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By email from info@forwomen.scot
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HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL BRIEFING FOR STAGE 3, 10th MARCH 2021

For Women Scotland (FWS) is a grassroots women's rights group concerned with protecting and strengthening existing rights for women under UK and Scots Law. We have twice given evidence to the Justice Committee on the potential impact of the Hate Crime Bill on women, following consultation with our extensive network across Scotland. We have prepared the following briefing on the amendments proposed at Stage 3.

We should first like to highlight our concerns with regard to the process of consultation, especially in consideration of women's rights. As a consequence of Parliamentary Questions lodged by Elaine Smith MSP on 5th February (refs S5W-35023 and S5W-35024) which concern consultation with women, we have written to the Permanent Secretary, Leslie Evans, this week asking how the Scottish Government attempts to comply with the Scottish Government Consultation Good Practice Guidance^[1], in particular section 2B:

"Even where relevant stakeholder, community and voluntary groups exist, it is worth remembering that they may not be representative of all individuals with an interest in an issue. Consultation teams are, therefore, encouraged not to rely only on existing groups and organisations, but also to think creatively about how to ensure the views of a full range of relevant individual citizens are included in the policy process."

While members of FWS and other groups attended early workshop sessions on the Bill, findings from those sessions on women's place in the legislation did not filter into the draft version. The Cabinet Secretary also disregarded evidence from "coalface" groups who requested that sex be added to the bill^[2] as well as ourselves, MBM, FOVAS, and several other witnesses or respondents.

Mr Yousaf's repeated public pronouncements with regard to engagement with "stakeholders" have not been matched in practice. On 9th September 2020 he promised that the "Scottish Government will work tirelessly with... anyone else who wishes to contribute to the Bill", yet women's groups who are unaffiliated to the government along with free speech campaigners have been shut out of engaging with ministers from the start (we would commend the committee who did consult more widely).

The Scottish Government has relied on the larger national groups and assumed that they are representative of specialist services which usually operate independently from the umbrella organisations. A Freedom of Information request^[3] reveals that Marsha Scott of Scottish Women's Aid, in reply to concerns raised by Jenny Marra, had not consulted in advance of submitting evidence. She subsequently spoke to only two local Women's Aid managers out of the 36. Engender, who last year spent under £10,000 on commissioning

[1] <https://www.gov.scot/publications/foi-201900009119/>

[2] <https://mbmpolicy.files.wordpress.com/2020/12/hate-crime-briefing-9.-legislating-for-hate-against-women.-view-from-the-coalface.pdf>

[3] FoI reference number 202100150594, not yet published by the Scottish Government

research have confirmed that they undertook no consultation with regard to Hate Crime - in answer to a question at the AGM, Emma Ritch said:

"I would like to be clear here - that Engender is not funded for a huge amount of engagement and are not presenting our work as advocating on behalf of the members or as representative of women. The colleagues at the Scottish Women's Convention are funded in this way and we are glad to hear from members but our work is quite technical. I would not want to give the impression that membership privileges certain perspectives above others."^[4]

We are not aware SWC, the group funded to consult, undertook any process of engagement on the Hate Crime Bill either, nor did they respond to the Committee's Call for Views. This lack of engagement or guidance contrasts unfavourably with the approach towards women's rights of earlier administrations as revealed in the contrast in the answer to a similar question on consultation with women's groups answered by Margaret Curran in 2003.^[5]

Latterly, it emerged that when the Cabinet Secretary claimed Stage 2 amendments on freedom of expression were withdrawn after meetings with stakeholders, he had, in fact, met only with Equality Network and their project group Scottish Trans Alliance.^[6] We hope MSPs will reflect that this lack of engagement with critics of the proposals and the over-reliance on Government funded organisations does not comply with good practice.

The Part 1 & 3 Amendments which we would urge MSPs to support are as follows:

Amendment 4 by Johann Lamont to add sex as characteristic to Part 1 of the Bill (aggravation of offences by prejudice). Women have been calling for this since it was first proposed 18 years ago and Lord Bracadale's recent review recommended its inclusion. Women are hugely, and increasingly, impacted by hate crimes and the Bill should not pass into law without us. This **does not** stop any work by the working group on misogyny. In evidence to the committee at Stage 1, witnesses spoke of the importance of seeing themselves in the Bill. We would draw attention to the Stage 1 briefing by MBM Policy^[7] which highlights the level of crime against women and the danger of not recognising the impact or of relegating the seriousness.

