

Closed doors and closing down debate: policy capture in the Hate Crime Bill

MBM Hate Crime Briefing 13

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March 2021

1. Introduction

The Stage 3 debate on the Hate Crime and Public Order Bill will take place in the Scottish Parliament on Wednesday 10 March. The Bill has had an exceptionally difficult passage to date, prompting criticism from a range of organisations, including the Faculty of Advocates, the Law Society, the BBC, the National Secular Society, the Catholic Church and a raft of writers and artists. Some of the original concerns have been addressed, but not all. Nonetheless, with parliamentary arithmetic standing in its favour, the Bill is likely to make it onto the statute book.

Most of the concerns centre on Part 2, which will extend the criminal offence of ‘stirring up hatred’, and the likely impact of this on freedom of expression. We have written extensively on this issue, specifically in relation to issues around sex and gender identity. In particular, we have highlighted the risk of further chilling effects in an area of debate that people are already afraid to enter.

This briefing traces the passage of the draft legislation, in relation to freedom of expression as it affects questions about sex and gender identity. Drawing on our previous work on policy capture, and new Freedom of Information returns, we show whose views have been privileged in the handling of those parts of the draft legislation, and discuss the likely implications for freedom of expression in Scotland.

2. Standing up for freedom of expression...

Following the culmination of the Stage 1 proceedings in December 2020, concerns about how the Bill gives explicit protection to freedom of expression (FoE) have intensified. The Bill as introduced did not implement the proposals of the Bracadale Review on this point. In late January 2021, the Scottish Government and a number of opposition MSPs lodged amendments to the Bill on FoE some of which were generic, and others which were tailored to specific characteristics in the Bill.

3. ...and standing down

Following a social media backlash and accusations of transphobia, on 1 February – the night before Stage 2 consideration of the bill began – opposition MSPs and the Cabinet Secretary for Justice withdrew their respective FoE amendments, and agreed to take a ‘collaborative’ approach to discussing a form of generic wording for a Stage 3 amendment on FoE.

That such a critical issue would be decided behind closed doors, prompted serious concerns about the lack of a transparent parliamentary process from [ourselves](#) and others.

In response, the Justice Committee established an emergency process to [invite](#) further submissions on a suite of draft amendments proposed by the Cabinet Secretary over a long weekend (18-22 February). The Committee received 681 submissions (ours can be read [here](#)), a selection of which were uploaded to the Parliament's website less than four hours before the Committee convened for a 90 minute roundtable [oral evidence session](#). The published evidence ran to 391 pages.

The submissions received by the committee suggested there was still significant concern about this aspect of the Bill, including about how clearly any of the government's proposed approaches would protect discussion on sensitive issues, such as sex and gender identity.

This came from bodies as diverse as Association of Scottish Police Superintendents, the Scottish Police Federation, and the Society of Editors, as well as women's groups and faith organisations. Noting how short notice and sensitive the discussion was, the Church of Scotland offered support to the view of the Catholic Parliamentary Office of the Bishops' Conference of Scotland and the Free Church, that Part 2 of the Bill should be deferred, to be completed with less haste, a view shared by the Network of Sikh Organisations. Umbrella group FreeToDisagree, whose members include the National Secular Society, Index on Censorship and the Peter Tatchell Foundation, alongside faith and libertarian groups, [assessed](#) the submissions initially published, and found that they were overwhelmingly in favour of stronger protections than proposed by the Scottish Government.¹ The [published submissions](#) excluded those which were duplicates or part of a campaign.

