



Sex Matters response to Law Commission proposal on reform of Communication Offences

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Introduction

1. Sex Matters is a not-for-profit organisation that campaigns and advocates for clarity about sex in language, policy and law, in order to safeguard everybody's human rights, health, safety and dignity.¹
2. In the words of the consultation document, we are a "self-described 'gender critical' group". That is, we criticise the imposition of gender stereotypes and we challenge gender identity ideology that regards being a woman as little more than an identity or a feeling. We understand that there are two sexes: that sex is real, binary and in many situations important. While some people hold the belief that being a man or a woman is a "fluid" inner state of being, which does not necessarily relate to biological sex, most people recognise that "man" and "woman" are the words for adult human male and adult human female respectively.² This is also how these words are defined in law.
3. We seek to ensure that the human rights of everyone are upheld, including people of both sexes; transsexuals and people who identify as transgender; gay, lesbian and bisexual people; and people who share different sets of religious and philosophical beliefs (or lack of beliefs).
4. We are concerned that in recent years people have been called "hateful" simply for making ordinary, everyday statements about what it means to be male or female. Public bodies and private entities are silencing and punishing lawful speech about sex and gender as "transphobic", with people already being removed from social media platforms, having websites and social media forums shut down, being bullied and harassed at work, losing jobs, and being arrested, questioned and prosecuted for communications offences. The proposed law reform would make this situation even worse, declaring "open season" on people speaking honestly and openly about the facts of life, about their sexual orientation and about other people.
5. Many organisations have adopted policies from a small number of campaigners and lobby groups working in this area, without undertaking any due diligence on how these negatively impact on women. We are particularly concerned that the proposed approach would in practice delegate power to determine what is acceptable speech to charities and organisations that are demonstrably willing to close down women's dissent regarding their rights being compromised. Private

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² For example a survey of Scottish Voters in April 2020 found that 72% agreed with the statement that a woman is "an adult human female with XX chromosomes and female genitalia"; only 28% agreed with definition "anyone who says they are a woman regardless of biology" - Panelbase survey commissioned by Wings Over Scotland <https://wingsoverscotland.com/abolishing-women/>

organisations should not be given the power to criminalise opposing views.

6. One result of the existing chilling effect on debate is that organisations are routinely confused about what the law says about sex, and unaware of the range of opinion and depth of disagreement that exists regarding what beliefs and opinions are in themselves “hateful”. Therefore, before answering the questions, we will clarify what the terms “sex” and “gender” mean, and their status in UK law.
7. **We urge the Law Commission to use the terms sex, and gender reassignment, transsexual or transgender as separate protected characteristics and avoid the blended term “gender”, which causes confusion.**

Avoiding confusion over “sex” and “gender”

8. According to the “hate crime” consultation, the Law Commission considers that the UK government has defined **gender** and **sex** as two distinct concepts. This is based on an article by two members of staff at the Office of National Statistics which was developed in the context of the UN Sustainable Development Goals (which use “gender” to mean sex).³ The article does not have status as law or general policy. It gives the impression that sex and gender are two separate, defined statuses related to individuals in UK law. This is not the case.
9. In UK law, “sex” is understood as binary, with a person’s legal sex - male or female - generally reflecting their biological sex (apart from in the rare cases where someone has obtained a “Gender Recognition Certificate” to change their legal sex).
10. In common law, sex is determined according to a person's chromosomes and endogenous sex organs (internal and external) (*Corbett v Corbett* [1971] P 83, followed by *R v Tan* [1983] QB 1053 and *Bellinger v Bellinger* [2003] 2 AC 467).
11. Consistent with this, “sex” is defined as a protected characteristic under Section 11 of the Equality Act 2010. It relates to the terms man and woman:
 - (a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;
 - (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.

³ Tolland, Laura and Joanne Evans (2019) What is the difference between sex and gender? ONS <https://www.ons.gov.uk/economy/environmentalaccounts/articles/whatisthedifferencebetweensexandgender/2019-02-21>

The Act further defines “man” as a “male of any age” and “woman” as a “female of any age”.

12. Social scientists use “gender” to mean the social expectations placed on men and women, such as women being caring and men being aggressive. This is not a legal status. Some people believe that everyone has a “gender identity”, which is sometimes conceived of as innate and sometimes fluid, but is in any case not necessarily related to their sex.⁴
13. “Gender” is nowhere defined in UK law, but the word is sometimes used as a synonym for sex. This creates confusion. The Equality and Human Rights Commission (EHRC) states:

The term is often used interchangeably with “sex”, partly in recognition that much of the inequality between women and men is driven by underlying social and power structures rather than by biological sex. Although the Equality Act protects people from discrimination because of their sex, other UK legislation (such as the regulations requiring employers to publish their gender pay gap) refers to gender. This may cause confusion in some circumstances. To avoid any ambiguity, we are reviewing our use of language across our website and publications to ensure clarity and consistency. However, it is important to note that any mistaken or structural use of the term gender does not affect how the law works in practice.⁵
14. Where organisations confuse and conflate the idea of “gender identity” and “sex” they can no longer provide clear and unambiguous rules for single sex services. Being faced with someone of the opposite sex in a space designated “single sex” (such as women’s showers, changing rooms and dormitories) can be distressing, humiliating and frightening. Being forced to accept a male who identifies as a woman as a “female” healthcare professional when one is requested, a rape crisis counsellor or a personal care assistant is considered by many women as a breach of trust and consent by institutions with a responsibility of care.⁶
15. Responding to a plea for clarity on single sex services, MSPs recently voted overwhelmingly in support of an amendment to the Bill on Forensic services (Victims of Sexual Assault) (Scotland) to allow survivors of rape and sexual

⁴ Gender and Sex: a beginners guide <https://sexandgenderintro.com/>

⁵ EHRC (2018) Our statement on sex and gender reassignment: legal protections and language <https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language>

⁶ For example when undergoing a medical examination Forstater, M (2020) Trans healthcare professionals and patient consent <https://a-question-of-consent.net/2020/09/16/doctors/> or personal care: Cunningham, N (2020) My body, my choice: privacy, consent and compulsion in personal care <https://legalfeminist.org.uk/2020/07/25/my-body-my-choice-privacy-and-consent-in-personal-care/>

assault to request the sex (rather than the “gender”) of the medical professional who examines them. In its stage one report on the Bill, Holyrood’s Health and Sport Committee warned that the definition of gender “could be ambiguous...which has the potential to cause distress to individuals undergoing forensic medical examination.”⁷

16. The Scottish Police Federation has said in response to the Hate Crime consultation in Scotland:

The use of language to distinguish between sex and gender is often conflated, in what can appear as an attempt to infer outrage or discrimination simply because of irreconcilable fundamental beliefs.⁸

17. The Equality Act 2010 includes a protected characteristic of “gender reassignment”, which is separate to sex. Section 7 of the Equality Act provides that a person has the protected characteristic of gender reassignment if the person

is proposing to undergo, is undergoing or has undergone a process for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex

Such a person is referred to in the Act as “a transsexual person.” The Criminal Justice Act 2003 was amended in 2012 to provide for increased sentences for crimes that are aggravated in relation to “transgender identity”. In both cases these protected characteristics are separate to sex.

18. The process of gender reassignment does not have to involve medical treatment, and may be simply a matter of changing how you wish to be addressed or adopting a style of dress and mannerisms. Some people take hormones, and have breast and facial surgery. It is estimated that at least 80% of people who identify as transgender do not have genital surgery.⁹
19. Under the Gender Recognition Act (“GRA”) 2004, a person can obtain a Gender Recognition Certificate (“GRC”) and a replacement birth certificate in the opposite legal sex if they have a diagnosis of gender dysphoria, have lived in their new identity for two years and declare that they intend to live in this new identity permanently. No specific surgery or other body modification is required.

⁷ Andrew Learmonth (2020) MSPs overwhelmingly vote to replace gender with sex in rape support law. The National, December 10 2020

<https://www.thenational.scot/news/18936441.msps-overwhelmingly-vote-replace-gender-sex-rape-support-law/>

⁸ Scottish Police Federation (2020) Hate Crime & Public Order (Scotland) Bill - response to consultation. July 2020.

<https://spf.org.uk/wp-content/uploads/2020/07/Hate-Crime-Media-Release.pdf>

⁹ Fair Play for Women (2019) The vast majority of male-born transwomen still have a penis
22nd July 2018 <https://fairplayforwomen.com/penis/>

20. As the EHRC has observed, “a trans woman who does not hold a GRC...is therefore legally male”¹⁰ (and a trans man without a GRC is legally female.)
21. **We recommend that the Law Commission should use the word “sex” across all its online harms work when referring to whether someone is a man or a woman, or male or female, to avoid confusion.** This is the term used in the law, and nothing is lost in using this term as a protected characteristic in relation to equality or hate crime, as it covers both people who are abused or harassed because they *are* a particular sex, or those who are abused or harassed because they are *presumed or appear* to be a particular sex, whether they have a GRC or not (in the same way that the characteristic of religion covers a Sikh who is abused “as a Muslim” because of a mistaken perception based on ethnicity). Gender reassignment is a separate protected characteristic.

Question 1: overall proposal

Question 1: We provisionally propose that section 127(1) of the Communications Act 2003 and section 1 of the Malicious Communications Act 1988 should be repealed and replaced with a new communications offence according to the model that we propose below. Do consultees agree?

No, we do not agree.

