

## **Keep Prisons Single Sex—written evidence (FEO0006)**

### **House of Lords Communications and Digital Committee inquiry into Freedom of Expression Online**

#### **1.0 Introduction**

1.1 This submission answers the questions: Is freedom of expression under threat online? If so, how does this impact individuals differently and why?

1.2 This submission is written by Dr Kate Coleman, Director of Keep Prisons Single Sex. We are concerned that interference with freedom of expression online compromises our ability to effectively campaign on behalf of women in prison.

#### **2.0 Background**

2.1 Keep Prisons Single Sex campaigns for the rights of female offenders to be held in single-sex prisons. We consider this their right under the Equality Act (2010) (Schedule 3, paragraphs 26, 27 & 28, and Schedule 23, paragraph 3). Evidence collected by the MoJ and HMPPS demonstrates the necessity of single-sex provision for female offenders.

2.2 A secondary aim is that male offenders are not recorded as women/female and that convictions of males are not recorded as convictions of women/females. We consider this vital for accurate data collection and necessary for responsive and equitable service development.

2.3 This brings us into conflict with those who believe that the group 'women' is not defined as 'adult human females' but includes adult human males by way of self-declared gender identity and/or the legal mechanisms provided for in the Gender Recognition Act (2004).

2.4 We argue that legal recognition of acquired gender obtained under the Gender Recognition Act does not and was not intended to entail a change of sex either in fact, or for the purposes of the Equality Act. We reject that 'woman' can also refer to adult human males and assert that 'male' and 'woman' are mutually exclusive terms. This is a legitimate debate which we do not engage in vexatiously.

2.5 Much of our work takes place online. We have a website and run a Twitter account. This is consistent with many campaigns across a variety of issues. The ability to express our aims and objectives online is necessary to our campaigning.

#### **3.0 Law Commission Consultation: Communications Offences**

3.1 We are concerned at the proposal to criminalise expressive acts which take place online in consideration of the question: was the communication

likely to cause harm to someone  
otherwise encounter it?

likely to see, hear or

3.2 At 2.16 the Law Commission Report on Communications Offences states that the causal harms of speech acts include emotional and psychological impact, which include distress, anxiety and trauma, as well as negative impact on social attitudes which include reinforcing widely held negative stereotypes. We are concerned that the proposal will be used to shut down legitimate online discourse on the grounds that it is 'likely' to cause distress and anxiety to members of certain groups that are likely to encounter it.

3.3 We note that the statement "woman = adult human female" has been perceived as hate speech and as causing both psychological/emotional harm to individuals (distress, anxiety and trauma) and social harm in that it signifies that the category "woman" excludes "adult human males". Where campaigns, such as our own, assert that women's sex-based rights should not extend to "male women" it is claimed that this reinforces negative stereotypes about these "male women". Transactivists are consistent in these claims that it is threatening, abusive and harmful to imply that single-sex spaces and services for women should be denied to males on the grounds that males can never be women.

3.4 We are aware of these claims and consider them to be wholly unreasonable as the data do not support them. However our material is "likely to" cause distress, anxiety and trauma and, given that it is publicly accessible on the internet, individuals who will experience these emotional and psychological responses are able to access it. Thus it is arguable that we are engaged in online communication that is liable to criminal prosecution.

3.5 Here we consider that a test of 'reasonableness' is important and should be applied separately to considerations of whether or not there was 'reasonable excuse' for the communication or whether or not it contributed to a debate of public importance. We note that there is no requirement that material actually does cause distress, anxiety or trauma. Merely that it is "likely to". We also note that there is no requirement that the material is viewed by anyone. Merely that it is "likely to" be viewed.

#### **4.0 Law Commission Consultation: Hate Crime**

4.1 For reasons related to those expressed in 3.0 to 3.5 above we are concerned that in light of the Law Commission Consultation on Hate Crime we are liable to be charged with committing "stirring-up" offences. This is because our legitimate discourse conducted online is considered to be insulting and abusive as it denies that there are 'male women' and is considered to be threatening in that we argue that single-sex spaces and services for women should be denied to all males, no matter how they identify.

4.2 We are aware that our material is perceived consistently as inflammatory by transactivists. We are aware that the aim of our campaign which is to have all male prisoners removed from the female estate (including those with protected characteristic gender reassignment and including those who have obtained legal recognition of acquired gender) is considered to be hateful conduct.

4.3 We also note with concern that the Law Commission Hate Crime Report at 14.169 references the judgement in Forstater (2019) as an example of an "objectionable" belief. Forstater's belief was that humans cannot change sex. The judgement that this is not worthy of respect in a democratic society and hence fails the Grainger test was met with widespread disbelief and ridicule amongst the general public. An appeal will be heard in 2021. We are concerned that the choice to use this as an example of an "objectionable belief" indicates a departure from neutrality.

## **5.0 The role of the police: hate crime**

5.1 We believe that the police are too quick to assume a hate crime may have been committed in respect of communication, including online communication, taking an investigative approach that is inappropriately heavy-handed. We are therefore concerned that "reasonable excuse" or "contributing to debate of public importance" will provide insufficient protection. E.g.