We note that claims have been made that a "gender neutral" aggravator might be used against women in DV cases. However, an aggravator requires an underlying crime: it is not an instrument in and of itself. None of the groups opposed to the addition of sex were able to bring any actual evidence of harm of inclusion, merely citing potential for under-reporting which is a common theme across all characteristics and an argument against the premise of aggravated crime as a whole. It is a sad fact that women who kill abusive partners are frequently judged more harshly than men who murder partners and are often said to have "snapped". Justice For Women have many examples of women convicted for life imprisonment for murder^[8] and contrast that to the more lenient sentence of five years recently handed down to Anthony Williams in Wales who strangled his wife days into the

[4] <https://forwomen.scot/wp-content/uploads/2020/11/Engender-AGM-14Nov2020.pdf>

[5] <https://twitter.com/AnnDHenderson/status/1368527031332450304>

[6] <https://twitter.com/ForwomenScot/status/1366863240286846979>

[7] <https://mbmpolicy.files.wordpress.com/2020/12/mbm-briefing-stage-1-hate-crime-and-public-order-bill2.pdf>

[8] <https://www.justiceforwomen.org.uk/emmajayne-magson>

lockdown.^[9] We would hope that the necessity for training of Police and others in the criminal justice system were sex to be added, would facilitate greater discussions of this inequality and raise awareness of the current structural misogyny in the criminal justice system.

A sex aggravator would also cover, and remove the need for, other characteristics in the bill: Claire Graham of dsdfamilies said that it would be preferential to a discrete VSC characteristic.^[10]

We remain concerned that the working group is looking at filling a narrow gap in law rather than considering the aggravated nature of a range of crimes against women. We know that reporting of violent crime against women is already low, and charge and conviction - especially in cases such as rape - even lower. We remain convinced that the addition of another crime (even were the working group to find the gap that eluded Bracadale) would do nothing to address the misogyny which underpins many crimes against women. However, in the event that the working group found a better solution, this could be amended. In the meantime, valuable data would be collected and essential training of police undertaken.

Amendment 17 by Johann Lamont to add a definition of sex, as given in the Equality Act 2010. This will provide important clarity whether sex is added to the Bill now or at a later date by the decision of the separate misogyny working group. It will also ensure that the Part 3 requirement for data collection by the police is consistent with the Public Sector Equality Duties in the Equality Act.

Amendment 26 by Johann Lamont to remove the possibility for sex to be redefined. Sex is clearly defined by the Equality Act and by many international organisations as a biological characteristic. There is no need for an "interpretive provision" which would possibly result in conflation with gender identity. The Government has been clear that sex and gender are two separate concepts^[11] so there is no need for a clause in the Bill that will introduce confusion.

In this context it is also important to note the record of some organisations opposed to adding sex at this stage. In evidence to Westminster, Equality Network/Scottish Trans Alliance and Stonewall called for the removal of single-sex exceptions in the Equality Act 2010.^[12] Subsequently, Tim Hopkins of EN has attempted to argue that the definition in the EqA2010 refers to "lived sex" a term which is not defined in law.^[13] We are concerned that the resistance to adding sex from these organisations should be seen in light of their repeated attempts to roll back women's legal rights or to redefine terms in law.

Amendments 35, 36, 39 & 40 by Johann Lamont to change the definition of sexual orientation. The Bill refers to "a different sex" which implies there are more than two sexes and should be corrected.

[9] <https://www.theguardian.com/uk-news/2021/feb/18/anthony-williams-killed-wife-act-of-great-violence-jailed-for-five-years>

[10] <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12954&i=117092&c=2296826#ScotParlOR>

[11] Reply by Shirley-Anne Somerville to (S5O-02754) <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=11875&i=107396&c=2142519#ScotParlOR>

[12] <https://womansplaceuk.org/references-to-removal-of-single-sex-exemptions/>

[13] https://www.parliament.scot/S5_European/Inquiries/CensusBill_EqualityNetwork_CTEEAS518CB35.pdf 3

Amendments 37 & 41 by Johann Lamont to remove cross-dressers. We consider it outrageous and sexist that something that is best a fashion choice or at worst a sexual fetish is protected in law and ahead of any provision for women. There is no evidence of any hate crimes against cross-dressers.^[14]

We would add that were sex to be added to the Bill, people who are subject to abuse for being gender non-conforming without being trans would have broader and better protection. The rationale forwarded by Equality Network (that it would provide a loophole for assailants who claimed they were motivated by a hatred of cross-dressers rather than trans people) is flawed. It could equally be applied to any other group (for example, someone might claim to be motivated by a dislike of people with ginger hair or tattoos). Ironically, considering EN's insistence that transwomen are women, an assailant who claimed they assumed the victim was female and were motivated by misogyny would not, at this time, be committing a hate crime.