22. As the consultation document states, quoting Lord Justice Sedley in *Redmond-Bate v DPP* [1999] Crim LR 998:

Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.
23. The proposed legislation would criminalise a wide range of ordinary speech on the internet, making it a potential offence to say things online that are not illegal if said in person or in mainstream media. This would have a chilling effect on freedom of speech overall. Individual citizens should not have less freedom of expression than professional journalists (and in practice the two cannot be clearly differentiated). Any curb on an individual's right to speak the truth of material reality risks infringing on universal human rights and fundamental freedoms.
24. This proposal to criminalise statements with no identified victims and no proven

¹⁰ EHRC (2018) Our statement on sex and gender reassignment: legal protections and language
[Our statement on sex and gender reassignment: legal protections and language](#)

harms would be an extreme and unwarranted curb on freedom of expression. The potential to cause “serious emotional harm” is subjective and undefinable. If put into legislation this proposal would criminalise robust debate, insult, satire, sarcasm, anger and disgust, and would be an incentive to co-ordinated complaints from politically minded groups seeking to shut down those they disagree with. Fear of vexatious complaints, even where there are no convictions or prosecutions, will mean a chilling effect on freedom of expression.

25. The potential to cause “serious emotional harm” is subjective and undefinable. Any offence that cannot be set out clearly until it is in court is unacceptable - a person must be able to know in advance what activity is criminal and what is not (Article 6 of the European Convention on Human Rights). This proposal leaves far too much discretion to police forces and the CPS.
26. We are particularly concerned that it will effectively result in delegating power to determine what can be safely articulated to favoured charities and organisations.
27. The defense of “reasonable excuse” is unacceptable. In a free society people should be able to express themselves without needing an excuse.
28. These are general concerns, but in particular we believe criminalising online speech in this way would have a disproportionately negative impact on women by making it dangerous to speak about the sex-based protections embedded within women’s rights. Women carry the bulk of domestic responsibilities and are more likely to be unable to attend debates or events in person. Because of the asymmetry in the hate crime legislation, which covers trans people but not women, in political debates about sex and gender identity one side of the argument will be able to (mis)use the threat of criminal penalties to shut down dissent.

Unreasonable definitions of transphobia

29. The proposal defines **hateful or otherwise discriminatory online communications** (footnote 276) as “a hostile online communication that targets someone on the basis of an aspect of their identity (including but not limited to protected characteristics). Such communications will not necessarily amount to a hate crime.”
30. We would like to draw the Law Commission’s attention to the definition of “transphobia” that is advanced by key organisations, and what kind of speech they would consider hateful or discriminatory in relation to the protected characteristic of gender reassignment/ transgender identity.
31. Stonewall’s definition of “transphobia” is “The fear or dislike of someone based on the fact they are trans, including denying their gender identity or refusing to

accept it.” The stated definition of gender identity is: “A person’s innate sense of their own gender, whether male, female or something else, which may or may not correspond to the sex assigned at birth.” As philosopher Kathleen Stock notes, not everyone believes in the notion of a free-floating innate sense of gender. This is in effect not just a requirement to respect that some people have this belief, but an anti-blasphemy rule that requires others to profess to share it.¹¹

32. Another, more detailed, definition of “transphobia” is that developed by “Transactual” a group whose founders include Helen Belcher and Jane Fae (of the NGO Trans Media Watch).¹² The Transactual definition has been endorsed by signatories including 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.¹³
33. It specifies a long list of allegedly transphobic behaviours, including:
 - **Misgendering** - “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.”
 - “Claiming there is a ‘conflict’ between trans people’s human rights and those of any other group”.
 - “Claiming that there is a “debate” about a conflict between “women” or “feminists” and trans people” (this is termed “**misrepresenting those who oppose trans people’s human rights**”. Transactual state the correct representation should be ‘hate groups’.)
 - Asking for single sex spaces to be respected (termed “**Encouraging or facilitating proxy violence against trans people**”)
 - Making statements such as “Woman: an adult human female.” “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.”
 - Refusing to adopt the term "cisgender".
 - Using the term “man” and “woman” for biological sex.

¹¹ Kathleen Stock (2019) Stonewall’s LGBT Guidance is Limiting the Free Speech of Gender Critical Academics <https://quillette.com/2019/07/06/stonewalls-lgbt-guidance-is-limiting-the-free-speech-of-gender-critical-academics/>

¹² <https://www.transactual.org.uk/transphobia>

¹³ <https://www.pinknews.co.uk/2020/11/30/scotland-transphobia-open-letter-crisis-independent-inquiry/>

- Concern about the medicalising of children as trans (termed “**deliberately endangering the lives of trans children and young people.**”) Using terms such as "contagion" is called “exclusion bullying by proxy”.
 - Defining transphobia more narrowly than Transactual does.¹⁴
34. We note that much of what is said in this response to the Law Commission’s consultation would be labelled “transphobic” and thus hateful under this definition. If the law was passed as proposed, we would probably be threatened with criminal prosecution for communicating and publicly discussing these arguments, or indeed any gender critical argument or even debate and future consultations about differing legal interpretations of sex and gender reassignment/ gender identity. Many people are already afraid of communicating these ideas for fear of losing their jobs or damaging their career prospects.

“Misgendering” and “deadnaming”

35. We are particularly concerned that the proposed legislation would criminalise “misgendering” and “deadnaming” under the headings of “**doxxing**”, “**outing**” and “**discriminatory or hateful comments**”.

“**Misgendering**” is defined by the Collins English Dictionary as “to refer to (a person) using a pronoun or title that does not correspond with that person's gender identity.”

“**Deadnaming**” is defined by the Collins English Dictionary as “to address or refer to (a transgender person) by a name used prior to transitioning.”

36. The consultation paper defines:

“**Doxxing**” (footnote 270) as “publishing of private or identifying information about a particular individual without their consent.”

“**Outing**” (footnote 271) as “disclosure of information...linking the identity of someone who is, for example, open about their gender history, sexual orientation, or HIV status to a different context in which they are not.”

37. In the section on abuse directed at different types of people (4.46), the consultation states:

LGBT+ people are particularly affected by a specific form of doxing known as “outing”, whereby information about their gender identity or sexuality is revealed against their will, sometimes in conjunction with other, aforementioned types of information.

¹⁴ <https://www.transactual.org.uk/transphobia>

38. Given the general confusion between “gender”, “gender identity” and “sex”, the wording of the proposal strongly suggests this law would be used to bring prosecutions, and to generate guidance suggesting that referring to a person’s sex, or their previous or even legal name (even when both are known and in the public domain in other contexts) is a form of abuse subject to criminal prosecution.

“Misgendering” and the law: Article 8 and the Gender Recognition Act

39. We do not agree that the law should criminalise any reference to a trans person’s actual sex as opposed to their gender identity, or any reference to their previous name where they have changed sex.
40. There are many perfectly ordinary reasons why people might want to refer to someone’s actual sex or previous name - for example when talking about an ex-husband, boyfriend or father who now identifies as a woman, when talking about a child or other person who is experiencing gender dysphoria and considering transition, when talking about crimes committed by a man who now identifies as a woman, when talking about their own sexual orientation and potential partners, when referring to a time before a person transitioned, or simply when describing their own experiences and memories of other people.
41. Discussions about policy issues such as how crimes should be recorded, how prisons and other single sex services should accommodate transgender people, how the census should record sex, what criteria should be used to determine who can compete in women’s sports, and how employment and discrimination laws should address the rights of women and of transsexuals, cannot be done only in generalities. They will necessitate discussion of individual cases and illustrations, and the sex of the people involved. People who are asserting their rights to single sex services should be able to do so in plain English and without the expectation that they can perform the mental gymnastics required to avoid “misgendering” or “deadnaming”.
42. The consultation proposes to criminalise “doxxing” or “outing” a person’s sex, citing the case of *Goodwin v United Kingdom* [2002] as supporting this proposal on the basis of Article 8:

Denial of a person’s gender may be deeply humiliating and distressing. It may interfere with an individual’s Article 8 right to respect for private life, of which gender identity has been held by the ECtHR to be a part.

43. This is a misunderstanding of the extent of the obligations on others entailed by Article 8, as established in *Goodwin*. The specific facts of the case are far too

narrow to conclude from them that the fact of a person's gender reassignment must not be spoken of or disclosed. There is no legal basis to extrapolate the findings of the court in this particular case to over-extend the privacy rights of transgender persons (whether or not they have a GRC) beyond those of other people, or to justify the criminalisation of “misgendering”.

44. The specific curtailment of privacy by the government in this case related to having to show a birth certificate revealing a person’s sex in situations such as applying for insurance, mortgages and pensions, and thus facing potentially intrusive and irrelevant questions. The ECtHR did not require that individuals validate, or participate in, a person’s beliefs about their gender identity, only that the government did not force post-operative transsexuals to reveal their sex or answer questions about their transition in every situation where official documents need to be produced.
45. Section 9 of the Gender Recognition Act 2004, which was enacted following the *Goodwin* decision, establishes that when a person is granted a Gender Recognition Certificate they can obtain a new birth certificate, and their sex changes “for all purposes”. Discussion in Parliament when it was enacted made clear that this meant for all **legislative** purposes (apart from where there are specific exclusions, such in relation to inheritance of titles, and sport). As Lord Filkin (the bill’s sponsor) stated:

The intent of the Bill is that if gender has been changed and a person is recognised in law as a woman as a result of the process, they are a woman for all legal purposes relevant in other legislation.¹⁵
46. Section 22 of the Gender Recognition Act deals with the disclosure of information. It makes it a criminal offence for a person who has acquired protected information about someone with a GRC (including a person's actual sex) while acting in an official capacity (eg an HR officer of a person’s employer or prospective employer) to disclose that information to any other person. It provides for specific circumstances (such as for the purpose of a social security system or in pursuit of crime) in which disclosure without permission is not an offence.
47. It was stressed several times when discussing the Bill, and specifically this section, that it would not create expansive obligations or constraints on private speech, and only related to people with access to records in an official capacity.
48. Lord Filkin stated:

