The definition in the Equality Act is precise and can be established in law since it refers to medical and legal processes. The concept of “gender identity”, by contrast, is weak and unverifiable. We do not consider it appropriate to include cross-dressing people in the legislation under this characteristic. Cross-dressing is at best a fashion statement, and at worst the public enactment of a male fetish to wear women’s clothing, particularly lingerie. We do not think it should be protected in law. We have reservations about the inclusion of non-binary people under this characteristic. All individuals are non-binary in personality, since no-one is a collection of stereotypes: moreover, the concept is not well understood by the general public, and an individual’s non-binary status is not usually apparent to others. Biological sex is fixed and binary in nature, and its inclusion in the legislation would (if properly defined) provide for the protection of all gender non-conforming individuals. The definition of “gender identity” should be replaced with “gender reassignment” and brought back in line with the Equality Act.

We do not accept the logic of including “variations in sex characteristics” within the hate crime legislation. It is now acknowledged that it was a mistake to include such variations (more properly known as Differences in Sexual Development, or DSDs) in the 2009 Act, and that the mistake was due to conflating transgender people with people with DSDs. No other medical condition is included in the legislation, other than chronic debilitating conditions that are covered under the characteristic of disability. DSDs are not readily detectable by others, and there is no rationale to support their inclusion in this legislation.

## **Question 6: Stirring Up Offences**

*Summary: Our experience leads us to believe that there are significant risks that Part 2 of the proposed legislation will have a range of perverse effects, principally on freedom of expression and on further polarising relationships between persons who do and do not share protected characteristics. In the current climate, the provisions on “stirring up hatred” and “possessing inflammatory material” could make it impossible for women to advocate peacefully for our sex-based rights as defined in law. They could also be used in the future to close down public discussion of important social questions where these involve critique of fashionable or dominant ideologies. We think Part 2 should be removed from the Bill.*

We are alarmed by the proposals in Section 3 (2). The terminology used is subjective and undefined, and would therefore open to malicious or vexatious interpretations. Although there is an attempt at mitigation in Section 3 (4), this is again poorly defined and would need to be tested in court cases. We are concerned at the consequent chilling effect on freedom of expression (see also response to Question 8), as individuals and groups self-censor out of fear of prosecution.

Whilst our reservation is general and could be applied in respect of any and all of the characteristics, we have a particular concern given the current prevailing context in relation to women discussing our sex-based rights. Nadia Whittome MP, writing in the Independent, argues that only the views and experiences of transgender people are relevant to the discussion on reform of the GRA, and says that “We must not fetishise debate as though debate itself is a neutral, innocuous act”<sup>2</sup>. Her comments typify the position taken by adherents of more extreme versions of gender identity ideology, that there can be no debate on sex and gender, thereby excluding from the debate anyone who does not agree with them. It is important that the Committee considers carefully such evidence relating to how people may seek to interpret the provisions in Part 2 in practice.

The Labour Women’s Declaration holds that “women and girls are subject to discrimination and oppression on the basis of our sex”; we maintain the scientific understanding that sex is binary and immutable, and that the social, cultural and political consequences of being born female are significant enough to require protections in law, as recognised in the Sex Discrimination Act (1975) and subsequently the Equality Act (2010). This belief, which was considered unexceptional and politically progressive until very recently, is now regularly traduced as “hate speech” by those who seek to advance the view that biological sex is a spectrum and politically irrelevant.

Our sister organisation, Woman’s Place UK (WPUK), was formed by women from the trade union movement in 2017 to ensure women’s voices were heard in the Westminster and Holyrood consultations on reform to the Gender Recognition Act. To date, they have held a series of meetings which platform individuals (including trans people) who advocate for women’s sex-based rights. Most of these meetings have been subject to allegations that the organisers intend to stir up hatred and transphobia, and that the meetings are likely to stir up hatred and cause other harms to transgender people<sup>3</sup>. No matter how carefully and calmly they rebut such baseless allegations<sup>4</sup>, they continue to be smeared as a hate group.