<https://www.telegraph.co.uk/news/2019/10/14/police-response-transphobic-stickers-branded-extraordinary/>

<https://www.spectator.co.uk/article/a-transphobic-crime-wave-has-hit-oxford>

<https://www.mirror.co.uk/news/uk-news/mum-hate-crime-probe-after-22563314>

<https://www.spectator.co.uk/article/why-are-the-police-stopping-a-74-year-old-tweeting-about-transgenderism-5-february-2019>

<https://www.spectator.co.uk/article/a-collapsed-case-shows-the-perils-of-policing-transphobia->

5.2 We consider that police actions constitute both a direct interference with the right to freedom of expression and Article 10 rights that includes communication online and an indirect interference through a chilling effect. We also believe that police actions contribute towards creating a climate in which it is acceptable, even desirable, to restrict freedom of expression, including online.

5.3 We also refer to Katherine Elizabeth Scottow v CPS (2020): <https://www.judiciary.uk/wp-content/uploads/2020/12/Scottow-v-CPS-judgment-161220.pdf>

5.4 This was an appeal against conviction by Scottow. On 7 February 2020 Scottow was convicted by District Judge Margaret Dodd at St. Albans Magistrates Court of one offence of improper use of a public communications network contrary to section 127(2)(c) of the Communications Act 2003. Scottow was successful in her appeal. In this judgement it was affirmed that free speech encompasses the right to offend and even abuse another. Judgement further stated that Parliament did not intend to criminalise forms of expressions the content of which is no worse than annoying or

inconvenient. Finally, the court also reminded decision makers (in this context police, CPS and Judges) of the need to have regard to free speech.

5.5 We believe that the the original case should not have been brought to court, indeed that Scottow should not have been arrested. In her judgement at that time District Judge Dodd stated that Scottow had been “unkind”. For these reasons, we consider that freedom of expression online is insufficiently protected.

5.6 We are also aware of the possibility of vexatious litigation, or threats of litigation, as a means to shut down debate. Here we refer to Hayden v Dickenson (2020) where a proliferation of cases in respect of online communications was noted by Nicklin J.

## **6.0 The role of the police: non-crime hate incidents**

6.1 The College of Policing guidance on non-crime hate incidents is here:

<https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/hate-crime/responding-to-non-crime-hate-incidents/>

6.2 A non-crime hate incident is: any non-crime incident perceived by the victim or another individual to be motivated by hostility or prejudice based on a person’s actual/perceived race, religion, sexual orientation, disability or a person who is/is perceived as transgender. Hostility includes: ill-will, ill-feeling, spite, contempt, prejudice,

6.3 Assessment of hostility lies solely with the individual who makes the report: this individual does not have to justify or provide evidence of their belief that the incident is motivated by hostility or prejudice. Police officers should not directly challenge this perception.

6.4 We consider that the definition of hate incident is too broad, the proof too subjective and the bar too low. Non-crime hate incidents may appear on a DBS check: their impact on an individual’s life may be significant. Recording non-crime hate incidents represents a significant departure from due process, transparency and accountability:

- The ‘accused’ has no opportunity to present a defence.
- There is no cross-examination of witness(es) hence no challenge to the reporting individual’s perceptions: it is a hate incident because that person says so.
- The ‘accused’ is not informed that a non-crime hate incident has been recorded against them.
- There is no right of appeal.
- Whilst convictions may become spent, it appears that there is no equivalent in respect of non-crime hate incidents which remain ‘live’ indefinitely.

6.5 We consider that this constitutes both direct interference with Article 10 rights and indirect interference through the chilling effect on freedom of expression, including online communication.

6.6 We refer to Harry Miller v (1) The College of Policing (2) The Chief Constable of Humberside:

<https://www.judiciary.uk/wp-content/uploads/2020/02/miller-v-college-of-police-judgment.pdf>

6.7 Mr Justice Knowles found that in recording non-crime hate incidents against him in respect of online communication, Mr Miller's right to freedom of expression had been interfered with and that the actions of the police had resulted in a chilling effect. The judgment emphasised that free speech "includes not only the inoffensive, but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative, and that the freedom only to speak inoffensively is not worth having."

6.8 Non-crime hate incidents are also recorded against children. Here, additional concerns arise as there appears to be no equivalent to the age of criminal responsibility.

6.9 We refer to Miss B, a 14 year old girl seeking to bring a Judicial Review of the College of Policing guidance referred to above. She argues that this guidance creates a chilling effect on her ability to raise legitimate views on transgender issues.