¹⁵ Lord Filkin, House of Lords, 29 Jan 2004 : Column 410
<https://publications.parliament.uk/pa/ld200304/ldhansrd/vo040129/text/40129-24.htm>

The noble Baroness [O’Cathain] also asked whether people who refuse to call a gender-changed man by the changed gender would be open to action. No, they would not, unless they had information about the person's gender history in an official capacity and they disclosed it otherwise than is allowed for by Clause 21. [Clause 21 became section 22.]¹⁶

49. Baroness Hollis stated:

"Clause 21 does not involve the criminalisation of activity that is purely in the private sphere. That would not be appropriate."¹⁷

50. Baroness O’Cathain had argued that in her mind “a man cannot be a woman and a woman cannot be a man”. Lord Carlile of Berriew said :

“The noble Baroness is missing the whole basis of legislation. Legislation does not change our consciences at all—it merely confers legal status. When it says in the Bill "for all purposes", it means for all legislative purposes. We cannot change the cast of the noble Baroness's mind, if that is the cast she chooses to adopt on this issue. It can be cast in bronze, indestructible. I would not pretend that I could destroy the indestructible cast in her mind on this issue.”¹⁸

51. In the case of *R v Secretary of State for Work and Pensions* [2017] UKSC 72, Lady Hale notes:

There is nothing in section 9 to require that the previous state of affairs be expunged from the records of officialdom. Nor could it eliminate it from the memories of family and friends who knew the person in another life. Rather, sections 10 and 22 provide additional protection against inappropriate official disclosure of that prior history.

52. Thus it is clear that the GRA 2004 does not restrict the ordinary speech of people who know someone’s sex because they knew them before transition, or because that information is in the public domain, or because it is obvious, and they can see it for themselves. In practice very few people (particularly “male to female” transitioners) are convincing as members of the opposite sex. A person’s sex can remain clearly perceptible. Some people are also “out and proud” about being trans. Thus a trans person’s ability to navigate the world does not depend on absolute secrecy about their sex, or on people believing that it is literally possible for someone to change sex, but on the conventions of politeness and mutual

¹⁶ Lord Filkin, House of Lords, 29 Jan 2004 : Column 411
<https://hansard.parliament.uk/Lords/2004-01-13/debates/be6cf168-907a-4058-b47d-5e198f5b8a7c/OfficialReportOfTheGrandCommitteeOnTheGenderRecognitionBillH>

¹⁷ Baroness Hollis, House of Lords, 29 Jan 2004 : Column 436
<https://publications.parliament.uk/pa/ld200304/ldhansrd/vo040129/text/40129-30.htm>

¹⁸ Lord Carlile of Berriew, House of Lords, 29 Jan 2004 : Column 409

respect. S.22 of the GRA only restricts the sharing of information by those learning it from official records.

53. Further, it is clear from the debates during the bill's passage through Parliament that the legislation was aimed primarily at post-operative transsexuals and that it was envisaged that it would apply to a very small group of people. Lord Filkin said:

Such people who do not have surgery are few.¹⁹

During debates on gender self ID, the government estimated that around a hundred times more people are covered by the broad definition of "transgender", including cross-dressers and people who identify as non-binary, than were addressed by the original GRA (500,000 vs 5,000).

54. In short: Article 8 as tested in the case of *Goodwin*, and protected by the GRA, does not justify criminalising "misgendering", either in relation to the narrow group of people who have a GRC, or in relation to the much wider group who self identify as transgender.
55. Collection, processing and sharing of personal information is already covered by the Data Protection Act. This would cover such things as information about a person's HIV+ status or sexual orientation where this information is held by an organisation.
56. It is not reasonable to allow anyone who changes their name or aspects of their appearance or identity to oblige others never to mention their previous life. Women who change their surname on marriage do not gain a protection which criminalises someone who uses their previous name. It is not clear why the previous names of people who have changed from a masculine to a feminine persona or vice versa should be given the extraordinary protection of criminalising people who use their previous names (including to talk about them in the past).

Compelled speech

57. Being forced to use vocabulary that indicates a belief one does not hold: that men can change sex to become women (and vice versa), either in general or in relation to individuals, is compelled speech, which impinges on a person's Article 10 rights. The principle that freedom of expression covers compelled speech is demonstrated in the case of *Lee v Ashers Baking Company* [2018]. Giving a unanimous judgment for the Supreme Court, Baroness Hale said:

¹⁹ <https://publications.parliament.uk/pa/ld200304/ldhansrd/vo040129/text/40129-15.htm>

The freedom not to be obliged to hold or to manifest beliefs that one does not hold is also protected by article 10 of the Convention. Article 10(1) provides that “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” The right to freedom of expression does not in terms include the right *not* to express an opinion, but it has long been held that it does...

The bakery could not refuse to provide a cake - or any other of their products - to Mr Lee because he was a gay man or because he supported gay marriage. But that important fact does not amount to a justification for something completely different - obliging them to supply a cake iced with a message with which they profoundly disagreed. In my view they would be entitled to refuse to do that whatever the message conveyed by the icing on the cake - support for living in sin, support for a particular political party, support for a particular religious denomination.²⁰

58. Being able to talk clearly and truthfully about the material reality of sex is important in scientific, medical and policy research and debate, for example regarding the administration of puberty blocking drugs to children and the previously proposed reforms of the Gender Recognition Act. It is also important personally in life, such as in talking about sexual orientation and consent, family relationships (including for example mothers, fathers, daughters and sons and relationships between potential, current and past sexual partners), and in talking about the implementation of rules relating to single-sex services and sports. It is also essential in academic and other research, and in reporting of crime, health and equality statistics. These are all everyday situations where sex matters.
59. While the proposal gives weight to the “humiliation and distress” experienced by someone due to the “denial of their gender” (i.e. by recognising their sex), it does not give any weight to the humiliation and distress experienced by someone forced to say things that they do not believe. As Maureen O’Hara states in the *Coventry Law Journal*:

The use of pronouns and forms of address which reflect a person’s “gender identity” rather than their sex is not simply a matter of social courtesy. For many people it is an expression of a political belief with which they profoundly disagree, and which they consider to be harmful to the rights of women and to society as a whole. For others, it may be an expression of a belief which is contrary to their religious beliefs; or may be

²⁰ *Lee v Ashers Baking Co Ltd and others* [2018] 3 WLR 1294, UKSC, at paras.52 and 55.

an unacceptable expression of a belief because it involves colluding with denial of material reality.²¹

60. For example, in September 2017 Maria MacLachlan was assaulted at Speakers' Corner while she was waiting to attend a public meeting in London about proposed reforms to the Gender Recognition Act 2004. One of her attackers, Tara Wolf, was later convicted of assault. While MacLachlan was giving evidence at Wolf's trial, the judge instructed her to refer to Wolf (who self-defines as a "trans woman") as "she" or "the defendant", as a matter of "courtesy". MacLachlan was rebuked by the judge for failing to comply with this instruction:

My experience of court was much worse than the assault... I was asked "as a matter of courtesy" to refer to my assailant as either "she" or as "the defendant." I have never been able to think of any of my assailants as women because, at the time of the assault, they all looked and behaved very much like men and I had no idea any of them identified as women...I tried to refer to him as "the defendant" but using a noun instead of a pronoun is an unnatural way to speak. It was while I was having to relive the assault and answer questions about it while watching it on video that I skipped back to using "he" and earned a rebuke from the judge. I responded that I thought of the defendant "who is male, as a male".

The judge never explained why I was expected to be courteous to the person who had assaulted me or why I wasn't allowed to narrate what had happened from my own perspective, given that I was under oath. His rebuke and the defence counsel's haranguing of me for the same reason just made me more nervous and I so continued to inadvertently refer to my male assailant as "he." In his summing up, the judge said I had shown "bad grace" and used this as an excuse not to award compensation. One writer said, "It was as if the state had colluded with the defendant to take one last stab at the victim," and that's exactly how it felt.²²

²¹ O'Hara, M (2019) Compelled speech: gaslighting in the courtroom, *Coventry Law Journal*, Cov. L.J. 2019, 24(1), 55-69

²² Julie Moss, 'INTERVIEW: Maria MacLachlan on the GRA and the aftermath of her assault at Speaker's Corner' (*Feminist Current*, 21 June 2018)

www.feministcurrent.com/2018/06/21/interview-maria-maclaughlan-gra-aftermath-assault-speakers-corner

Sex and sexual consent

61. The paper gives an example of “outing” (page 112) that is very troubling, as it seems to condone sexual deception and to threaten the victim with criminalisation if they communicate their experience and distress:

Alvin and Asmita met on a dating app. Alvin quickly broke things off when he found out that Asmita is a transgender woman. Asmita told Alvin that “very few people in her life know about her transition. Alvin finds Asmita’s colleagues on LinkedIn and uses the LinkedIn messenger service to send them photos of Asmita, with captions like, “Take a closer look... THIS IS NOT A WOMAN, THIS IS AN EFFING MAN! You work with a pervert freak. Just thought you’d want to know.

It is not made clear at what stage in the date Alvin learnt that Asmita is male.