Both north and south of the border there are countless incidents of women being accused of transphobia and/or hate for arguing (for example) that:

1. Sex and gender are not the same and women are entitled to protections under the law based on sex;
2. Women have the right to their own sports;
3. Only women experience the menopause;
4. Lesbians are same-sex attracted and do not want to have sex with male-bodied persons.

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<sup>2</sup> <https://www.independent.co.uk/voices/trans-rights-equality-gender-recognition-politics-a9635021.html>

<sup>3</sup> <https://womansplaceuk.org/a-record-of-womans-place-uk-meetings/>

<sup>4</sup> <https://womansplaceuk.org/2019/10/24/misogyny-in-action-a-rebuttal-of-statement-by-trans-action-oxford/>

Such accusations have already meant that women are not able to express themselves freely: women have been disinvited from giving talks in public institutions such as universities, and have been unable to organise public meetings to discuss our rights because of the targeting of individuals and venues. We think it entirely probable that the extension of state power to investigate and arrest women for respectfully defending sex as a protected category would have a further chilling effect. We set out below two examples of incidents where there were widespread but unfounded allegations that meetings to discuss women's rights had been convened with the intention of stirring up hatred against transgender people and would also result in stirring up such hatred: these represent a tiny fraction of similar incidents.

### University of Edinburgh Public Discussion of Women's Sex-Based Rights 5 June 2019

In June 2019, the University of Edinburgh hosted a public panel discussion on women's sex-based rights, organised by one of our members. This was the only public event platforming women's sex-based rights at the university during the whole of 2019: as far as we know, 11 public events platforming gender identity ideology<sup>5</sup> went ahead on campus with no protest or adverse commentary.

In the weeks leading up to the meeting there was an onslaught of unfounded allegations that the meeting would stir up hatred. A group of university staff and students launched a petition<sup>6</sup> mischaracterising the event as "transphobic", alleging that it would platform "views expressing hate and phobic sentiments", stating that it would put trans students and staff at risk of physical and psychological harm, and accusing the university of "affording legitimacy and credibility to hateful rhetoric". Social media posts by members of the university<sup>7</sup> broadcast the view that the event was to be transphobic and made specific allegations of hate in respect of named speakers. An article appearing in *The Scotsman*<sup>8</sup> documented social media posts from Edinburgh's Lighthouse Bookshop calling the speakers "a gathering of misogynistic transphobes" and a "vocal, hateful minority" whose "actions put lives at risk, encourage marginalisation & discrimination".

The student press carried articles about the event: one article<sup>9</sup> alleged that, "It is negligent of the University to platform guests who have been widely criticised for promoting hate speech". It is noteworthy here that the mere presence of prior allegations of hate speech is used as evidence of actual hate speech, in a chilling echo of McCarthyism. Another student press article<sup>10</sup>, the record of a speech given at a rally opposing the panel discussion, alleged that women's discussion of sex-based

<sup>5</sup> <https://blogs.ed.ac.uk/academicfreedom/>

<sup>6</sup> <https://www.change.org/p/university-of-edinburgh-edinburgh-university-transphobic-event-is-unacceptable>

<sup>7</sup> <http://archive.fo/0HBGL>

<sup>8</sup> <http://archive.vn/d3mIV>

<sup>9</sup> <https://studentnewspaper.org/there-is-no-one-way-to-be-a-woman-the-future-of-our-rights-includes-trans-identities/>

rights “directly fuels” hate crime, citing a fictitious example of razor blades posted behind stickers.

Despite these allegations, the meeting went ahead<sup>11</sup> (albeit amid an intimidating protest and an assault on one of the speakers<sup>12</sup>), was attended by a number of MSPs, and was subsequently supported in Holyrood by a parliamentary motion signed by a majority of members<sup>13</sup>. However, all of the cited allegations could be considered to fall within the scope of the proposed legislation and it is reasonable to suppose that those making the allegations would have used the provisions in the proposed Bill had they been able to do so. If the allegations been reported and investigated, then at best, the event would have had to have been called off pending investigation, and at worst, it would have been cancelled and its organisers subjected to legal proceedings.

