

The inclusion of ‘cross-dressers’ under the Hate Crime and Public Order (Scotland) Bill

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1. Introduction

During the Stage 1 oral evidence sessions on the Hate Crime and Public Order (Scotland) Bill, the definition of ‘transgender identity’ was discussed. This blog traces how ‘cross-dressers’ came to be included within the definition of transgender identity in the current Bill, and shows that its inclusion within existing legislation has never been subject to parliamentary discussion or debate.

2. Cross-dressing in the Hate Crime and Public Order Bill

The Hate Crime Bill defines ‘transgender identity’ in the following terms:

- (7) A person is a member of a group defined by reference to transgender identity if the person is—
- (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 accompanying the Bill provide the following explanation:

‘The terms ‘transsexualism’ and ‘transvestitism’ are also widely understood to be outdated and are therefore also removed from the definition included in the bill, helping to ensure that the definition is future proofed as far as possible. **Cross-dressing people are included in the definition within the Bill to ensure the protection provided by the word ‘transvestitism’ is not lost.**’
[our emphasis]

The reference to ensuring that protection for cross-dressers ‘is not lost’ is to the [Offences \(Aggravation by Prejudice\) \(Scotland\) Act 2009](#), which added ‘transgender identity’ as a protected characteristic to the list of statutory aggravations for hate crimes, and included ‘transvestitism’ within its scope.

2 Prejudice relating to sexual orientation or transgender identity

- (1) This subsection applies where it is—
 - (a) libelled in an indictment, or specified in a complaint, that an offence is aggravated by prejudice relating to sexual orientation or transgender identity, and
 - (b) proved that the offence is so aggravated.
- (2) An offence is aggravated by prejudice relating to sexual orientation or transgender identity if—
 - (a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to—
 - (i) the sexual orientation (or presumed sexual orientation) of the victim, or
 - (ii) the transgender identity (or presumed transgender identity) of the victim, or
 - (b) the offence is motivated (wholly or partly) by malice and ill-will towards persons who have—
 - (i) a particular sexual orientation, or
 - (ii) a transgender identity or a particular transgender identity.

- (8) In this section, reference to transgender identity is reference to—
 - (a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c. 7), changed gender, or
 - (b) any other gender identity that is not standard male or female gender identity.

The definition in the current Bill has been amended in part to remove the reference to 'intersexuality', which has been redefined as 'variations in sex characteristics' and now features as a separate protected characteristic (we have written about this [here](#)), but also to remove references to 'transsexualism' and 'transvestitism', as set out above.

3. Defining cross-dressing

In response to a series of PQs following the Bill's introduction, the Cabinet Secretary for Justice declined to offer any definitions for 'a non-binary person' or 'a person who cross-dresses', saying it was "not considered necessary" to define either category. Nor did he provide any evidence that persons in either category were the victims of hate crimes on the basis of their status.

Question S5W-29940: Liam Kerr, North East Scotland, Scottish Conservative and Unionist Party, Date Lodged: 15/06/2020

To ask the Scottish Government whether it will provide a definition for a (a) "non-binary person" and (b) "person who cross-dresses" under section 14(7) of the Hate Crime and Public Order (Scotland) Bill.

Answered by Humza Yousaf (06/07/2020):

The phrases 'non-binary person' and 'person who cross-dresses' 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.

There is already a statutory aggravation where an offence is aggravated by prejudice relating to transgender identity. This is in the Offences (Aggravation by Prejudice) (Scotland) Act 2009, which is to be repealed by the Bill. In that 2009 Act, there is a definition of transgender identity which includes the terms 'transsexualism' and 'transvestitism'. Those terms are not used in the Bill because the Bill seeks to use more modern language. The term 'person who cross-dresses' is used in the Bill to ensure that the protection provided by the word 'transvestitism' is not lost.

The term 'non-binary people' is also used as modern language referring to a group currently protected by the definition in the 2009 Act. The definition of transgender identity in the 2009 Act includes 'any other gender identity that is not standard male or female gender identity'.

Current Status: Answered by Humza Yousaf on 06/07/2020

Question S5W-29942: Liam Kerr, North East Scotland, Scottish Conservative and Unionist Party, Date Lodged: 15/06/2020

To ask the Scottish Government what evidence it has regarding hate crimes committed against (a) "non-binary persons", (b) "persons who cross-dress" and (c) persons with "variations in sex characteristics".

Answered by Humza Yousaf (07/07/2020):

The application of hate crime legislation is based on the motivations of the perpetrator (and thus not on whether a victim actually shares one or more of the characteristics protected by the Bill).