62. Although clearly Alvin’s message about Asmita was insulting and unkind, the case study suggests that the criminal element was revealing Asmita’s sex. Arguably this is important information for someone to share *before* going on a date; certainly this is part of sexual consent.
63. Where penetration or other sexual activity takes place on the basis of false information, this can be a crime. A number of people have been convicted of having sex without their partner’s consent through deception about their sex (*R v Gemma Barker* [2012], *R v Chris Wilson* [2013], *R v Justine McNally* [2013], *R v Gayle Newland* [2015] and *R v Kyran Lee (Mason)* [2015]).
64. While Alvin is presented unsympathetically in the case study, finding oneself tricked into a sexual situation (including sharing intimate chat and photos) with someone who has not been honest about their sex is likely to be highly emotionally distressing. The Law Society proposal recognises the intimidating and degrading impact of being sent unwanted and unexpected “dick pics” in other contexts, but seems to suggest here that exposure to an unwanted and unexpected penis is no big deal, as long as the person who owns the penis identifies as a woman.
65. The abuse in this situation is more obvious if you replace “Alvin” with “Ali” a lesbian who meets Asmita who represents themselves to be female on a dating app. Ali finds herself having been tricked into intimate discussions, exchange of photos, or in a vulnerable situation on a date with someone who is unexpectedly male. This scenario is not hypothetical; there are large numbers of “Asmitas” on lesbian dating apps: males (including many who have made no hormonal or surgical body alterations) seeking sexual relationships with lesbians. The unwillingness of many lesbians to date such males is referred to by some gender identity proponents as “the cotton ceiling”.

66. For example, one lesbian who responded to a survey of gender critical opinion recounts:

I was horrified at men approaching me on lesbian dating sites. Most of them didn't declare this and I worked it out. I felt humiliated and a bit scared that I might have met someone in person without knowing they were biological men. It chilled me to the bone. I can now spot them and block them, but it was unpleasant and degrading for me at the time.²³

67. In another survey of gender critical lesbians, a third of those who use dating sites report being approached by males identifying as women.²⁴ A woman described feeling violated when she realised the person she had shared intimate messages with online was "a man". Several young women explained how they were pressured to accept male, self identified lesbians as sexual partners:

After I came out as a lesbian, I went on many dates/entered relationships with transwomen because the culture I was in said if I didn't do that I was evil and should be banished from everything. I knew I wasn't attracted to them but internalised the idea that it was because of my "transmisogyny" and that if I dated them for long enough I could start to be attracted to them. It was DIY conversion therapy.

68. Young women feel pressured to sleep with transwomen to prove they "are not a TERF":

I thought I would be called a transphobe or that it would be wrong of me to turn down a transwoman who wanted to exchange nude pictures;

69. One describes a clear example of rape.

The man I went on a date with, unknowingly, was mutual friends with people I knew, he threatened to out me as a terf and risk my job if I refused to sleep with him. I was too young to argue and had been brainwashed by queer theory so he was a "woman" even if every fibre of my being was screaming throughout so I agree to go home with him. He used physical force when I changed my mind upon seeing his penis and raped me.

70. The criminalisation of "outing" (as in the case of Alvin and Asmita) would prevent these women from being able to communicate their experiences online, or warn others about a predatory male pursuing women online under false pretences. It would open the door to criminalising anyone who spoke with emotion, anger or anything less than the utmost respect for the person who had tried to deceive or

²³ <https://gender-dissidents.net/2020/09/25/i-was-horrified-at-men-approaching-me-on-lesbian-dating-sites/>

²⁴ Wlode, A (2019) Lesbians at Ground Zero How transgenderism is conquering the lesbian body
<http://www.gettheloutuk.com/attachments/lesbiansatgroundzero.pdf>

pressurise them into sexual relations they did not want. In fact it would normalise such deception, and make it even harder to negotiate sexual consent. The threat of criminalisation for sharing this experience with others would in itself be a form of coercion, particularly for younger people who have grown up exposed to media that confusingly emphasises “gender identity” over sex, and who may be confused and inexperienced. This is also likely to have a disproportionate effect on young women.

71. That this proposal so casually suggests criminalising an aspect of everyday speech, necessary for sexual consent as well as discussion of personal experience and policy issues, suggests that it seriously oversteps the mark. The inclusion of this example is an illustration how the failure to talk clearly about sex leads institutions to overlook the risk of sex discrimination, harassment and abuse, or even to seek to institutionalise them.

Question 2: Scope of coverage

Question 2: We provisionally propose that the offence should cover the sending or posting of any letter, electronic communication, or article (of any description). It should not cover the news media, broadcast media, or cinema. Do consultees agree?

We strongly disagree.

72. This is unworkable. The distinction between “news media” and “broadcast media” and blogs, newsletters, online articles, Youtube and other video sites and podcasts is untenable. These distinctions have broken down in practice. Moreover, there is no principled reason why someone who is being paid by a corporation to express an opinion should have greater protection for their freedom of speech than someone doing it in their own time, going freelance or via a direct-subscription model. Journalists also use social media to engage with people and promote their work. Academics publishing and discussing their work online could be targeted, as could artists, legal publishers and lawyers, philosophers, politicians and campaigners. Trying to write in profession-based exceptions or “reasonable excuse” would create two classes of people; those who can speak freely online and those who cannot. Constraining expression in this way breaches the right of individuals to Article 9 (Freedom of Thought, Belief and Religion), Article 10 (Freedom of Expression) and Article 11 (Freedom of Assembly and Association).

Question 3: Likely harm

Question 3: We provisionally propose that the offence should require that the communication was likely to cause harm to someone likely to see, hear, or otherwise encounter it. Do consultees agree?

We strongly disagree.

73. Based on this approach any person or political group would be able to take offence at something not directed at them, claim emotional harm and use this to to harass someone for their views. This could be used by political and identity based movements to silence debate and persecute opponents. Even people who don't face prosecution will see their freedom of speech cut back through self-censorship, and as institutions such as employers and universities react to the threat.

Cases: chilling effect at work

74. We have already seen hundreds of examples of this chilling effect outside of the criminal justice system, where economic, social and institutional pressures have been put on people to recant views on sex and gender. To give just a few examples:
- **Suzanne Moore** wrote a Guardian column about women's rights and transgender issues.²⁵ A person (who had already resigned) rendered their resignation at an editorial meeting. 338 colleagues signed a letter saying they were "deeply distressed" by the resignation and called for the Guardian to "do more to become a safe and welcoming workplace for trans and non-binary people". Moore has now left the Guardian and stated that she feels she was forced out.
 - **Selina Todd**, a professor of modern history at Oxford, has been accused of being "transphobic" on the basis of her tweets and speeches by students, who argued that: "The power dynamics of providing a platform to Selina Todd in the name of 'academic free speech' means putting trans and non-binary members of our community into the position of having to defend their right to exist. Her views refuse to acknowledge that trans women ARE women, that trans women's rights ARE women's rights."²⁶

²⁵

<https://www.theguardian.com/society/commentisfree/2020/mar/02/women-must-have-the-right-to-organise-we-will-not-be-silenced>

²⁶

<https://www.inquiremedia.co.uk/single-post/2020/03/10/University-under-fire-for-planned-talk-by-anti-transgender-feminist>

- **Allison Bailey**, a criminal defence barrister, feminist, lesbian, lifelong campaigner for racial equality, lesbian, gay, and bisexual rights, and survivor of child sexual abuse, opened a crowdfunder to finance the legal costs in a discrimination case that she is pursuing against her chambers and Stonewall. After receiving complaints, the platform she was using to raise funds to support her case, CrowdJustice, closed her crowdfunder, saying that her background information breached its policy against “discriminatory or hateful content”, with “gratuitously violent language and accusations regarding trans people”. In fact, it consisted of careful, factual statements citing government statistics and an account of her own experience of sexual abuse as a child.²⁷
- **Maya Forstater**, a researcher, lost her job at the Centre for Global Development after colleagues expressed concern about her writing and tweeting about gender identity and sex. She is pursuing a belief discrimination case in the employment tribunal. An appeal on the question of whether her belief is a protected belief is due to be heard in the Employment Appeal Tribunal in April.²⁸
- **Dr Eva Poen** of the University of Exeter was accused of “abhorrent bigotry” after she posted on social media that only women can have periods. In response to a post on Twitter calling for a fitness app to change its wording from “female health” to “menstrual health”, she said: “Only female people menstruate. Only female people go through menopause. ‘Female health’ is exactly what this is about.” A student complained to the university, claiming that her comments were making transgender people “live in fear” and demanding that she “stop spreading vitriol”.²⁹

75. Those cases are the tip of an iceberg. Professor Michael Biggs maintains a list of academics targeted for their views on sex and gender whose stories have made it into the public domain.³⁰ Professor Kathleen Stock has collected additional testimonies from academics and others working in universities.³¹ They include

²⁷ <https://www.legalfutures.co.uk/latest-news/censored-or-offensive-crowdjustice-trans-row-rumbles-on>

²⁸ Karon Monaghan (2020) The Forstater Employment Tribunal judgment: a critical appraisal in light of Miller, UK Labour Law Blog <https://uklabourlawblog.com/2020/02/19/the-forstater-employment-tribunal-judgment-a-critical-appraisal-in-light-of-miller-by-karon-monaghan/>

²⁹

<https://www.dailymail.co.uk/news/article-8083431/Exeter-University-economics-lecturer-branded-transphobic-LG-BT-feminist-students.html>

³⁰ Academics and others at British universities targeted for questioning transgender orthodoxy <http://users.ox.ac.uk/~sfos0060/GCtargets.shtml>

³¹ Are academics freely able to criticise the idea of ‘gender identity’ in UK Universities? <https://medium.com/@kathleenstock/are-academics-freely-able-to-criticise-the-idea-of-gender-identity-in-uk-uni>

managers demanding that staff defend their Twitter histories; institutions failing to protect staff from student and public harassment; staff facing complaints for signing letters to newspapers about academic freedom; a lost editorship of an academic journal and a lost membership of an editorial board; research rejected from publications on vague suspicions of transphobia; no-platforming; and researchers being warned by managers not to pursue gender-critical research in the first place. Many respondents were too fearful of the professional consequences to put their names to their testimonies. Professor Stock describes a situation in which:

a vocal minority of students, well versed in university procedures, has become trigger(ed)-happy when it comes to issuing complaints against academics they perceive to be transgressors. Equally, some academics—although #notallGenderStudiesProfs—are apparently happy to describe gender-critical views as attacks on vulnerable members of the trans community, not as intellectual challenges to ideas or powerful institutions. University administrators are often slow to protect gender-critical employees from harassment and, in some cases, terrifyingly quick to believe that such employees are bigoted.