### The Labour Campaign for Trans Rights pledge and the Expel me rally in support of WPUK and LBG Alliance 9 March 2020

On 9 March 2020 Labour Women’s Declaration held a rally<sup>14</sup> in support of WPUK and the Lesbian, Gay and Bisexual Alliance (LGBA) following the signing of the Labour Campaign for Trans Rights Pledge<sup>15</sup> by the majority of candidates for the Labour Leadership and Deputy Leadership elections.<sup>16</sup> This pledge mischaracterises WPUK and LGBA as “transphobic” and “hate groups” and calls on those of us who do not agree with its positions to be expelled from the party. It remains in circulation and candidates for various Labour roles (including the current election of the party’s National Executive Committee), are being urged to sign it and targeted if they do not: it is particularly worrying to see descriptions of organisations such as ours as “trans-exclusionist hate groups”, and allegations that “The transphobia of these groups is well-documented” when, in fact, that documentation consists of earlier unsubstantiated allegations.<sup>17</sup>

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10<sup>1</sup> <https://studentnewspaper.org/a-speech-made-by-taliah-horner-at-the-trans-solidarity-rally-on-5-june-in-edinburgh/>

11<sup>1</sup> <https://www.youtube.com/watch?v=ljHn1Bj5lt8>

12<sup>1</sup> <https://www.scotsman.com/news/scottish-news/feminist-speaker-julie-bindel-attacked-transgender-person-edinburgh-university-after-talk-545841>

13<sup>1</sup> <https://www.parliament.scot/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S5M-17604&ResultsPerPage=10>

14<sup>1</sup> <http://labourwomensdeclaration.org.uk/news/press-release-womens-rights-rally-targeted/>

15<sup>1</sup> [https://docs.google.com/forms/d/e/1FAIpQLSd\\_wPyenUicSJgKv1YTknZ47gDGU4b\\_389zYbqH10TGSTRrpg/viewform](https://docs.google.com/forms/d/e/1FAIpQLSd_wPyenUicSJgKv1YTknZ47gDGU4b_389zYbqH10TGSTRrpg/viewform)

16<sup>1</sup> <https://makemorenoisemanc.wixsite.com/mysite/post/culture-war-breaks-out-at-labour-party-leadership-hustings>

17<sup>1</sup> <https://newsocialist.org.uk/interview-momentum-ncg-candidates-south-east-and-south-west/>

The rally was held at Maxilla Hall in West London. The venue was kept secret until the day of the event. Tickets sold out quickly, and over 200 people attended. Speakers included Professor Selina Todd<sup>18</sup>, Kiri Tunks of WPUK<sup>19</sup> and Bev Jackson of LGBA<sup>20</sup>, all of whom have been subjected to unfounded allegations of seeking to stir up hatred. A message of support was read out from MSP Johann Lamont.<sup>21</sup> The videos of all the speeches are available for all to see on our YouTube channel with transcripts on our website.<sup>22</sup>

A group called London Bi Pandas advertised a protest against our event, stating that there should be “no platform for transphobes”<sup>23</sup>. Around 100 protestors, some brought in a minibus to the location, protested outside, and let off smoke flares (in the shadow of Grenfell Tower), creating an intimidating environment for attendees arriving and leaving. Their shouts can be heard from within the hall during the videos of the speeches, and towards the end of the meeting the smoke was smelt by attendees in the hall, as recorded by Helen Steel who then also filmed some of the protesters<sup>24</sup>. The police were called repeatedly but did not attend until most of the attendees had left.

The Twitter hashtag #expelme trended after the meeting and there was some press coverage from writers and journalists including Joan Smith and Joanna Williams who had attended the meeting.<sup>25</sup> None of the leadership or deputy candidates commented to condemn the intimidation of our meeting and none withdrew their support from the defamatory pledges they had signed.

