

Engender submission of evidence to the Justice Committee's short timescale call for views on the Hate Crime and Public Order (Scotland) Bill – Freedom of Expression Amendments

22 February 2021

Engender's prior support for a general Freedom of Expression clause

When Engender provided our written evidence to the Committee at Stage 1, we noted that freedom of expression has long been relied on by women and women's organisations to advocate for equality and rights.¹ We remain strongly opposed to the use of a stirring up offence to prevent criticism of political action or social debate that affects women and gender equality outcomes. We also noted that concerns about the scope of criminalised hate speech could have a chilling effect on protest, and restrict the voicing of concerns from marginalised groups with lesser access to power and to advice that prevents them from engaging in – sometimes difficult - public discourse in pursuit of their own rights. Feminist speech and advocacy for equality and rights must not be undermined.

We reiterate our view here that:

- A perceived threat of criminality may stifle necessary political and social debate;
- Marginalised groups and causes are more vulnerable to interference and less capable of inspiring actual hatred to a majority or state-backed power;
- Exceptions should be narrowly constituted and not used to further or excuse oppression, and therefore the scales must be weighted in favour of the oppressed.

We noted that the freedom of expression clauses in the Bill as introduced were focussed on specific aspects of a person's identity or behaviour without a strong justification for their being singled out. We suggested that replacing the specific

¹ Engender (2020) Engender submission of evidence to the Scottish Parliament Justice Committee call for views on the Hate Crime and Public Order (Scotland) Bill. Available at <<https://www.engender.org.uk/content/publications/Engender-submission-of-evidence-on-Hate-Crime-and-Public-Order-Scotland-Bill-.pdf>>

exemptions with a more general provision which explicitly provides reassurance of protection for speech made as part of political or social debate in the public interest. This reflects the approach the European Court of Human Rights has adopted, weighing the need to promote democracy and advance political, artistic, scientific or commercial development and the need to protect the rights of individuals and minority or marginalised groups, and would focus on protecting the forum rather than narrow subject matter.

We continue to believe that this approach balances the need to provide reassurance that discussions on all matters is protected by existing human rights law while protecting marginalised minorities from harm.

This is because the value of any freedom of expression clause is ultimately secondary to the threshold for criminality and provides reassurance that underlying protections in the European Convention on Human Rights, mainly Article 10 and Article 17, apply. It is worth stating again here that ‘hate speech’ of the sort the stirring up offences in the Bill aim to address is generally excluded from protection under Article 17 and that Article 10 is not absolute, often involving an examination of the facts and the context in cases relating to hate speech.² A freedom of expression clause, because it is not absolute, will not prevent the need for an examination of whether the threshold for criminality has been met in cases when an offence is alleged.

We believe that section 3(2) of the Bill, especially following amendments at stage 2, creates an appropriately high threshold for an offence – behaviour or material must be **objectively** threatening or abusive, and there must be intent to stir up hatred. This leaves considerable space for difficult, challenging and offensive comments to be made.

We do not believe it is appropriate to single out aspects of protected characteristics or identity as being more or less worthy of criticism than others and welcome that consensus is being sought that would treat all protected characteristics in the Bill the same. We suggest that fixing aspects of current social and political debate on the face of the Bill runs the risk of the law becoming out of date as what is contested or accepted may shift over time.

Prescriptive yet narrow freedom of expression clauses will not prevent criminality where the high threshold for criminal offence is met, yet there is risk that such an approach causes unnecessary distress to people the Bill aims to protect. Additionally, we are not convinced that such reassurance is possible given that somebody may still commit an offence while engaging in criticism of a sort included in a freedom of expression clause, and that it may in fact lead people to commit offences capable of crossing the threshold in section 3(2), under the mistaken belief their speech is

² Vejdeland and others v. Sweden. ECHR No. 1813/07

protected in absolute because its content corresponded with a matter listed on the face of the Bill.

The Scottish Government's draft amendments

Specifically on the options proposed, all four options make clear that discussion or criticism of any protected characteristic, relevant attribute, or behaviour thereof, is not in itself to be taken as threatening or abusive and cannot itself amount to an offence unless delivered in objectively threatening or abusive terms or manner and delivered with the intention of stirring up hatred.

Engender takes no strong view on the degree to which race and religion should be treated the same as all other protected characteristics and would defer to other stakeholders on this point. We would however not support extending “expressions of antipathy, ridicule, dislike or insult” to other protected characteristics because the freedom of expression clause will make no difference to the level of protection speakers are provided by the Bill. It will however send a clear message to those the Bill is intended to protect that “expressions of antipathy, ridicule, dislike or insult” are appropriate. There is a difference between speech not being criminalised and being expressly sanctioned or condoned. There is no need for the Bill to create this distress when it will offer no additional protection from criminality.

We also note that concern about the process of agreeing these amendments has led to an impression that it is somehow unusual for parties and stakeholders to meet outside of formal sessions of a Committee to test ideas. We are concerned that this may impede the quality of amendments on future Bills and would suggest that more discussion with more stakeholders in this process may have actually led to better drafting, avoided considerable upset and contributed to better public discourse about what risk to freedom of expression actually exists and how best to manage that. We welcome the openness of the Committee and opportunity to contribute to this particular discussion while also hoping an environment of meaningful dialogue, reflection and cooperation can be preserved, even where we disagree.

Treatment of Sex

It is not clear at this stage, but we would expect an enabling power to add ‘sex’ to the freedom of expression clause on the same basis as the approach to ‘sex’ in the rest of the Bill to be forthcoming. Without seeing or having specific opportunity to consider how such an amendment could work, we cannot yet draw any firm conclusions on such an approach. However, Engender’s concern about the symmetrical application of ‘sex’ remains, and we think it vital to consider what statements about women, gender norms and sex could be given tacit approval under the guise of freedom of expression. For example, would it be appropriate to question women’s suitability for particular jobs or industries or to make comments about women’s bodies or physical

appearance? Even if such comments were not of themselves criminal, we would not expect to find such comments in legislation in 21st century Scotland. For this reason, we would be even more concerned by, and strongly opposed to, any proposal to craft a prescriptive freedom of expression protection for 'sex' that listed aspects of women's lives deemed acceptable for debate.

Additionally, we would want to be sure that a symmetrical freedom of speech protection for sex did not undermine any new misogyny-related offence or any reform proposed by the Working Group on Misogyny. This needs to be properly and fully considered before any such clause is added to the Bill.

FOR FURTHER INFORMATION

Contact: Eilidh Dickson, Policy and Parliamentary Manager, Engender
Email: eilidh.dickson@engender.org.uk

ABOUT US

Engender is Scotland's feminist policy and advocacy organisation, working on feminist agendas in Scotland and Europe to increase women's power and influence and to make visible the impact of sexism on women, men and society. We provide support to individuals, organisations and institutions who seek to achieve gender equality and justice.