76. The Feminist blogger Wild Woman Writing Club has collected testimonies from artists and writers hounded out of commissions and publications.³² Over 700 people shared their concerns about sex and gender in a survey of “Gender Dissidents” in 2020. These included parents, teachers, social workers, lawyers and healthcare workers. Many highlighted that they remain publicly anonymous because of fear of consequences at work.³³ 9 out of 10 of those who responded were women.

77. **Christian Wilton-King**, a Social Work lecturer, writes:

Nearly 2 years ago, a group of trans activists, local to me, sent a load of complaints to my employer - Cardiff & Vale College. I was eventually sacked & as a new teacher, on probation, I was automatically referred to my professional body for a fitness to practice hearing. My apparent crime? I laughed about a transwoman’s eyebrows. Screenshots were taken and doctored to align my “offending” comment with another comment to make it look like I was inciting harassment, which I wasn’t. Nevertheless, my workplace ignored that & investigated me anyway. Eventually, despite appeals and protestations, I “failed” my probation... Throughout this time, I had involved my union - Universities & Colleges Union (UCU). For the best part of the whole process, they were helpful & co-operative, until, just

versities-67b97c6e04be

³² https://wildwomanwritingclub.wordpress.com/2020/06/10/what-it-costs-women_speak-out/

³³ Gender Dissidents <https://gender-dissidents.net/tag/work/>

prior to the hearing, someone sent some screenshots of comments I had made in a small, private group. The group was a place where I was sharing concerns about learners, in particular SEN & autistic learners, who were at risk in the push for transgender rights etc. At this point, I realised, my being targeted was more about my views than a solitary comment about eyebrows. The hearing was the culmination of 18 months of hell for my family & me. And for what? For an off the cuff comment, not directly made, which was then doctored to make it look worse. To say this has left a bitter taste in my mouth is an understatement.³⁴

78. A part-time teacher at a college writes:

One day I get a phone call from the HR department telling me they have had a complaint. Apparently my classes are no longer safe because I am transphobic. I ask the HR woman to elaborate.

The person who called to complain claimed to be an ex-student, although they did not leave their name so we will never know if they genuinely were a student. My crime was liking a Tweet by Kathleen Stock. I had just heard about puberty blockers and as I was writing and researching on the subject of HRT used for menopausal women for a publication, I had started wondering about the role of pharmaceutical companies in the increased prescribing of puberty blockers for children.

I asked on Twitter if anyone had been looking into the links between Big Pharma and puberty blockers. Apparently asking this question made me a transphobe and made me unsafe to be around students. I was told I could keep my job because the students “liked me so much” but I was informed that if I wanted to carry on working at this college I was to delete this Tweet and to not share anything on social media linking me to the college. They could not be seen to have any contact with “transphobes”. Not once did this HR woman think that this call might be malicious. She said she had to assume it was one of my students because if it’s their word over mine, she had to take their word as they are the “victim”.³⁵

79. If the proposal is passed into law, it is likely that cases like these will be raised with the police as well as with employers. None of these expressions of opinions ought to be criminalised online.

80. Even if they did not result in convictions, this would send a message that if you want to silence others, all you need to do is claim that they have hurt you. There is a risk of cultivating intolerance and “smearing” of others for their online

³⁴ <https://twitter.com/genderisharmful/status/1337863861358252033>

³⁵ This is one of 20 stories collected by feminist blogger “Wild Woman Writing Club” <https://wildwomanwritingclub.wordpress.com/2020/07/26/the-chilling-effect/>

communications. Smearing is a way of bullying and undermining someone else by creating reputational damage that falls short of defamation. Victims often feel reluctant to defend themselves because it draws further attention to the smears, and because the practice is so undermining to their well-being and sense of self-esteem.

Question 4: no proof

Question 4: We provisionally propose that the offence should require that the communication was likely to cause harm. It should not require proof of actual harm. Do consultees agree?

We strongly disagree.

81. A crime which is vaguely defined, and for which there may be no victim and no proof of actual harm, is a crime of “wrongthink”. The threats and actual prosecutions would have a deeply chilling effect on freedom of speech and would allow a proliferation of vexatious complaints along the lines of those already targeted at people through their workplaces.
82. This formulation puts far too much discretion in the hands of the police and the CPS. These institutions may wish to signal support for minorities, but we should be very wary of allowing the courts to silence political and ideological opposition.

Cases: police and CPS action

83. Given such vague criteria, where no evidence of harm is needed, such a legal change is likely to encourage oppressive application of the law by the police and the CPS. This is already a serious problem:
 - **Harry Miller** posted a number of tweets between November 2018 and January 2019 about transgender issues as part of the debate about reforming the Gender Recognition Act 2004. In one tweet Mr Miller wrote: “I was assigned mammal at birth, but my orientation is fish. Don't mis-species me.” This tweet was among several reported to Humberside Police as “transphobic” by a Mrs B. Humberside Police told Mr Miller that although the tweets were not criminal, “they were upsetting many members of the transgender community who were upset enough to report them to the police”. It later turned out that this was not true. There was only one report. Mr Miller sought judicial review. Giving judgment, Mr Justice Julian Knowles said:

I hesitate to be overly critical of Mrs B [the complainant] given she has not given evidence, but I consider it fair to say that her reaction

to the Claimant's tweets was, at times, at the outer margins of rationality. For example, her suggestion that the Claimant would have been anti-Semitic eighty years ago had no proper basis and represents an extreme mindset on her behalf.³⁶

The public response from Mrs B was to accuse Mr Justice Julian Knowles of transphobia).³⁷

- **Sarah Phillimore** is a barrister and a campaigner on sex and gender issues. She was contacted by an account on Twitter informing her that she had a “record for life” of “hate”, as her tweets had been reported and recorded by the police under “Hate Crimes Operational Guidance”. She requested information from the police and received 12 pages of tweets they had recorded as a transphobic and religiously aggravated “non-crime hate incident”. Phillimore says: “The tweets I posted contained nothing that any reasonable person could describe as 'hatred' - for example one is discussing that my dog likes to eat cheese!”³⁸
- **Miranda Yardley**, a transsexual, was prosecuted for a transgender hate crime after a complainant, who worked on behalf of the charity Mermaids, alleged harassment by potentially exposing her and her transgender child to bullying and abuse. Helen Islan frequently campaigns on transgender issues via social media on the basis that she is the mother of a transgender child. The defendant had tweeted a message linking Islan's full name to her Twitter handle and stating that the “self-interest of Helen Islan is in justifying to herself her decisions to trans her daughter”. The information was contained in a screenshot of a Google search which had also brought up an image of Helen Islan and her children. The CPS unsuccessfully applied for reporting restrictions to prevent the complainant's full name being published (on the basis that this was necessary to send a message to future victims of “transgender hate crime” that the courts would protect them by granting anonymity). The judge stated that there was no evidence of harassment, that issues of freedom of speech enshrined in Article 10 of the ECHR were clearly engaged and that it was a case that the CPS should never have brought.³⁹
- **Caroline Farrow** was reported to police after she referred in a tweet to the child of Mermaid's CEO Susie Green, who was taken to Thailand at the age of 16 to have sex reassignment surgery. Farrow wrote: “Susie Green

³⁶ *R (Harry Miller) v The College of Policing and The Chief Constable of Humberside* [2020] EWHC 225, para.280.

³⁷ <https://judicialcat.blogspot.com/2020/02/harry-miller-judicial-review-mrs-b.html>

³⁸ <https://www.crowdjustice.com/case/the-police-recorded-me-as-hate/>

³⁹

<https://www.2harecourt.com/2019/03/04/gudrun-young-secures-no-case-to-answer-in-controversial-first-prosecution-for-transgender-hate-crime/>

is in breach of Samaritans policy about how suicide should be discussed and broached in the media. What she did to her own son is illegal . She mutilated him by having him castrated and rendered sterile while still a child”.⁴⁰ Farrow said she was told by police that the complaint was about misgendering. Susie Green later withdrew the complaint and Mermaids issued a statement: “The tweets are a lot more serious than about misgendering. They were allegations of serious misconduct and vile and spiteful personal attacks.”⁴¹ Sexual reassignment surgery on under-18s is illegal in the UK, and was subsequently made illegal in Thailand. A Court has since ruled that children under the age of 16 do not have the capacity to consent to puberty blocking drugs.