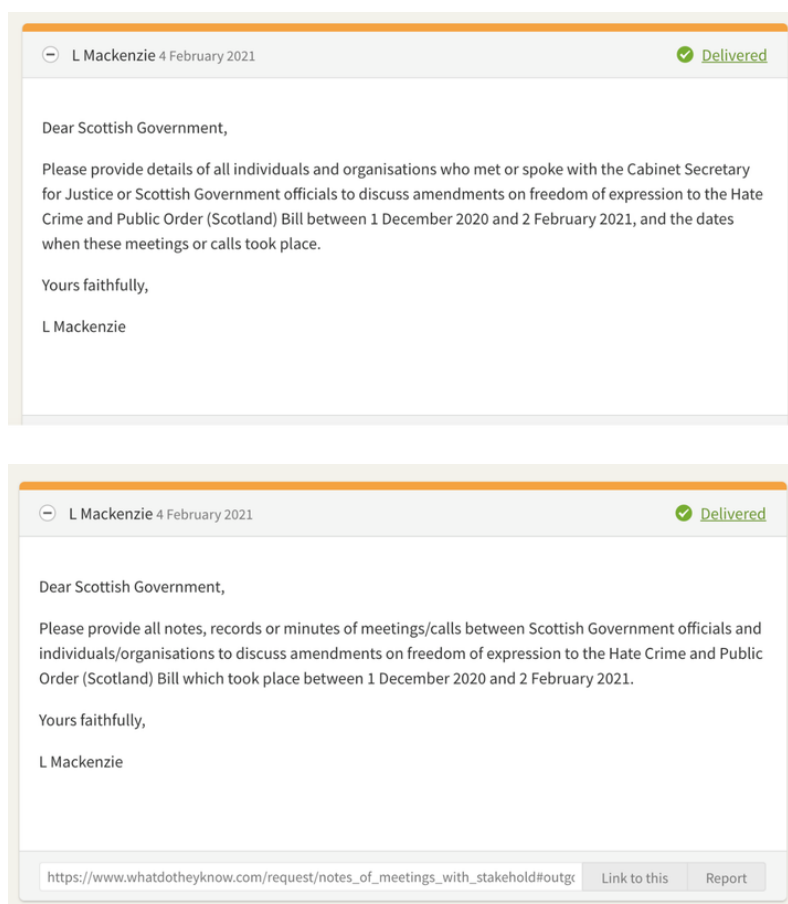
The roundtable, held on the public record, consisted of 13 witnesses (Lucy gave evidence on behalf of MBM) and the Cabinet Secretary for Justice. During the roundtable, Mr Yousaf indicated his willingness to meet those with concerns about this issue. Indeed, throughout the passage of the bill, Mr Yousaf has regularly signalled that his 'door is open' to meeting with 'external stakeholders'.

The day after the roundtable evidence session, we [wrote](#), along with feminist campaign group For Women Scotland, to indicate our willingness to meet with the Scottish Government before the deadline for lodging Stage 3 amendments had passed, and offering suggestions for drafting of this part of the Bill. We received no response.

¹ The Committee initially published 185 submissions in time for the roundtable evidence session, treating the remainder as unpublishable for various reasons. On further examination, they deemed a further 90 publishable.

4. Who was the door open to?

On 4 February, we submitted two freedom of information requests to establish who the Scottish Government did meet with from around the end of Stage 1, to discuss concerns about freedom of expression.



We received responses to these requests on Thursday 4 March.

The response to the [first request](#) revealed that Scottish Government officials and the Cabinet Secretary for Justice met a number of backbench SNP and opposition MSPs in the two-month period leading up to the start of Stage 2 proceedings. The Minister and officials also met with six groups and trade unions representing those working in the arts sector on 21 January.

Officials met representatives of the Equality Network on four occasions: 8 December, 14 December, 14 January and 29 January, with the last of these meetings attended by the Cabinet Secretary. (The response notes that it is not possible to say whether the freedom of expression amendments were discussed at the meeting on 14 January, which suggests this meeting was unminuted.) Representatives of the Scottish Trans Alliance (a project of the Equality Network) are recorded as being separately present at the meeting on 29 January.

Officials met with representatives of Stonewall Scotland twice, and Engender met officials with the Cabinet Secretary on 1 February.

[Notes](#) taken at those meetings demonstrate the clear objection to anything other than a generic freedom of expression protection in the bill from the Equality Network, the Scottish Trans Alliance and Stonewall Scotland:

Meeting with Equality Network 8 December 2020

Notes from discussion:

- Overall the Equality Network, Scottish Trans Alliance and Stonewall Scotland are supportive of one general provision. In terms of the various options for more specific provisions ■■■ made the following comments:
 - Concern that listing more specific behaviour 'throws a bone for homophobe and transphobes' and it send the wrong message to victims.
 - Noted serious concern should SG consider including wording such as 'antipathy, dislike, ridicule or insult' for trans identity or sexual orientation. In particular very specific concerns with the word ridicule.
 - Concern that if ridicule were included that a defence may be 'it was intended as ridicule and not abuse' and gave the example of the anti-Semitic leaflets as could imagine a similar scenario for homophobic or transphobic leaflets and for such behaviour to be described as 'only ridicule'.
 - Was a little reassured that the provision contained the wording 'solely on the basis..' but concern remained.
- Prefers the 4th and most broadest options for both sexual orientation and transgender identity

Transgender identity

- ■■■ strongly opposes all options other than a broad provision (final column in the table)
- Emphasised that trans people are feeling increasingly let down by SG (e.g. with the GRA not progressing) and such provision could further damage that relationship
- Concern that listing specific behaviour is incredibly problematic as it suggests SG is giving permission to express particular views re trans people but it doesn't do this for the other characteristics.
- In addition, language used and the specific examples used cause concerns
 - 'the basis upon which a person should be recognised as being a transman or transwoman' - the issue for the trans community is not being recognised as a man or a women.
 - 'the nature of what is transgender identity' – concern as this would not be considered for any other characteristics including sexual orientation. Including it suggests SG does not think of trans identity in the same way as other identity characteristics and plays into the hands of those who say transgender does not exist.

