

Should ‘Variations in Sex Characteristics’ be included in the Hate Crime and Public Order Bill?

MBM Hate Crime Briefing 2

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1. Background

The Hate Crime and Public Order Bill provides for ‘Variations in Sex Characteristics’ (VSCs) as a standalone protected characteristic. This represents a change from the [Offences \(Aggravation by Prejudice\) \(Scotland\) Act 2009](#), which currently classifies ‘intersexuality’ under ‘transgender identity’.

The reclassification of ‘intersex’ and change in terminology in the Bill, as recommended by Lord Bracadale ([recommendation four](#)), is prompted by the recognition that VSCs are a physical condition and as such should not be conflated with gender identity.

The change in terminology also taps into some of the contested politics around this issue, and the how labels used by stakeholders reflect different perspectives. As well as VSCs, these include ‘Differences in Sex Development’ (DSD), which tends to be used by those focussed on better recognition and understanding within the health service, and ‘intersex’, which tends to be used by those whose advocating from an LGBTI perspective, often with the implication that ‘intersex’ people lie between male and female.¹

2. What are VSCs?

To date, most commentary on the Hate Crime Bill has skirted over the inclusion of VSCs, most likely because the conditions are rare and not widely understood. Indeed a lack of expertise is even acknowledged by those advocating for its inclusion in the Bill. For example, the [Equality Network](#) state that “*we are very aware that we are not the experts in the remit of lived experience of being intersex*”.

The Scottish Government [definition](#) of VSCs in the Bill puts emphasis on ambiguity around sex characteristics:

‘The Hate Crime and Public Order (Scotland) Bill sets out ‘variations in sex characteristics’ as a reference to a person being born with physical and biological sex

¹ For example, the [NHS Scottish Differences in Sex Development Clinical Network](#) is aimed at supporting people with DSD conditions, and explicitly uses this terminology. [Minutes](#) from the Clinical Network Steering Group meeting in January 2018 also suggest that the Network disagrees with the Scottish Government policy approach, which positions DSD conditions under the LGBTI umbrella:

‘Scottish Government Consultation – differences of sex development

Dr Deeny advised the group that someone from Scottish Government made contact through the website and it was made clear that DSD patients are not LGBTI patients. It was also highlighted that early infancy surgery is only undertaken for life saving reasons. These points were taken on board by Scottish government.’

characteristics which, taken as a whole, are neither those typically associated with males nor those typically associated with females.

The definition of 'variations in sex characteristics' includes people whose physical sex development is different from what is generally expected for males and females.

The phrase 'physical and biological sex characteristics' is not specifically defined in the Bill, meaning that the phrase takes its ordinary meaning in the context and would include genetic, chromosomal, gonadal, anatomical and hormonal characteristics.'

This contrasts with the [overview](#) provided by the specialist charity [dsdfamilies](#) (in the context of the Census (Amendment) (Scotland) Bill), which notes that in the overwhelming number of cases, a person's sex is clear. It is quoted at length here, as we think the detail is helpful.

'What is DSD/intersex?

DSD (or intersex) is an umbrella name for some 40 different conditions that affect the development of the reproductive organs and of the genitals.

These biological conditions become apparent due either to genital appearance or different development at the time of puberty.

DSD conditions are understood in terms of specific health diagnoses involving chromosomes, hormones, the development of the reproductive organs and puberty, for example:

Large clitoris in girls due to excess androgen production in the adrenal gland (e.g. Congenital Adrenal Hypoplasia –this is a life-threatening condition);

Small penis with the opening at the base not at the tip and a bifid scrotum (appearance of labia) due to partially developed testes and reduced production of testosterone (Peno-scrotal Hypospadias)

Testes in a girl whom is insensitive to androgen so follows a female development in puberty but without a womb (Androgen Insensitivity Syndrome)

The instance of DSD/intersex?

Some reporting has referred to a statistic of 1.7% (1/60) of the total population being 'intersex' or 'as common as red hair'. This tally includes a wide range of sex developmental endocrine/gynaecological/urological conditions where there is no ambiguity regarding the person's sex e.g. an XX girl with functioning ovaries but without a womb or an XY boy with a meatus (hole) in the shaft of his penis. People with such development are recorded straightforwardly as male or female at birth.