- **Linda Bellos OBE**, a leading feminist and campaigner for racial equality, was prosecuted for an offence of using threatening, abusive or insulting words or behaviour contrary to section 5 of the Public Order Act 1986. The alleged offence arose out of a public event where Bellos stated that “if any one of those bastards comes anywhere near me I will take my glasses off and clock ’em”. She has said she was referring to the attack on Maria MacLachlan at Speakers’ Corner. The event was live-streamed on Facebook by Venice Allan. Giuliana Kendal, a trans woman who had watched the live-streaming of the debate, complained to South Yorkshire Police that she found the remarks threatening as a trans woman. South Yorkshire Police launched a full investigation, including interviewing Bellos under caution. In May 2018 the CPS decided there was no realistic prospect of conviction, taking into account the context in which the words were uttered and the fact that Bellos would have a defence of freedom of speech under Article 10 of the ECHR. Kendal then embarked on a private prosecution of both Bellos (under section 5 Public Order Act) and Allen (under section 127 of the Communications Act 2003.) Eventually in November 2018 the case was dropped after the CPS exercised their statutory powers to take over the prosecution and then discontinued it.⁴² Bellos and Allen had had to instruct criminal defence lawyers and attend court on three occasions.
- **Kate Scottow** was prosecuted under s.127 of the Communications Act and found guilty of using a public communications network to “cause

⁴⁰ <https://www.dailymail.co.uk/news/article-6846643/Devout-Catholic-mother-44-reported-police.html>

⁴¹

<https://www.theguardian.com/society/2019/mar/20/catholic-journalist-investigated-by-police-after-misgendering-trans-woman>

⁴²

<https://www.dailymail.co.uk/news/article-7978797/amp/Mother-two-called-transgender-woman-man-racist-series-offensive-tweets.html>

<https://www.2harecourt.com/2018/11/30/gudrun-young-successfully-defends-leading-feminist-anti-racist-campaigner-linda-bellos-obe/>

annoyance, inconvenience and anxiety”. Her crime was to write some tweets referring to a person called Stephanie Hayden. In court it was revealed that Hayden, under previous names, had been before criminal courts on 11 occasions for 21 offences and spent six months in prison for obtaining property by deception.⁴³ Hayden had obtained an interim injunction, prohibiting Ms Scottow from publishing “any personal information relating to” Ms Hayden “on any social media platform” in either male or female identity. Ms Scottow’s tweets included describing Hayden as “a pig in a wig” and referring to Hayden as “he” or “him”. In court the judge told Scottow that “we teach our children to be kind” and took particular exception to Scottow’s use of “Mandy McGirlDick” as a Twitter handle. As Kim Thomas wrote in *The Spectator*, “Scottow’s tweets were, admittedly, uncivil. But nothing she wrote was worse than what can be seen every day on Twitter and other social media platforms, where thousands of cruel insults and threats are regularly posted without any comeback at all. Hayden herself has referred to people as ‘nutters’ on Twitter. Hayden has also referred to social media site Mumsnet as ‘Nuttersnet’. Hayden admitted in court to being a serial litigator in the civil courts. “I am litigious, I put my hands up. I use the law if I feel I have to use the law.” In 2018, Hayden launched civil proceedings against “Father Ted” writer Graham Linehan for harassment after he allegedly published tweets with her previous male name. The case was later dropped. Scottow was not so lucky. She was arrested and held in a cell for seven hours, and her computer and phone were impounded as evidence for months.”⁴⁴ The conviction was overturned on appeal almost two years after her arrest.

84. In quashing Scottow’s conviction (*Scottow v CPS* [2020] *EWHC 3421 (Admin)*), the judges Bean and Warby were particularly scathing of the overreach of the law that had taken place:

The prosecution did not charge Ms Scottow with malicious communication or harassment, but with an offence contrary to s 127(2) of the 2003 Act, which charge they then amended. They presented that charge to the Judge as if it were a lesser version of harassment, with a less demanding threshold – a kind of “harassment-lite” - in which it was enough to prove an intent to cause offence of at least one the kinds referred to in s 127(2)(c). That, in my judgment, is also how the Judge treated the matter. I am satisfied that this was wrong in law. In addition, although [Article 10 of] the Convention was mentioned by the prosecution and the Judge the approach of both, and the Judge’s analysis, were legally flawed and

⁴³

⁴⁴ Thomas, Kim (2020) I stand with Kate Scottow <https://www.spectator.co.uk/article/i-stand-with-kate-scottow>

inadequate.⁴⁵

85. They stated (at para.44):

It is not the law that individuals are only allowed to make personal remarks about others online if they do so as part of a “proper debate.”

86. It is this project of criminalising “harassment-lite” and “making hurtful remarks without reasonable excuse” that the Law Commission proposal would introduce.

Question 5. Serious emotional distress threshold

Question 5: “Harm” for the purposes of the offence should be defined as emotional or psychological harm, amounting to at least serious emotional distress. Do consultees agree?

We strongly disagree.

87. Social media interaction can be emotionally intense on all sides (indeed the platforms are designed to raise emotional engagement). The criterion of a hypothetical possibility of “serious emotional distress” suffered by hypothetical harmed groups, with no requirement for evidence, is no basis for criminal prosecution.

88. The consultation gives a specific example of types of tweets that the Law Commission authors “have no doubt” reach the threshold of distress which could result in prosecution. These are shockingly mild:

“‘People who menstruate’. I’m sure there used to be a word for those people. Someone help me out. Wumben? Wimpund? Woomud?”

“If sex isn’t real, there’s no same-sex attraction. If sex isn’t real, the lived reality of women globally is erased. I know and love trans people, but erasing the concept of sex removes the ability of many to meaningfully discuss their lives. It isn’t hate to speak the truth.”

“The idea that women like me, who’ve been empathetic to trans people for decades, feeling kinship because they’re vulnerable in the same way as women — ie, to male violence — ‘hate’ trans people because they think sex is real and has lived consequences — is a nonsense.”

⁴⁵ <https://www.judiciary.uk/wp-content/uploads/2020/12/Scottow-v-CPS-judgment-161220.pdf>

“I respect every trans person’s right to live any way that feels authentic and comfortable to them. I’d march with you if you were discriminated against on the basis of being trans. At the same time, my life has been shaped by being female. I do not believe it’s hateful to say so.”

The consultation document states that the sender of these tweets (**JK Rowling**) would only escape a criminal prosecution if they could make a reasonable excuse that the tweets were written as a “matter of public interest”.

89. That these four mildly worded tweets, which do not mention any individual or express any hate or wish any harm on anyone, could be judged, **without doubt**, as meeting the threshold, illustrates **the disproportionate nature of this proposal**.
90. Millions of social media posts that reach this level of potential “harm” (and much worse) are posted every day. Such a subjective threshold would result in an avalanche of complaints, which could only result in selective (and likely ideologically and politically manipulable) prosecutions. As the Scottish Federation of Policing notes in its response to the Scottish Hates Crimes Bill:

In policing in particular we are all too aware that there are individuals in society who believe that to feel insulted or offended is a police matter. There are those who believe that to be disagreed with is tantamount to being insulted or abused. When the subject of debate is a personal matter, or one which people may feel passionately about, emotions can be heightened and anger can inform decision making.⁴⁶

91. By way of example of the millions of social media posts that would be within scope, the Commission should consider a sample of the myriad posts on Twitter expressing hatred of radical feminists and gender critical feminists (referred to as TERFs)⁴⁷ and a collection of tweets attacking JK Rowling for having expressed the views already referred to above:⁴⁸ Many of these tweets are arguably already criminal under existing legislation; others would be brought within scope of the criminal law by the present proposals. How many police and prosecutors would be needed to enforce the existing law consistently, let alone the new proposals?

Cases: Emotional harms on all sides

92. People on both sides of any debate or philosophical position can feel serious emotional distress at the same time. Children’s author **Rachel Rooney** was

⁴⁶ <https://spf.org.uk/wp-content/uploads/2020/07/Hate-Crime-Media-Release.pdf>

⁴⁷ <https://terfisaslur.com/>

⁴⁸

<https://medium.com/@rebeccarc/j-k-rowling-and-the-trans-activists-a-story-in-screenshots-78e01dca68d>.

branded a transphobe by some other authors after she wrote a body-positive picture book for infant school children in association with the gender critical organisation Transgender Trend. On social media she has been called hateful likened to an Islamophobe, and her suitability for visiting schools has been publicly called into question. Undoubtedly those making these complaints could argue that Rooney's work causes "serious emotional distress". Meanwhile she gives her account of the impact on her psychological well-being:

This name calling has been extremely distressing. I have had periods where I haven't slept or eaten a meal for several days, and have been constantly crying and battled suicidal thoughts. This distress is exacerbated by my autism and natural social anxiety. I no longer attend social publishing industry functions for fear of being shunned and I haven't been able to focus on any sustained writing project for over a year from when this first began. I feel I have no option but to exit my career as a writer once my forthcoming books have been released. ⁴⁹

93. **Jenny Lindsay** is another artist, a poet who has documented what happened to her when she was labelled a transphobe:

A trans rights activist, with whom I had no contact or connection whatsoever, tweeted my name and picture as a "TERF" because I retweeted an article from the Scotsman about proposed changes to the Gender Recognition Act in Scotland. This person also trawled through published articles of mine claiming "transphobic" content; claimed to be afraid of living in the same city and working in the same industry as me; asked others to "call me out"; and advised caution in dealing with me since "TERFS can be awfully vicious". They posted similar accusations about me to a private group called Culture Journalists Scotland. I asked the moderators of Culture Journalists Scotland to take the accusations down, or else to let me join the group so I could respond to them. The moderators told me I was "transphobic" (based on my having retweeted the Scotsman article) and not welcome...

I find it frightening and humiliating having to constantly wonder whether someone I am friendly with or have worked with is now of the opinion that I am a hateful bigot. I don't go looking for arguments about this, and I don't name-search or Google myself, so I'm sure I'm innocent of a great deal of what gets said about me – but being smeared like this has certainly caused me to withdraw from many, many opportunities and situations. I just know there is no point going near whole sectors of Scottish culture where my name is mud because of whispering campaigns. The chilling

⁴⁹ Rooney, R (2020) Bullying the Children's Author, <https://wildwomanwritingclub.wordpress.com/2020/12/15/bullying-the-childrens-author/>

effect this issue has had on my future engagement with sectors in which I was once valued is immeasurable. The loss of networks and friendships is significant; obviously, my livelihood is also affected. Meanwhile no-one has ever provided evidence of me being “transphobic”, or causing anyone any harm.⁵⁰

94. When the Scottish Poetry Library issued a statement against no-platforming in relation to Ms Lindsay, the response in an Open Letter complained of it causing extensive distress:

We have all heard extensive distress from our trans friends, both readers and writers, as a result of your recent communications. Despite the Library’s previous work supporting LGBT+ writers and events, many trans people do not now think the Scottish Poetry Library is a welcoming and supportive space.⁵¹

95. There will be thousands of such disputes, with genuine and serious emotional distress on all sides. The police and CPS will have an impossible job in fairly investigating and prosecuting these emotion-provoking communications as “crimes”.