The Part 2 Amendments which we would urge MSPs to support are as follows:

Amendments 6-10 and 13 by Liam Kerr to leave out Part 2 of the Bill. The amendments proposed by the Scottish Government do not go far enough to protect free speech and will not prevent a chilling effect on women's ability to discuss their rights or partake in debates on reform of the Gender Recognition Act. This is demonstrated by the Cabinet Secretary for Justice being unable to confirm there are only two sexes.^[15] When the Scottish Trans Alliance call for stickers with the definition of women to be reported as hate crimes,^[16] and, during evidence to Committee, call a women's rights declaration based on CEDAW transphobic,^[17] it is clear that women will face malicious and vexatious reporting.

This weekend, Barrister Allison Bailey published a letter sent by the publicly funded Stonewall to her chambers^[18] which was described by Employment Judge Stout as a "threat". Stonewall frame her defence of the principle of single-sex spaces, discussion of sex rather than gender, and her objections to a male activist who runs workshops to teach men who self-ID as women how to "overcome" lesbian's resistance to sex with a male as "inflammatory language which encourages violent resistance". They also claim that Woman's Place UK, a socialist, feminist group is a "hate group". This outrageous attack on Ms Bailey (who, as a black working class lesbian, should be someone equality groups speak for rather than vilify) makes it clear that funded groups are already using resources and influence to allege that women are "stirring up hate" simply for defending current rights. We are certain that, had a similar law been in place in England, Stonewall would have used it, or expected her Chamber to use it, against Ms Bailey.

This makes us even more concerned that Scottish Government is also a part of the Stonewall Diversity Programme used to bully Ms Bailey and blackmail her Chambers. In light of the enthusiasm of some in senior positions for this programme,^[19] we are not confident

[14] https://www.whatdotheyknow.com/request/data_on_hate_crimes_perpetrated

[15] <https://www.heraldscotland.com/news/19093782.justice-secretary-humza-yousaf-condemned-refusing-say-two-sexes/>

[16] <https://www.thetimes.co.uk/article/principal-backs-transgender-students-over-hurtful-stickers-9jpztg2tz>

[17] <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=13148&i=118981&c=2322443#ScotParIOR>

[18] <https://allisonbailey.co.uk/updates/update-5-breaking-exclusive/>

[19] <https://twitter.com/PermSecScot/status/1222826647986081793>

that commitments with regard to the scope of the Bill or the protection of women will be enforced unless they appear on the face of the Bill.

We would also draw attention to the evidence sent to Committee by Prof Sarah Pederson of Robert Gordon University^[20] on the low threshold which exists on campus and in publishing for malicious reporting. Academics have recorded these experiences on the GC Academia website^[21] which has itself been targeted and reported as “hate”.

In recent days, passionate, factual speeches made by MSPs in Holyrood to mark International Women’s Day have been called “hateful”, “transphobic” and a “dogwhistle” because of reference to sex, sexism and women’s rights. This included a Labour list candidate who demanded “action” against feminist MSPs, Johann Lamont and Elaine Smith.^[22] In answer to a tweet citing “vicious transphobia” in the IWD debate, an MSP replied “we can expect more of that when it comes to stage 3 of the Hate Crime Bill.^[23] The amendment to substitute sex for gender in the Forensic Medical Services Bill which was supported by the overwhelming majority of MSPs has also been called “shameful” and “transphobic” by candidates and former politicians. Ex MEP Sheila Ritchie, who has publicly called Fair Play For Women a “transphobic group” claimed the amendment “removed rights”.^[24]

Would an MSP, ex-MEP or a veteran campaign group fulfill the criteria for the “reasonable person” test? If so, women advocating for legal rights have a great deal to fear from this Bill. These concerns have been raised by a large number of different groups in the last minute consultation in February, and have not been adequately addressed. Part 2 of the Bill is not fit for purpose and should be scrapped altogether.

However, if MSPs cannot support scrapping of Part 2 we would urge you to support the following:

Amendments 11B-11F by Johann Lamont, any of which will go some way to allay women's fears over protection of free speech.