EN, STA and Stonewall would only support section 12 if it was broad – and would give explicit support if it were. They are all also working together on an amendment in this area. They are considering something along the lines of:

Behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves or includes discussion or criticism of matters related to a characteristics listed in section x.

■■■ made the point that by including a broad provision for all other characteristics other than religion, that we are still broadening it out and may satisfy most people. It also ensures consistency and parity. The breadth and depth comments were more in relation to the FoE provision for religion and we are taking that forward.

This position was reiterated at the meeting on 29 January between representatives of the Equality Network and the Scottish Trans Alliance and the Cabinet Secretary for Justice. The approach to opposition MSPs inviting them to withdraw their amendments appears to have been an action point from this meeting:

Summary

During discussion, the following points were aired:

- The reaction to Government and non-Government amendments lodged on freedom of expression protections for the characteristic of transgender identity was acknowledged.
- It was noted that in light of this reaction, SG amendments on freedom of expression (apart from on religion) would not be moved.
- Discussion would be had with opposition MSPs about withdrawing their freedom of expression amendments and asking them to work with the SG to develop something that had broader consensus for Stage Three.
- There was general agreement that there is a need to have freedom of expression provisions in the Bill, however concerns were expressed about transgender identity being 'singled out' through the amendments lodged and the message that this sends to both the trans community and wider communities.
- It was indicated there was a strong preference for a general 'catch all' provision for freedom of expression to cover all characteristics, with an acknowledgment that the reasons for additional protections in respect of religion.
- A catch-all provision would be explored.
- There was discussion about the legal and policy challenges of a freedom of expression protection referring to ECHR articles.
- It was agreed to continue to engage as a provision is developed for Stage Three.
- All present were happy to be involved in discussions as the freedom of expression amendments are developed for Stage Three.

Whilst there is no note of the meeting that the Cabinet Secretary had with representatives of Engender held on the morning 1 February, an email confirms that the freedom of expression amendments were discussed. Engender's later evidence to the Committee supported the approach the government is now taking (p.14 [here](#)), although it does suggest that the government having "more discussion with more stakeholders" might have improved the process and helped to reduce levels of concern.²

² Engender describes itself as '**Scotland's feminist policy and advocacy organisation**'. Like the Equality Network, Engender is almost wholly funded by the Scottish Government and is explicit that it is not a representative body in any sense, having stated, "We neither 'represent women and girls', nor make any claim to" ([Letter to Joan McAlpine MSP](#), 1 March 2019). On questions of sex and gender identity, Engender [takes the same line](#) as the Equality Network.

Meeting with Engender 1 February 2021

From: [REDACTED]@engender.org.uk>
Sent: 01 February 2021 11:22
To: [REDACTED]
Cc: [REDACTED]
Subject: Hate Crime and Freedom of Expression

Hi [REDACTED],

Lovely to meet you in the meeting this morning, unfortunately I dropped out just at the end of the freedom of expression discussion, which was wasn't ideal timing.

However I've attached the documents I was largely speaking to – firstly our stage 1 evidence to the Committee which outlined our suggested approach to developing a single freedom of expression clause and secondly a joint statement from a number of equality organisations we joined advocating the same sort of approach. If there was anything else raised in that meeting on freedom of expression that I might have missed or be able to help with just let me know.

I'd be very pleased to discuss these further as well as any other thoughts or questions you may have on freedom of expression proposals.

Best wishes,
[REDACTED]

Another recently published FOI response suggests that representatives of Scottish Women's Aid, Rape Crisis Scotland and Zero Tolerance were also invited to attend the meeting on 1 February, at the request of Engender's Director.

From: Emma Ritch
Sent: 28 January 2021 15:12
To: Cabinet Secretary for Justice
Cc: Maxine Blane
Subject: RE: Hate Crime and Public Order (Scotland) Bill - Meeting with the Cabinet Secretary for Justice

Dear [redacted]

Thank you for extending this invitation, and 9.30 on Monday 1 February is convenient.