Questions 6, 7 and 8: context and sensitivity

Question 6: We provisionally propose that the offence should specify that, when considering whether the communication was likely to cause harm, the court must have regard to the context in which the communication was sent or posted, including the characteristics of a likely audience.

Question 7. We provisionally propose that the new offence should not include a requirement that the communication was likely to cause harm to a reasonable person in the position of a likely audience.

Question 8. We provisionally propose that the mental element of the offence should include subjective awareness of a risk of harm, as well as intention to cause harm.

We disagree with the overall proposal to make it a criminal offence to send communications that could potentially cause emotional harm, and we disagree with these aspects.

⁵⁰Jenny Lindsay. 2020. Whispering Campaigns <https://wildwomanwritingclub.wordpress.com/2020/06/10/no-7/>
Also see Nick Cohen, 2020, The hounding of a Scottish poet by trans activists, The Spectator, 4 October 2020
<https://www.spectator.co.uk/article/the-hounding-of-a-scottish-poet-by-trans-activists>

⁵¹ <https://splopenletter.wordpress.com/>

In particular, we believe that taken together they will result in relying on campaigning organisations and charities to set expectations as to what is legitimate speech, and we caution the Law Commission against this.

96. The proposed definition of harm is so wide that thousands of individuals every day could legitimately claim to have reached the threshold of loss of appetite, difficulty sleeping, anxiety, and withdrawal caused by a bruising or “triggering” online interaction. Not requiring any evidence or test of reasonableness of harm is tantamount to inviting vexatious and irrational complaints.
97. The proposed approach where the **context** and **sensitivity** (even if unreasonable) of particular groups of people is given weight (but no actual victims or proof of harm are needed) would pose an impossible challenge for police resources, and leave too much discretion to the police and CPS.
98. We believe that in practice it would result in determination being made in response to coordinated groups and charities who would raise complaints, and offer arguments about the sensitivity of those they represent. For example the proposal references the US charity GLAAD as the arbiter of whether JK Rowling’s tweets were distressing. It also gives an example of a person tagging a disability charity as being an instance where it would be “especially easy” for a court to find that tweets would be likely to cause harm to a likely audience (the charity and its followers).

Cases: organisations seeking “no debate”

99. Many charities are funded by donations from government departments. They also act as lobby groups and are a significant means of influence on UK policy decisions. It is very important that these organisations’ positions are open to challenge, debate and scrutiny. Organisations that subscribe to the expansive definition of transphobia set out in response to Question 1 are already using it to try to silence criticism of their organisation or debate on issues where they say there should be “no debate”.
100. “Trans rights” charities have actively worked to silence dissent:
 - **Stonewall** wrote to schools and local authorities in 2018 warning them not to use guidance provided by the gender critical organisation Transgender Trend, calling their schools’ resource pack “dangerous” and saying “It is a deeply damaging document, packed with factually inaccurate content”.⁵²

⁵² Stonewall (2019) Creating a trans-inclusive school environment - response to Transgender Trend <https://www.stonewall.org.uk/node/62946>

- **Mermaids** has stated that sharing JK Rowling’s essay on sex and gender online where colleagues at work could see “mightn’t necessarily be treated as an act of transphobia”, but could, “if an employee shared it in a deliberate act of aggression and cruelty...be a severe case of harassment”.⁵³
- **Mermaids** told a publisher of a magazine for A-level law students that they should edit a report on the case of Harry Miller v Humberside Police. The article was heavily cut, with the editor giving the explanation: “The claimant’s [Harry Miller’s] views and the judge’s [Mr Justice Julian Knowles’s] comments about transgender issues would be offensive to most of our readers and our staff.” The author, Ian Yule, protested: “If the judgment of a respected High Court judge is likely to upset such students and their teachers, they have no business studying or teaching this subject.” He resigned as chairman of the editorial board of A-Level Law Review. He wrote to colleagues: “In the process of ‘reviewing’ my article [Mermaids] effectively destroyed it.”⁵⁴
- **Gendered Intelligence** argued that Transgender Trend should not be allowed to raise funds via the online Crowdfunder platform. It said that the organisation’s aim is “to spread incredibly harmful and untrue claims about what it means to be trans”. Crowdfunder investigated and exonerated Transgender Trend.⁵⁵
- **Girlguiding** developed a new policy based on gender self-ID, and expelled Guide Leaders Helen Watts and Katie Alcock for expressing objections to the policy which allows male who identify as women to act in otherwise female-only roles as guide leaders, and male children who identify as girls to share tents and showers with girls, while their parents are told it is a female-only group.⁵⁶ Ms Alcock is suing Girlguiding for discrimination.
- **Trans Media Watch** wrote an open letter to the BBC to complain when it

⁵³ The New Rules of What You Can Say in the Office, Financial Times
<https://www.ft.com/content/c96647db-65e9-457c-9940-1975ea61979c?>

⁵⁴

<https://www.thetimes.co.uk/article/jk-rowling-publisher-asked-mermaids-trans-group-to-censor-legal-article-on-fr ee-speech-ruling-2dl7t5g9g>

⁵⁵

<https://www.independent.co.uk/news/uk/home-news/transphobic-booklet-school-campaign-crowdfunder-reinstated-fundraising-transgender-trend-gendered-intelligence-fox-owl-fisher-a8389346.html>

⁵⁶

<https://www.dailymail.co.uk/news/article-6222859/Guide-leader-says-sacked-telling-bosses-new-transgender-policies-pose-risk.html>

featured feminist author Joan Smith in a report on JK Rowling's tweets.⁵⁷

- **Equaliteach** published a guide for schools on tackling homophobic, biophobic and transphobic bullying that contained a “warning” box calling Transgender Trend an “anti LGBT+ organisation”. It says “the work they do encourages schools to reject the identity of transgender pupils and create an environment that may be unsafe for gender-questioning and transgender young people.”⁵⁸
- **The CEOs of Liberty and Amnesty International** signed an open letter condemning Suzanne Moore's article “Women must have the right to organise. We will not be silenced” as transphobic. Ms Moore's article defended Professor Selina Todd for being deplatformed due to her association with Woman's Place UK.
- **The Labour Campaign for Trans Rights** put out a pledge during the last Labour leadership election calling Woman's Place UK and LGB Alliance “Trans Exclusionist Hate Groups”.⁵⁹ This pledge, which called for members of these groups to be expelled from the Labour Party, was signed by four out of five contenders.⁶⁰
- **Transgender Equality Network Ireland** published an open letter, signed by several NGOs including Amnesty International Ireland, arguing against the LGB Alliance and saying: “We call on media, and politicians to no longer provide legitimate representation” for those they designate as holding “bigoted beliefs”.⁶¹
- **Trans rights ally Adrian Harrop complained about a billboard poster** bearing the definition of the word woman, saying it was a transphobic campaign. He complained that Standing for Women, the group that put it up, was a “hate group.” The billboard was removed.⁶²

101. The police and CPS are likely to respond to these organisations uncritically as they do not want to be labelled transphobic. In fact they have already actively committed to be overseen or supervised by these organisations. The Crown Prosecution Service, Ministry of Justice, College of Policing and many police forces are part of the Stonewall Champions scheme.⁶³ Under this scheme the

⁵⁷ <https://hiyamaya.files.wordpress.com/2020/06/letter.pdf>

⁵⁸ <https://equaliteach.co.uk/for-schools/classroom-resources/free-to-be/>

⁵⁹ https://twitter.com/Labour_Trans/status/1226939313264394241/photo/2

⁶⁰ <https://www.bbc.co.uk/news/uk-politics-51465800>

⁶¹ <https://gcn.ie/irish-lgbtq-community-stand-irishsolidarit-transphobia-trans-day-remembrance/>

⁶² <https://www.bbc.co.uk/news/uk-45650462>

⁶³ Police Forces in England that are members of the Stonewall Champions Scheme: Avon and Somerset Police, Cheshire Police, Derbyshire Constabulary, Dorset Police, Durham Constabulary, Dyfed Powys Police, Hampshire Constabulary, Hertfordshire Constabulary, Humberside Constabulary, Lancashire Constabulary, Leicestershire

charity gives institutions its mark of approval if they sign up to a number of core principles, including adopting Stonewall’s stated definition of transphobia and committing to an approach of “zero tolerance”. Furthermore they are expected to adopt de-facto self-ID policies that go beyond the law and ignore potential conflicts with women’s rights.

