

Defining transgender identity in the Hate Crime and Public Order (Scotland) Bill and public policy

MBM Hate Crime Briefing 1

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1. Introduction

This briefing looks at how the characteristic 'transgender identity' is defined in the [Hate Crime and Public Order \(Scotland\) Bill](#), and in public policy more widely. We argue that a failure to clarify what is meant by this term is likely to add to the already substantial risks around freedom of expression, as identified by the [Law Society of Scotland](#), the [Faculty of Advocates](#) and [many others](#).

2. Defining transgender identity

'Transgender identity' is a hate crime characteristic under section 2 of the [Offences \(Aggravation by Prejudice\) \(Scotland\) Act 2009](#). This allows a statutory aggravation to be attached when a person has committed an offence, based on the conduct or motivation of the offender. Under the Act, 'transgender identity' is defined in the following terms:

- a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004, changed gender, or
- b) any other gender identity that is not standard male or female gender identity

Hate Crime and Public Order Bill

The [Hate Crime and Public Order Bill](#) currently before the Scottish Parliament extends the scope of hate crime significantly, and creates the offence of stirring up hatred against individuals with a number of protected characteristics, including transgender identity (it keeps the same term for the general characteristic as in the 2009 Act).

In a change from the definition in the 2009 Act, the Bill sets out four categories that constitute 'transgender identity', and removes the reference to 'intersexuality'. The categories are:

- (a) a female-to-male transgender person;
- (b) a male-to-female transgender person;
- (c) a non-binary person;
- (d) a person who cross-dresses.

The [Explanatory Notes](#) to the Bill state that transgender identity 'does not only refer to people with a Gender Recognition Certificate or who have undergone, are undergoing, (or propose to undergo) medical or surgical interventions, but includes people whose gender identities are different from their sex at birth. This includes those who identify as male, but were registered as female at birth, those who identify as female but were registered as male at birth, non-binary people and cross-dressing people' (para. 80).

Equality Act 2010

Note that under civil anti-discrimination legislation, namely the Equality Act 2010, the mirror protected characteristic is 'gender reassignment' which is [defined](#) as follows:

- (1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.
- (2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.
- (3) In relation to the protected characteristic of gender reassignment—
 - (a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person;
 - (b) a reference to persons who share a protected characteristic is a reference to transsexual persons.

3. What is meant by transgender identity in the Hate Crime Bill?

The Scottish Government has responded to a series of written parliamentary questions asking for clarity on what the government means by transgender identity, as referenced in the Explanatory Notes, and on the terms set out in the draft Bill. The Scottish Government responses to these questions illustrate the difficulty in pinning these concepts down in an objective way.

When asked what the Scottish Government means by 'gender identity' in the Explanatory Notes, the Justice Secretary [described this](#) as "*an individual's gender identity where this is different from their sex at birth*". This is at best a circular definition and arguably not a definition at all.

The government also was unable to provide any further detail on the four categories that constitute transgender identity, instead stating that the terms "*are not specifically defined in the Bill because it is not considered necessary for those phrases to be given any special definitions for the purposes of the Bill*" (see [here](#) and [here](#)). The government response also noted that "*the term 'person who cross-dresses' is used in the Bill to ensure that the protection provided by the word 'transvestitism' is not lost*".

4. Defining transgender identity in public policy: NHS Lanarkshire and Police Scotland

The reluctance by Scottish Government to flesh out the key terms in the Bill is remarkable given that such terms are already regularly defined by public bodies in other policy areas, for instance in policies aimed at supporting transgender employees and service users.

For example, NHS Lanarkshire's [Supporting Trans Staff in the Workplace Policy](#) states:

"An individual's gender identity is their internal self-perception of their own gender. A person may identify as a man, as a woman, or as having a 'non-binary' gender identity which is more complex or fluid. A person's gender identity may not match up with their biological sex. A person's understanding of their own gender identity usually develops during the early years of their childhood and often (but not always) becomes permanent by the time they go through puberty. Unlike someone's physical body, a person's gender identity is as invisible as their personality when they are born. A person's gender identity remains hidden from others unless the person decides to articulate or express it in some way" (2020:17)

Equally elaborate definitions are set out in the Police Scotland [Transitioning at Work](#) Standard Operating Procedure. For instance, ‘non-binary trans people’ are described as:

“the sub-set of trans people who do not feel comfortable thinking of themselves as simply either men or women. They reject the traditional idea of gender as binary, defined only in terms of man or woman. Instead, they feel that their gender identity is more complicated to describe. Some non-binary trans people may identify their gender as a mixture of being a man and a woman or as fluctuating on a spectrum between man and woman. Alternatively, they may feel they have no gender and prefer simply to be seen as just a human being. The gender-neutral pronoun ‘they’ is often used by non-binary people. Some non-binary trans people have no interest at all in undergoing any form of gender reassignment. Others may wish to partially transition. Some may undergo the same gender reassignment process as transsexual people but reject identifying simply as a man or a woman after transition. Occasionally, the desire to transition might fluctuate over time.” (2019:17)

‘Androgynous People’, also referred to as ‘Third-gender People, Bi-gender People and Polygender People’, are separately described by Police Scotland in the following terms:

“people who find they do not feel comfortable thinking of themselves as simply either men or women. Instead, they feel that their gender identity is more complicated to describe. Some may identify their gender as being some form of combination between a man and a woman, or as being neither. Like transsexual people, they can experience gender dysphoria (sometimes as intensely as transsexual people do) and may sometimes at least partially transition socially and may take hormones or occasionally undergo some surgery.” (2019:16)

5. Defining ‘cross-dressing’ in public policy: NHS Lanarkshire, Police Scotland, and Glasgow Life

Both NHS Lanarkshire and Police Scotland define ‘cross-dressing’ as a relevant category in their respective transgender policies, although on close examination neither appear to include people who cross-dress within their practical scope, which has caused understandable confusion.

NHS Lanarkshire defines cross-dressing in the terms below, whereas the term ‘trans’ and its legal protections are understood to apply to people who are *“proposing to undergo, undergoing or having undergone any part of the process for the purpose of gender reassignment”* (2020: 8):

“Cross-dressing people simply wear, either occasionally or more regularly, clothing associated with the opposite gender (as defined by socially accepted norms). Cross-dressing people are generally happy with the gender they were labelled at birth and do not want to permanently alter the physical characteristics of their bodies or change their legal gender. They may dress as the opposite gender for emotional satisfaction, erotic pleasure, or just because they feel more comfortable doing so.” (2020:17)

Defined in very similar terms to NHS Lanarkshire (see below), Police Scotland includes cross-dressing in its generic definition of transgender and states that *“we will support all transgender members of staff in the workplace and go beyond the requirements of the Equality Act 2010”*.

“This term refers to people who dress, either occasionally or more regularly, in clothes associated with the opposite gender, as defined by socially accepted norms. Cross-dressing people are generally satisfied with their birth gender and do not want to permanently alter the physical characteristics of their bodies or change their legal

gender. They may dress as the opposite gender for emotional satisfaction, or just because they feel more comfortable doing so.” (2019:16)

On a closer reading however, the inclusion of cross-dressing people appears to be conditional. For example, access to opposite-sex facilities is intended for those who define themselves as transitioning or transitioned.

Defined as people who “*feel more comfortable expressing themselves in masculine or feminine clothing*”, [media reporting](#) has read cross dressers as included in within the scope of [Glasgow Life’s](#) guidance on accessing sports facilities and services by transgender people. Glasgow Life did not refute this when pressed.

The definitions of cross-dressing in each of the above policies suggest that people who cross-dress do not necessarily have a conflict between their sense of gender identity and their sex at birth, but instead may have a variety of other motivations for cross-dressing. This differs from the Hate Crime Bill, under which people who cross-dress are understood as a subgroup of those whose gender identities are different from their sex at birth.

6. Operationalising gender identity in law and policy

The gulf between the sparse definition of transgender identity in the Hate Crime Bill on the one hand, and the use of multiple, paragraph-long definitions by some public bodies on the other, brings out the difficulties in formulating law and policy in this area.

The unifying feature of all these definitions (except that for cross-dressers above) is that they are grounded in a person’s internal feelings, and specifically in a belief in the presence of a gender identity which exists innately and separately from physical sex, rather than being related to any observable behaviours or physical traits. As NHS Lanarkshire put it “*A person’s gender identity remains hidden from others unless the person decides to articulate or express it in some way*”.