The belief that there can be no debate on sex and gender is core to more extreme versions of gender identity ideology (see Nadia Whittome’s comments in note 2, that

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18<sup>\*</sup> <https://www.oxfordstudent.com/2019/04/29/oxford-professor-found-tweeting-transphobic-tweets/>

19<sup>\*</sup> <https://you.38degrees.org.uk/petitions/remove-kiri-tunks-as-vice-president-of-the-nut>

20<sup>\*</sup> <https://www.independent.co.uk/life-style/lgb-alliance-group-transphobic-alison-bailey-lesbian-gay-bisexual-a9169091.html>

21<sup>\*</sup> <https://www.youtube.com/watch?v=HPJMX3yEww4>

22<sup>\*</sup> <https://www.youtube.com/channel/UCQRGV3Yy6C-OKsrkQVdVjtw/>  
<http://labourwomensdeclaration.org.uk/features/expelme-rally-speeches/>

23<sup>\*</sup> <https://twitter.com/LondonBiPandas/status/1236319239881068544>

24<sup>\*</sup> <https://twitter.com/helensteel12/status/1237293339789099009>  
<https://twitter.com/helensteel12/status/1237301612563103744>  
<https://twitter.com/helensteel12/status/1237305410371096576>

25<sup>\*</sup> <https://wildwomanwritingclub.wordpress.com/2020/06/10/no-8/>  
<https://www.spiked-online.com/2020/03/11/labour-members-vs-the-trans-tyranny/>  
<https://debbiehayton.wordpress.com/2020/04/14/defend-me-or-expel-me/>  
<https://morningstaronline.co.uk/article/b/smoke-bomb-protest-outside-expelme-rally-near-grenfell-tower-sparks-sensitivity-row>  
<https://womansplaceuk.org/2020/03/12/thank-you-labour-womens-declaration/>

“The very act of debate in these cases is an effective rollback of equality and a foot in the door for doubt and hatred”). It is wholly reasonable to suppose that people may interpret the provisions of the proposed legislation to include any evidence-based discussion of sex and gender that departs from an uncritical acceptance of gender identity ideology.

It may be possible for the Committee to look again at the wording of the proposed Bill, and clarify how its provisions may be interpreted, and this might go some way towards limiting the possible damage that could be done in the present context. However, it would be very hard to ‘future-proof’ any Bill against possible ideologies that may emerge in the future and might seek to close down discussions of other important social issues. It may also be the case that the Bill would fuel a culture of litigation, further polarising relationships between those whose rights pertain to different protected characteristics.

Our experience therefore leads us to believe that the possible perverse effects of Part 2 of the Bill are potentially more harmful than the harms it intends to prevent. It is reasonable to suppose that it would have a further chilling effect on the freedom of women to advocate for sex-based rights in the current climate, and on other groups and ideological positions which may emerge in the future. It would do nothing to improve relationships between people with different views. We therefore ask the committee to remove Part 2 from the Bill.

### **Question 8: Protection of Freedom of Expression**

*Summary: More can and should be done by the Scottish Government to protect freedom of expression, especially (but not solely) in relation to advancing the Public Sector Equality Duty, and in Universities.*

Since we do not support the inclusion of Part 2, we will not comment in detail on the proposed clauses protecting freedom of expression in relation to religion and sexual orientation. We do, however, think that the Scottish Government should take seriously its role in protecting freedom of expression, particularly (but not solely) in relation to public discussions on contentious issues.

We are mindful of the Public Sector Equality Duty which includes the duty to “foster good relations between people who share a protected characteristic and people who do not”. We do not think this duty has been exercised to proper effect by public sector and Scottish Government-funded third sector organisations with respect to the discussion on sex and gender.