102. Transgender advocacy organisations Mermaids and Gendered Intelligence provide training to the police and the tribunals service.⁶⁴ Earlier this year the Crown Prosecution Service withdrew its LGBT hate crime guidance issued to schools, after a 14-year-old girl mounted a legal challenge against it. The “LGBT bullying and hate crime schools pack” followed the self-ID proposals of these advocacy organisations and threatened schools that, if they do not allow transgender pupils to use their preferred toilets or changing rooms, they could face legal challenge.⁶⁵ The claimant is arguing that the CPS’s membership of the Stonewall Diversity scheme means it was not impartial in considering the rights of both women and girls, and transgender people.
103. The view promoted by these organisations, that “gender critical” organisations are “hate groups”, is wrong. There have also been votes of confidence for gender critical organisations from experts, civil society leaders and law courts. Transgender Trend’s founder was shortlisted for the John Maddox Prize for science communication in 2018 and its guidance was recommended as most compliant with EHRC Technical Guidance for Schools in a review published by TES.⁶⁶
104. Professors and lecturers Brad Blitz, Anja Boeing, Prof Lesley Gourlay, Dr Ruth McGinity, Dr Amy North, Prof Gemma Moss, Prof Sophie Scott, Dr D’reen Struthers, Dr Holly Smith, Prof Judith Suissa, Prof Alice Sullivan, Prof Elaine Unterhalter and Dr Ralph Wilde wrote a letter defending Women’s Place UK when it was called a “hate group” by Labour Leadership candidates.⁶⁷
105. Another letter defending Women’s Place UK was signed by 195 people, including writers, actors, academics, lawyers and activists such as Pragna Patel, the founder of the Southhall Black Sisters Fund. “We believe the right to discuss

Police, Merseyside Police, Metropolitan Police Service, North Wales Police, Northumbria Police, Nottinghamshire Police*, Police Scotland, Staffordshire Police, Suffolk Constabulary, Surrey Police, Sussex Police, West Midlands Police, West Yorkshire Police, Wiltshire Police

⁶⁴ Mermaids training for police ridiculed online

<https://www.christian.org.uk/news/mermaids-training-for-police-ridiculed-online/>

⁶⁵

<https://www.telegraph.co.uk/news/2020/04/30/cpspulls-hate-crime-guidance-schools-14-year-old-girl-mounted/>

⁶⁶ Hayton, D (2019) How teachers can support transgender students, TES, May 2019.

⁶⁷ <https://www.theguardian.com/society/2020/feb/20/womans-place-uk-is-not-a-trans-exclusionist-hate-group>

proposed changes to the law is fundamental in a democratic society,” they wrote.⁶⁸

106. Speakers at Woman’s Place UK Woman’s Liberation 2020 Conference held at UCL in February 2020 included Joan McAlpine MSP, Joanna Cherry QC MP, Harriet Wistrich (Director, Centre for Women’s Justice), Julian Norman (Barrister, now Judge), Mary-Ann Stephenson (Director, Women’s Budget Group), Audrey Ludwig (Director, Suffolk Law Centre), Rosa Freedman (Professor of Law, Conflict, and Global Development at the University of Reading, Viv Hayes (Director, Women’s Resource Centre), Jodie Ginsberg (Then Director Index on Censorship, now Internews) Fiona Kumari Campbell (Senior Lecturer In the School of Education and Social Work at the University of Dundee), Michele Moore (Professor and Head of Centre for Social Justice and Global Responsibility, LSBU), Janet Veitch OBE (Gender advisor to the British Council and Consultant to Rape Crisis England and Wales), Hibo Wardere (Anti-FGM campaigner), Frances Crook OBE (CEO The Howard League), Jo Phoenix (Professor of Criminology, Open University and Trustee Centre for Crime and Justice), Mariam Namazie (Spokesperson One Law for All and the Council of Ex-Muslims of Britain), Louise Raw (Historian) , Helen Joyce (Journalist and Executive Editor, The Economist) and Beatrix Campbell OBE (Writer and Activist).⁶⁹

107. Sam Smethers, at the time CEO of the Fawcett Society, has also spoken up to defend Woman’s Place UK against being labelled a hate group. She said:

The only way forward is for both sides of this issue to be heard with mutual respect. Characterising Women’s Place UK in this way misrepresents them and is fundamentally unhelpful. It is time to move this agenda forward.⁷⁰

Other senior leaders in the charity sector have spoken to us but say they fear speaking up publicly because of reprisals for their organisations’ funding and their own position.

108. Transgender Trend was allowed as an intervener in the case of *Keira Bell v The Tavistock and Portman*. The judgement noted:

The third Intervener is Transgender Trend Ltd., an organisation that provides evidence based information and resources for parents and

⁶⁸

<https://southallblacksisters.org.uk/news/sbs-signs-letter-supporting-need-for-free-and-open-debate-on-gender-politics/>

⁶⁹ <https://womansplaceuk.org/womens-liberation-2020-plenaries-panels-workshops/>

⁷⁰ Fawcett Society Fawcett Comments on the Criticism of Woman’s Place UK

<https://www.fawcettsociety.org.uk/news/fawcett-comments-on-the-criticism-of-womans-place-uk>

schools concerning children with GD. Ms Davies-Arai is the director of that organisation and she has filed a witness statement in these proceedings. She set out concerns about the lack of evidence as to the impacts and effectiveness of puberty blockers and in relation to which patients it is most likely to help. Much of her evidence focused on the increase of referrals to the Gender Identity Service of teenage natal girls and the cultural factors, including material on the internet and social media, which may play a part in this.⁷¹

109. Constant repetition of the accusations that gender critical organisations and individuals are hate groups has an illusory truth effect, which, combined with the exhortation to report hate crimes, will guarantee that individuals and organisations who argue that sex matters will be disproportionately negatively impacted. This proposed legislation will be used to censor the gender critical and feminist viewpoint.

Promoting and encouraging vulnerability

110. This proposal, if enacted, would encourage organisations to promote feelings of vulnerability and unreasonable offence-taking amongst the group it purports to serve, and penalise and discourage all those who promote resilience, tolerance of other viewpoints and robust and open debate.
111. In order to secure resources and influence, it is in the interest of charities to emphasise the vulnerability of, and threats to, their stakeholders. This law would strengthen this incentive. This is demonstrated by the reports on “online hate crime”⁷² and transphobic hate crime⁷³ by the organisation GALOP that are featured in the consultation document. The Transphobic Hate Crime report states that “4 in 5 respondents had experienced a form of transphobic hate crime” and claims this shows “startlingly high levels of transphobic violence and abuse faced by people on a regular basis”. It is the result of an online survey that the national charity ran over 5 weeks to an audience of over 13,000 social media followers. It attracted 227 responses, with some 15 reporting physical assault, about which no further details are given. The most commonly reported “hate crimes” were “invasive questions” (60%) and “deadnaming” (55%). Neither of these are crimes in themselves. Respondents generally said they had not reported the incidents to the police, listing reasons such as “police could not help”, “is not serious enough”, “did not have the energy”, “was not a crime”. Common coping strategies instead included “spoke to people in support network”, “bought nice things” and “joined trans groups online”.

⁷¹ <https://www.judiciary.uk/wp-content/uploads/2020/12/Bell-v-Tavistock-Judgment.pdf>

⁷² http://www.galop.org.uk/wp-content/uploads/Online-Crime-2020_0.pdf

⁷³ <http://www.galop.org.uk/wp-content/uploads/Trans-Hate-Crime-Report-2020.pdf>

112. The report includes quotes such as:

“being a constant victim of transphobia makes you very aware of the space you take up in the world, and how you are perceived by onlookers. this hyperawareness has added to my body image issues”

“I have developed twitches that are triggered by anxiety, especially by transphobia. Hearing my deadname causes me to twitch nonstop for up to an hour.”

“Before I leave the house, if I’m planning to do something where my trans identity might be an issue, I have to do a huge itinerary in my head of all the things that might prevent me passing...”

“Every time I am not feeling crippling dysphoria, I am terrified that I am not transgender, and I have been told that I have to hate my body all the time otherwise I am not transgender.”

“I now assume everyone is transphobic until I’m proved wrong to avoid disappointment and ridicule.”

This suggests that the mental wellbeing of vulnerable people is being harmed by the sense that the world is against them and that anyone who recognises their sex wishes them ill.

Questions 11 and 12: Reasonable Excuse

Question 11. We provisionally propose that the offence should include a requirement that the communication was sent or posted without reasonable excuse, applying both where the mental element is intention to cause harm and where the mental element is awareness of a risk of harm. Do consultees agree?

Question 12. We provisionally propose that the offence should specify that, when considering whether the communication was sent or posted without reasonable excuse, the court must have regard to whether the communication was or was meant as a contribution to a matter of public interest. Do consultees agree?

We disagree with the overall proposal. We do not think that the defence of “reasonable excuse” is an adequate safeguard for freedom of expression.

113. The presumption of freedom of expression is that you shouldn't need an excuse to speak. As outlined above, this proposal would advance a culture of offence-taking, which would incentivise organisations to exaggerate emotional harm and vulnerability as political weapons against opponents. It would undermine democratic debates. Relying on individual defences of public interest against this would be inadequate.
114. The threat of arrest, questioning and prosecution, and the cost and time that it takes to clear your name, and the impact meanwhile on your reputation and employment, would make speaking up in public a dangerous proposition.
115. While we have outlined these concerns in relation to debates on sex and gender, which we believe is the area where there is the most immediate threat, these same pressures would also be used to shut down debate by other political movements and identity groups.

Question 13: Article 10

Question 13. We invite consultees' views as to whether the new offence would be compatible with Article 10 of the European Convention on Human Rights.

We do not believe the new offence is compatible with Article 10 for reasons given above.

116. In particular, the distance between the results of this proposal and the judgments in *Miller v Humberside Police* and *Scottow v CPS*, both of which rest on Article 10, is worth considering closely.
117. We would also caution against relying on the European Court of Human Rights to sort these matters out. It cannot be assumed that the UK will continue to agree to be bound by that Court. It is all the more important therefore that our laws are cautiously drafted in the first place.

Questions 22 and 23: Pile-ons

Question 22. Should there be a specific offence of inciting or encouraging group harassment? Knowing participation in a pile-on

Question 23. Should there be a specific offence criminalising knowing participation in uncoordinated group ("pile-on") harassment?

We strongly disagree with these proposals.

118. We do not think it is practical or proportionate to criminalise “being part of a pile-on”, which can simply be lots of people disagreeing with one person or an organisation. Nor do we think it practical or proportionate to criminalise “inciting or encouraging group harassment”, which can simply be quoting something someone has said and criticising it. We believe such a law would be an unacceptable infringement on free speech and impossible to police consistently, and that it would be used by organisations and powerful people receiving criticism to criminalise their detractors.

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