0.02% of DSD presentations to health professionals require specialist DSD input to understand why a baby is born with genitals that look different. These represent ca 0.02% of the total population (1/5500 or 1/4500). This statistic includes a small number of adolescent girls who are diagnosed in puberty (e.g. when a girl doesn't have periods towards the end of puberty; or a girl who at puberty has an unexpected androgen response).

In the UK this translates to approx. 130 babies needing specialist input every year at birth (for Scotland approx. 12 babies). This may include assignment of legal sex based on the investigation of the person's biology. Such investigation will include blood tests, hormonal responses, karyotype and physical external (and sometimes internal) assessment to inform sex assignment.

For most babies with a DSD diagnosis sex assignment will be clear. In about 7 or 8 babies annually this is not the case.'

3. Is there evidence to support the inclusion of VSCs as a hate crime characteristic?

The evidence base for the inclusion of VSCs as a hate crime characteristic is unclear. Both the Bracadale Review and Bill Policy Memorandum state that the inclusion of VSCs in the Bill is supported by the Equality Network.

The only empirical evidence available appears to be an [Equality Network hate crime research report](#) that refers to the experiences of five respondents who reported that they had been the victim of a hate crime on the basis of their 'intersex' status (as far as we can see, no definition of 'intersex' was offered in the survey). In response to a [parliamentary question](#) on the evidence base for its inclusion, the Scottish Government drew on this report, stating:

'In terms of specific evidence in relation to 'variations in sex characteristics', although it is noted that more research is required, the Equality Network believe that people with variations in sex characteristics, or people perceived to have variations in sex characteristics, can face hate crime. In one of its hate crime research reports, they found that 29% of respondents with variations in sex characteristics had experienced hate crime based on having variations in sex characteristics (although noting the small number of respondents).'

Conversely, the [dsdfamilies](#) response to the 2018 consultation states that '*there is no evidence to suggest that those targeted as 'intersex' in the proposed legislation welcome being considered vulnerable to hate crime*'.

One explanation for the divergent reports of experience may be that the groups being described are not the same. Specifically, it is not clear how far the group describing themselves as 'intersex' to the Equality Network would all fall within the group who could obtain a VSC or DSD diagnosis, or whether any were using the term in another way, for example, as a descriptor based on self-perception.

4. What is the rationale for the inclusion of VSCs?

The inclusion of VSCs in the Bill appears to be based on two related factors.

First and most directly, it is included as a continuation of the 2009 Act, which provides for 'intersexuality' as part of 'transgender identity' as stated in this Scottish Government response to a [parliamentary question](#):

'On 14 November 2018 the Scottish Government's 'One Scotland: hate has no home here' consultation sought views on whether 'variations in sex characteristics (intersex) should be a separate category from transgender identity in Scottish hate crime legislation', in line with Lord Bracadale's recommendation.

The majority of organisations who responded agreed with Lord Bracadale's recommendation to include 'intersex' as a separate category from transgender identity within hate crime legislation.

Since the enactment of the Offences (Aggravation by Prejudice) (Scotland) Act 2009, it has become clear that there are concerns with listing 'intersexuality' as an aspect of transgender identity. 'Intersex' and transgender identity are now widely understood to be two separate and distinct characteristics ('intersex' relating to physical sex development that is different to what is generally expected of males and females, and transgender identity relating to a person's gender identity).'

In effect, this means that its original inclusion was grounded in a *misunderstanding* that resulted in the classification of VSCs as an identity. Instead of fully addressing this category error, the 2018 Government consultation asked

respondents if VSCs should remain included, but separate to transgender identity, rather than whether VSCs should be included as a hate crime characteristic at all.

The dsdfamilies submission to the consultation highlighted these points.

‘Whilst it is clearly erroneous to have ‘intersex’ included in the trans umbrella (and it should be investigated why it was ever so), the remedy is not to have a separate category. Instead intersex should be omitted altogether from this legislation until there is a clear understanding of the meaning and scope of the term to whom it applies.’ ([dsdfamilies 2018](#))

Their view was not however acknowledged in the Bracadale Review, which once again described ‘intersex’ as an “identity characteristic”.