It would be helpful if the following participants could attend:

Emma Ritch, Executive Director, Engender
Sandy Brindley, Chief Executive, Rape Crisis Scotland
Marsha Scott, Chief Executive, Scottish Women's Aid
Eilidh Dickson, Policy and Parliamentary Manager, Engender

Kind regards,
Emma

5. Scottish Government draft FoE amendments

The Scottish Government put forward two FoE models for discussion at the emergency Justice Committee roundtable on 22 February. These can be accessed on pages 5-8 here. For each model, there were two options, as versions including and excluding race were offered in each case. Groups representing racial minorities expressed surprise to see options being introduced at this late stage extending FoE coverage to race: the existing legislation for race, in place since 1986, does not have such a provision.

One model was based on the wording suggested by the Equality Network at the 8 December meeting. It reversed an agreement reached with religious and secular groups for a stronger FoE protection in relation to religion, which had been agreed at Stage 2 of the Bill only a week before. The National Secular Society described this as “perplexing and farcical”, the Network of Sikh Organisations as “frankly remarkable” and the Edinburgh Secular Society were “shocked and exasperated”. (Their submissions can be read here.)

The other formula offered applied the Equality Network suggestion above to everything except religion, and kept the wording already agreed for that.

6. Stage 3 FoE amendments

Ahead of the forthcoming Stage 3 debate on 10 March, the Cabinet Secretary for Justice and opposition MSPs have now tabled a series of amendments on FoE. The full list of marshalled amendments can be read here.

The model now proposed by the Government in its Stage 3 amendment to the Bill is in effect the one produced by the Equality Network (amendment 11) at the 8 December meeting, except where bodies representing religion and race have successfully challenged their inclusion in the Equality Network’s preferred generic formula.

Labour MSP Johann Lamont has lodged a number of amendments relating to FoE, including the one below, which sets out a list of items that should not, by themselves, be considered “abusive or threatening”:

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.>

On 5 March, the Equality Network and Scottish Trans Alliance circulated a briefing to all MSPs, advising voting against this amendment, for the following reason:

We oppose amendment 11B. Amendment 11 already covers all discussion or criticism of any matters relating to any of the characteristics. Amendment 11B seeks to add into the bill an unnecessary “laundry list” of matters relating specifically to transgender identity. This includes propositions that fundamentally undermine trans people’s long-established Convention right to be legally recognised in their transitioned gender. Gender recognition has enabled trans women to be legally recognised as women for all purposes since 2004, and that recognition has been in place for much longer in many areas (eg, obtaining a new passport, driving licence, medical records, etc).

People should be free to discuss or criticise this fundamental human right, without being criminalised (unless it is done in an objectively threatening or abusive way, and intended to stir up hatred). Amendment 11 already provides this reassurance. But to add into legislation a list of “approved” statements that include attacks on the fundamental rights of one group of people is entirely wrong. It says that trans people’s rights are open season for attack, and it would completely undermine the message that the bill otherwise provides, that people with the characteristic are valued as part of Scottish society.

In addition, expression of views listed in amendment 11B could constitute a civil wrong under the Equality Act 2010. For example, repeatedly asserting to a trans woman work colleague that they are not a woman would constitute unlawful harassment under the Equality Act. It is important that the freedom of expression provision in this bill does not inadvertently give people the impression that such unlawful acts now have impunity.

7. Policy capture in the Hate Crime Bill

We have previously [documented](#) how the views and demands of some interest groups are privileged over and above others in the policy making process, to the detriment of women.

We think that the same process of policy capture has been evident also in the passage of the Hate Crime Bill in relation to the freedom of expression amendments, where the imprint of particular groups seems clear.

It is also now more obvious than it has ever been that groups claiming to represent the trans community in Scotland believe that simply to assert that sex is a binary concept rooted in biology, to ask to be able to use plain language to describe this, or to contend that a person’s sex might be relevant to their life experiences is tantamount to an “attack on the fundamental rights” of trans people.

There could be no clearer demonstration that at the heart of the debate about sex and gender identity is an unresolved and unaddressed conflict over rights, and that within government, voices on one side of this conflict are listened to, to the absolute exclusion of the those on the other.

We will discover this week if legislators also accept unquestioningly the view of those groups exclusively listened to by the Scottish Government. If so, Scotland now looks like an increasingly hostile place for anyone who believes it is ever important to have the freedom to see, name and discuss the relevance of sex.