We suggest that the Justice Committee consider restorative approaches to intervening in and beyond this current flashpoint, and signposting to such approaches in the Bill. As stated in our Declaration, “Women have the right to discuss policies which affect them without being abused, harassed or intimidated”. We do not think that the proposed legislation will advance this right. We have no desire to infringe on the rights of anyone else to advocate for their political position, we have never tried to prohibit the legitimate speech of others, and we want to work with, rather than against, those who genuinely seek to advance the rights of other

protected groups. To that end, restorative approaches are more likely to enable the building of relationships that would make possible the calm, respectful, evidence-based discussion of rights pertaining to sex and gender of which we seek to be a part. Whilst detailed provision regarding such approaches would be out of scope of the proposed Bill, the guidance documents could direct potential litigants towards restorative approaches to addressing and resolving concerns.

We are also mindful that education is devolved, and that the Scottish Government has responsibility for universities. In 2019 the EHRC issued guidance for HE providers in Scotland<sup>26</sup> which included the following key points:

Higher Education should always work to widen debate and challenge, never narrow it

Peaceful protest is itself a form of freedom of expression: however, protest should not be allowed to shut down debate or infringe the rights of others

We are alarmed by the recent examples of protest being allowed to close down legitimate debate on sex and gender, creating a chilling effect in universities. Towards the end of 2019, events platforming advocates of women's and girls' sex-based rights were cancelled or indefinitely postponed by Oxford Brookes University<sup>27</sup>, the University of Essex<sup>28</sup> and the University of Edinburgh<sup>29</sup>. Campaigns against these events had consisted of unsubstantiated and extreme allegations and acts of sabotage, such as this Twitter post by a University of Edinburgh staff member (and co-chair of the University's Staff Pride Network)<sup>30</sup>. Transactivists have campaigned for the removal of academics who do not share the view that gender identity should be the sole criterion for whether one is considered to be a woman, man, or something else<sup>31</sup>, and the editor of an academic journal was subject to a campaign for her removal<sup>32</sup>. Less noticeably, research, teaching and discussion of women's sex-based rights has simply not gone ahead by dint of the self-censorship exercised by academics who are cognisant of the consequences of challenging the more extreme aspects of gender identity ideology.

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<sup>26</sup> <https://www.equalityhumanrights.com/sites/default/files/freedom-of-expression-guide-for-higher-education-providers-and-students-unions-scotland.pdf>

<sup>27</sup> <https://www.thetimes.co.uk/article/oxford-brookes-university-cancels-feminist-speaker-rachel-ara-after-students-accuse-her-of-transphobia-3tdkxscz6>

<sup>28</sup> <https://www.thetimes.co.uk/article/trans-rights-activists-halt-gender-debate-at-essex-university-qf9sh5r3q>

<sup>29</sup> <https://www.scotsman.com/news/scottish-news/scottish-schools-transgender-event-cancelled-amid-fears-speakers-safety-1400793>

<sup>30</sup> <http://archive.ph/XtPUI>

<sup>31</sup> <https://www.theguardian.com/education/2018/oct/30/uk-universities-struggle-to-deal-with-toxic-trans-rights-row>

<sup>32</sup> <https://www.thetimes.co.uk/article/journal-editors-quit-in-protest-over-transphobic-academic-6tvq3cwf>

In England, the Universities minister has suggested new measures to protect freedom of speech and to address the chilling climate currently prevailing in relation to some contentious issues<sup>33</sup>. We believe that measures should be taken in Scotland to ensure that universities can continue to promote discussion of the many difficult and complex issues associated with current developments in sex and gender. Again, detailed provision is out of scope of the proposed Bill, but the wording and guidance of the legislation needs to be clear about the differences between hateful speech and legitimate (if uncomfortable) discussion of unpopular ideas in HE settings.

Respectful, evidence-based discussion of difficult social issues is one of the ways in which misunderstanding between groups can be aired and resolved. Seen that way, it is an important (but not the only) strategy for preventing hate crime. Freedom of expression (and, in universities, academic freedom) is an important condition for enabling such discussion. We ask the Justice Committee to work with other relevant committees in the Scottish Parliament to explore ways to protect and promote freedom of expression including in relation to the two aspects we have outlined, and to revise the proposed legislation in that spirit.

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<sup>33</sup> <https://www.telegraph.co.uk/news/2020/07/15/universities-could-required-fund-security-controversial-speakers/>