After similar amendments were proposed at Stage 2, the reaction of certain activists was so extreme that the government withdrew theirs and encouraged the opposition to do likewise. It should then have been apparent that many of these people hope to use the legislation to attack women discussing sex-based rights and injustices. These responses came from activists and even office bearers in political parties. Justice committee Convener, Adam Tomkins, said the reaction left him “disturbed” and “a little afraid”.^[25] That being the case, we are not reassured by commitments given by Humza Yousaf at committee on 22nd February that “there is nothing in the list of statements that Lucy Hunter Blackburn read out or in the written submission from For Women Scotland that would be criminalised under the bill.”^[26]

[20] p41,

[https://www.parliament.scot/S5_JusticeCommittee/Meeting%20Papers/Paper_3_-_Collated_evidence_\(003\).pdf](https://www.parliament.scot/S5_JusticeCommittee/Meeting%20Papers/Paper_3_-_Collated_evidence_(003).pdf)

[21] <https://www.gcacademianetwork.org/>

[22] <https://twitter.com/ForwomenScot/status/1367768095226540038>

[23] <https://twitter.com/patrickharvie/status/1367526902848757764>

[24] <https://twitter.com/europesheila/status/1337481616357269517>

[25] <https://www.pressandjournal.co.uk/fp/news/politics/scottish-politics/2866399/hate-crime-bill-amendment/>

[26] <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=13148&i=118981&c=2323643#Scot>

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Assuming this to be true, we can see no reason why the Cabinet Secretary would object to making this explicit on the face of the Bill by accepting **11B**.

11D would give reassurance to those who fear that this bill will be used to compel speech - especially as this is already happening in schools and on University campuses. It is an important reaffirmation of the principle of freedom of belief and, as such, should not be controversial.

Similarly, the extended definition in **11F** is an important and necessary affirmation of Article 10 rights and would prevent unnecessary and expensive investigations. We expand on the likelihood of such and the chilling effect on women in our assessment of 11G below. The longer list in this amendment would provide much needed clarity to investigators as well as reassurance for those in the arts or journalism that robust, blunt or shocking material would be protected. This is crucial in any society which values intellectual or artistic freedom.

Amendment 11G by Joan McAlpine. Mr Yousaf is on record as saying comments people consider offensive will not be criminalised. We believe that this should be on the face of the Bill and not left to chance or interpretation. The wording “perceived to be offensive” is important as it recognises that comments considered reasonable by one group can be considered hateful by another.

We are aware that the Equality Network believes this will not be needed in the event that Amendment 1 in the name of Adam Tompkins passes. We feel that, however, that this gives welcome additional clarity for those who have to interpret the Bill. This is especially important when the Police have to assess reports of hate crime and prevent unnecessary investigations and the damage, distress and expense they will cause. The possibility of investigation will certainly have a chilling effect, even if cases never come to court. As the same lobby groups who urge the reporting of stickers or used their heft to bully (as in the Bailey case) are training officers, we have little confidence that, without such explicit guidance, they would not be told to pursue cases of “offence”. Last month, Merseyside police had to apologise after displaying a sign saying “Being Offensive is an Offence”.^[27]

Finally, we ask that you **reject Amendment 24 in the name of Humza Yousaf** which proposes to downgrade the mandatory collection of data on hate crimes by sex to data that “may” be collected. Many organisations, including FWS and Engender, have stressed how important it is to have sex-disaggregated data.

As the Scottish Police Federation said “If ever a piece of legislation has demonstrated that opposing views are met with intolerance and all too readily branded as hate, then the Hate Crime and Public Order (Scotland) Bill has done precisely that.” They also recommend that being offensive should not be potentially criminalised: “Whilst we can all agree that offence is undesirable, even when intended, we consider that parliament either needs to follow the approach of commonality as recommended by Lord Bracadale, or be explicit that merely being offensive will not be considered a criminal act.”^[28]

[27] <https://www.bbc.co.uk/news/uk-england-merseyside-56154542>

[28] p14,

[https://www.parliament.scot/S5_JusticeCommittee/Meeting%20Papers/Paper_3_-_Collated_evidence_\(003\).pdf](https://www.parliament.scot/S5_JusticeCommittee/Meeting%20Papers/Paper_3_-_Collated_evidence_(003).pdf)

The Bill also does not require corroboration to prove the aggravator. This is a deviation from Scots Law and is especially ironic considering the resistance of the Scottish Government to remove corroboration in cases of rape or sexual assault.

For a deeper consideration of the legal issues, we refer MSPs to the submission of Scott Wortley,^[29] Law Lecturer at Edinburgh University, especially his concerns about *Expressio unius est exclusio alterius* (para 19). Other lawyers have expressed concerns that the bill in current form might fall foul of Article 10 rights. MSPs should consider whether they wish to be party to another deeply unpopular, legally flawed piece of legislation.

[29] <https://scott-wortley.medium.com/submission-to-justice-committee-on-hate-crime-and-public-order-scotland-Bill-freedom-of-6ad6e9077b66>