Although certain behaviours are described as sometimes occurring, none of the definitions appear to require that any behaviour or physical change is observed which would distinguish a person *with* the characteristic from someone *without* it, other than the assertion of having the characteristic. This is clearly difficult in any context where people’s treatment changes if they have the characteristic, especially where that will have implications for any other people. It is also a difficulty where the law becomes involved.

The common, essentially subjective approach to definitions, grounded in a belief in innate gender identity, may perhaps be traced back to [Stonewall’s definition of ‘trans’](#):

“An umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth. Trans people may describe themselves using one or more of a wide variety of terms, including (but not limited to) transgender, transsexual, gender-queer (GQ), gender-fluid, non-binary, gender-variant, crossdresser, genderless, agender, nongender, third gender, bi-gender, trans man, trans woman, trans masculine, trans feminine and neutrois.”

Stonewall also provide this answer to the question “[How do you know you’re trans?](#)”

“Many people know they’re trans from a young age. Some trans people might not have the language or understanding of what it means to be trans until later in life. But it is always something innate and absolutely core to your sense of self. It’s not something that’s a fad, a ‘lifestyle choice’ or something that comes and goes. It is an essential part of who you are that can’t be changed. If you aren’t recognised as being the gender you know you are, it’s extremely damaging.”

Stonewall's definition of [gender identity](#) is:

“A person's innate sense of their own gender, whether male, female or something else (see non-binary below), which may or may not correspond to the sex assigned at birth.”

And their definition of [gender](#) is:

“Often expressed in terms of masculinity and femininity, gender is largely culturally determined and is assumed from the sex assigned at birth.”

Stonewall's own definitions read conflictingly about whether organisations are dealing with a fixed or fluid characteristic. Organisations have evidently struggled in attempting to convert such thinking into a basis for public policy decisions, often resulting in legally inadequate guidance, with affected parties left in limbo. That the Scottish Government has [neither withdrawn nor not withdrawn](#) the LGBT Youth Scotland [guidance](#) for supporting transgender young people in schools, which Ministers view as 'not legal' in relation to the potential exclusion of girls, eighteen months after it identified this problem, is a case in point.

In a similar vein, a review of the Scottish Prison Service (SPS) policy on transgender prisoners, initially proposed in [December 2018](#) has repeatedly stalled. In [May 2019](#) a SPS spokesperson stated that the consultation would be opened “*in the coming weeks*”; in [June 2019](#) the Justice Minister stated that the review was already “*going on*”; in [August 2019](#) the SPS stated that it was “*committed to reviewing the policy and holding an open consultation*”; and in [January 2020](#) the SPS stated that a review would take place in “*early 2020*”.

More recently, feminist campaign group For Women Scotland has been [granted permission](#) by the Court of Session to proceed with a Judicial Review to the [Gender Representation on Public Boards Act 2018](#). Although designed to remedy the under-representation of women on public boards, the Act's definition of 'woman' includes males who self-identify as women.

7. Legislating for what?

In the Hate Crime Bill, the absence of a coherent description of transgender identity means that the Scottish Government is effectively proposing a new offence of stirring up hatred towards a group that it cannot define beyond a person's expression of their feelings. The alternative Equality Act definitions do not rely on a person's beliefs or feelings. although using those instead would exclude people who identify as non-binary or who cross-dress, for whom at present the law provides for hate as aggravating factor.

The approach seems to be in essence that people (individuals? the police? prosecutors? the courts? juries?) will know it when they see it. Longer definitions are available elsewhere but are not much help to legislators, providing them with nothing more objective to work with.

As we have argued [elsewhere](#), the threshold in the Bill for criminalisation is low: behaviour is only required to be deemed “abusive”, likelihood is a sufficient test, freedom of expression protection is not provided and the penalties are substantial.

This Bill comes at a point where the debate around gender identity and sex is contested and volatile, and people have already felt [justified](#) in trying to limit as 'hateful' the expression of certain views which other people hold to be important statements of fact, with no hateful content.

We believe that the Bill suffers from a lack of clarity and thus scope for confusion about exactly who is covered by characteristic of 'transgender identity', and that there are not straightforward templates for clarifying this further in law. This is likely to add to the substantial chilling effect on freedom of expression that we are far from alone in identifying as a likely outcome if Part 2 the Bill is passed.