<https://www.thetimes.co.uk/article/girl-14-takes-on-police-over-pupils-right-to-free-speech-v9ht8pwck>

## **7.0 Other Restriction on Freedom of Expression:**

7.1 We note that accusations of hate in respect of online communication are frequently uncritically accepted at an organisational level. The following is a non-exhaustive list of actions taken against those expressing 'hateful' opinions including online:

- No-platforming (e.g. Linda Bellos, Germaine Greer, Professor Selina Todd):  
<https://www.thetimes.co.uk/article/bristol-university-students-ban-transphobic-feminists-73d0pmrx7>  
<https://www.bbc.co.uk/news/uk-england-oxfordshire-51737206>
- Academic papers being refused or withdrawn from publication (e.g. Stephen Gliske; Professor Kathleen Stock):  
<https://retractionwatch.com/2020/04/30/journal-retracts-paper-on-gender-dysphoria-after-900-critics-petition/>  
<https://www.theguardian.com/education/2020/jan/14/sacked-silenced-academics-say-they-are-blocked-from-exploring-trans-issues>
- Universities censoring academics (e.g. Alistair Bonnington censored by Open University):

[https://www.dailymail.co.uk/news/article-9021739/amp/Open-University-student-silenced-support-JK-Rowling.html?\\_twitter\\_impression=true](https://www.dailymail.co.uk/news/article-9021739/amp/Open-University-student-silenced-support-JK-Rowling.html?_twitter_impression=true)

- Threats of violence on social media (e.g. threats received by JK Rowling in response to online statements supporting single-sex spaces for women):  
[https://www.dailymail.co.uk/news/article-8777531/JK-Rowling-receives-support-Ian-McEwan-Griff-Rhys-Jones-amid-transphobia-row.html?ito=amp\\_twitter\\_share-bottom](https://www.dailymail.co.uk/news/article-8777531/JK-Rowling-receives-support-Ian-McEwan-Griff-Rhys-Jones-amid-transphobia-row.html?ito=amp_twitter_share-bottom)
- Loss of or threats to employment (e.g. Maya Forstater's contract was not renewed after she stated online that people cannot change sex; Kevin Price forced to resign as college porter because he would not agree that transwomen are women; Dr David Bell faces disciplinary action after raising concerns about hormone treatment provided to trans-identifying children):  
<https://www.bbc.co.uk/news/uk-50858919>  
<https://www.dailymail.co.uk/news/article-8883575/Cambridge-students-demand-transphobic-Labour-politician-loses-college-porter-job.html>  
<https://www.thetimes.co.uk/edition/news/david-bell-tavistock-gender-clinic-whistleblower-faces-the-sack-rtkl09907>
- Loss of online business (e.g. Etsy removes 'hateful' products/seller accounts):  
[https://www.dailymail.co.uk/news/article-8819877/Etsy-bans-sellers-heart-JK-Rowling-items-promoting-products-F-JK-Rowling-slogan.html#:~:text=Etsy%20bans%20craft%2Dmaker%20from,slogan%20'F\\*\\*\\*%20JK%20Rowling'&text=Online%20marketplace%20Etsy%20has%20banned,that%20it%20'promotes%20hatred'.](https://www.dailymail.co.uk/news/article-8819877/Etsy-bans-sellers-heart-JK-Rowling-items-promoting-products-F-JK-Rowling-slogan.html#:~:text=Etsy%20bans%20craft%2Dmaker%20from,slogan%20'F***%20JK%20Rowling'&text=Online%20marketplace%20Etsy%20has%20banned,that%20it%20'promotes%20hatred'.)
- Impact on professional activities (e.g. author Amanda Craig removed from judging panel after signing a letter published online supporting JK Rowling, journalist Suzanne Moore faced a campaign of intimidation at the Guardian):  
<https://www.thebookseller.com/news/mslexia-asks-amanda-craig-step-down-judge-over-concern-rowling-letter-threatens-climate>  
<https://unherd.com/the-post/suzanne-moore-i-felt-absolutely-betrayed/>
- Impact on political career (e.g. Rosie Duffield MP faced abuse and a campaign to have the whip withdrawn):  
<https://www.thetimes.co.uk/article/rosie-duffield-it-feels-like-gilead-where-women-arent-allowed-to-ask-questions-2gvv39g96>

7.2 We consider that this constitutes a chilling effect on freedom of expression including online and indirect interference with Article 10 rights: individuals who witness the consequences of expressing these opinions engage in self-censorship.

7.3 These consequences are disproportionately aimed at women. Evidence also indicates that these are disproportionately aimed at individuals who reject the concept 'male woman', 'man' more usually being allowed to refer to 'adult human male'. E.g. public health initiatives concerning conditions affecting men use 'man' or 'male' without

<https://prostatecanceruk.org/prostate-information/are-you-at-risk>

<https://www.telegraph.co.uk/news/2018/06/14/cancer-research-removes-word-women-smear-campaign-amid-transgender/>

7.4 We consider that this indirect interference is disproportionately targeted at discussion of female bodies and issues affecting women and girls.

## **8.0 Conclusion:**

8.1 We are concerned at what we perceive to be a marked societal shift from a position where freedom of speech is cherished as fundamental to democracy to one where those expressing the 'wrong' opinions are censored and 'punished'.

8.2 We consider police actions in respect of hate crime and non-hate crime incidents encourage and reinforce this.

8.3 This chilling effect inhibits our ability to campaign effectively on behalf of women in prison and to engage in legitimate debate including online.

8.4 We believe that the proposals continued in the Law Commission consultations on Hate Crime and Communications Online at a minimum do not afford adequate protection to our freedom of expression online or our Article 10 rights. At a maximum we consider that our freedom of expression online and our Article 10 rights are undermined as a result of a chilling effect