Second and more broadly, the inclusion of VSCs in the Bill reflects the Scottish Government’s general approach, which treats these conditions for policy purposes as part of the equalities agenda, rather than a healthcare issue. In April 2014 the [Scottish Government](#) added intersex equality to its approach to sexual orientation and gender equality, and in the same year, funded a [Transgender and Intersex conference](#). The [Fairer Scotland Action Plan](#) (2016) stated that the Scottish Government would ‘*review and reform gender recognition law so it is in line with international best practice for people who are Transgender or Intersex*’. In November 2017, on opening the first consultation on reform of the Gender Recognition Act, the Scottish Government [stated](#) that it had ‘*decided that because people with intersex people/people with variations in sex characteristics face issues that are distinct from those experienced by transgender people, we should consult separately on each set of issues*’, and that a consultation would be published’. This is yet to take place.

The coupling of ‘intersex’ and equalities/transgender issues is most clearly reflected in the allocation of Government funding, where all the available funding for organisations representing this group is dispersed under ‘intersex equality’, and classified as part of the LGBTI ‘protected characteristic’ under the [Equality Funding stream](#).²

At the time of writing the Scottish Government is seeking to recruit a [Director for Equality, Inclusion and Human Rights](#), and consistent with this framing, is encouraging applications from ‘*women and individuals from those groups currently under represented at this level, including lesbian, gay or bisexual orientation and/or transgender or intersex status (LGBTI), disabled and those from a minority ethnic background*’.

² The sole organisation funded for this purpose is the [Equality Network](#), who since 2015/16 have received £45k per annum for its intersex advocacy (see [here](#) [2015/6], [here](#) [2016/17] and [here](#) [2017/18-2019/20]). A [Freedom of Information request](#) shows that the Equality Network was the only organisation considered for intersex funding by the Scottish Government.

The Equality Network have been careful to make clear that they do not represent people who are intersex but are in receipt of this funding simply as part of their general brief to advocate for equality. For example, in giving evidence to the Culture, Tourism, Europe and External Affairs Committee on the Census (Amendment) (Scotland) Bill, Equality Network Director Tim Hopkins stated: “*It is very important to say that we do not represent the intersex community. In fact, we do not claim to represent anybody; we just speak up for people’s equality*” ([6 December 2018. col. 36](#)). [Correspondence](#) released under Freedom of Information also shows that the Equality Network asked the Scottish Government to issue the grant in the name of the Equality Network, rather than the Scottish Trans Alliance, noting ‘*sensitivities within the intersex communities about the potential risk of intersex and trans issues being confused*’ and that there was ‘*less sensitivity and potential concern about a previous LGBT organisation doing intersex work, than there is about a purely trans project doing it*’ (p.5). Responding to a [parliamentary question](#) in June 2019, the Scottish Government stated that ‘*We understand that the Equality Network have not taken a policy position on intersex/variations in sex characteristics (VSC) issues until they have consulted further on them with intersex people/people with VSCs in Scotland*’.

The same thinking was also reflected in the Census (Amendment) (Scotland) Bill as originally drafted. As introduced, it sought to include 'intersex' under the 'trans' category ([Policy Memorandum, para. 18](#)). In response to evidence from dsdfamilies, the Scottish Government subsequently removed all references to "intersex" people, agreeing that there was no justification for singling out this group, compared to any other group of people sharing a specific type of medical history.

The change to that legislation appears exceptional, however, with the Hate Crime Bill reflecting an overarching policy approach which remains anchored in seeing this group principally as part of the LGBTI group.

5. What does this mean for the Hate Crime Bill?

For Justice Committee members tasked with reviewing the Hate Crime and Public Order Bill these observations raise a question that the consultation and the policy memorandum both side-stepped. This is whether VSCs should, uniquely among specific types of physical condition, be included as a hate crime characteristic and, if so, based on what evidence. In our submission to the Justice Committee, we recommend that Committee engages with those who have the relevant specialist expertise to speak about what are rare medical conditions, in assessing the case for including VSCs among the characteristics covered by the Bill.