The latest Crown Office and Procurator Fiscal Service statistics show that, in 2019-20, 41 charges were reported with an aggravation of prejudice relating to 'transgender identity' as defined under the Offences (Aggravation by Prejudice) (Scotland) Act 2009. The definition in the 2009 Act is wide enough to encompass 'non-binary persons', 'persons who cross-dress' and persons with 'variations in sex characteristics' (although those are not the terms used in that Act).

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).

Current Status: Answered by Humza Yousaf on 07/07/2020

As set out above, the Scottish Government's justification for including those who 'cross-dress' in the Hate Crime and Public Order Bill therefore is "*to ensure the protection provided by the word 'transvestitism' is not lost*".

In an [email](#) to Scottish Government officials in February 2020, prior to the Bill's introduction, the director of the Equality Network, Tim Hopkins, states:

'the last thing we want to see is a bill introduced that reduces the protections of the current law, taking away protections from cross-dressers that they have had for 10 years under the 2009 Act.'

He explains the rationale for ensuring the Bill includes 'cross-dressers' under its definition of transgender identity:

'A man who is not a trans woman but wears a dress for a drag performance, or a trip to the Rocky Horror Picture Show, or because he feels an emotional need to cross-dress occasionally is at high risk of transphobic hate crime and it is very likely that a perpetrator could later claim that they have no issue with "trans women who are really transitioning" and only had a problem with men dressing up as women without transitioning, so when they used the term "tranny" in the attack, they were only referring to transvestism / cross-dressing. The aggravation would not then apply if transvestism / cross-dressing is removed from the protection, because the prejudice was based on cross-dressing not on gender identity.'

During a Stage 1 oral evidence session on 24 November 2020, Conservative MSP Liam Kerr ([col.13](#)) asked Susan Smith, representative of the feminist campaign group For Women Scotland, for her views on the Bill's definition of transgender identity. Citing the emails from the Equality Network noted above, Ms Smith said:

"the reference to cross-dressing is evidently there to protect men, because it is hard to think of circumstances in which a woman might be considered to be a cross-dresser... Then there is the issue of why one set of people is being protected for what is essentially sartorial choice and others are not. There are plenty of examples of people being attacked for what they are wearing, such as Goths, and for having facial tattoos, body piercings, the wrong football strip or the wrong school uniform. Why is one dress sense being protected but not another?"

“The other issue is that, at one extreme, crossdressing can be dress sense and at the other it can be a paraphilia. It is listed as such in the [Diagnostic and Statistical Manual of Mental Disorders](#). Sometimes it is accompanied by a crossover with other indicators for offences. Therefore we get the quite bizarre situation where something that might be done for purposes of arousal is being protected under a hate crime law.”

Similarly, the NHS Lanarkshire [Supporting Trans Staff in the Workplace Policy](#) notes that people may cross-dress for ‘erotic pleasure’.

‘They may dress as the opposite gender for emotional satisfaction, erotic pleasure, or just because they feel more comfortable doing so.’

That there can be a sexual dimension to cross-dressing should not in itself a controversial point: a [Swedish study](#) suggested that just under 3% of men had experienced sexual arousal from cross-dressing at least once.

In a late [supplementary note](#) to the Justice Committee, the Equality Network made one additional new argument, that the inclusion of cross-dressing under the definition of transgender identity was needed to avoid “a loophole”: it suggested that in cases where the victim was *not* a cross-dresser, offenders might successfully but untruthfully claim that their use of transphobic language, for example, was due only to prejudice against cross dressing, but not towards transgender people in general. We have seen no evidence of this argument being tested for plausibility.

In the absence of any clear definition as to what constitutes cross-dressing, it appears that the government’s sole rationale for including it in the current Bill hinges entirely on the inclusion of transvestism within the 2009 Act. Below, we therefore consider how ‘transvestism’ came to be legislated for in the 2009 Act.

4. The appeal to precedent: ‘transvestism’ in the 2009 Act

The 2009 Act was a private member’s bill brought forward by Patrick Harvie MSP and [introduced](#) to the Scottish Parliament on 19 May 2008.

Offences (Aggravation by Prejudice) (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about the aggravation of offences by prejudice relating to disability or to sexual orientation or transgender identity.

Introduced by: Patrick Harvie
On: 19 May 2008
Bill type: Member’s Bill

The [explanatory notes](#) accompanying the Bill provide the following commentary on the definition of ‘transgender identity’:

‘Subsection (8) provides the definition of transgender identity for the Bill. The definition gives four specific examples: transvestism (often referred to as ‘cross-dressing’); transexualism; intersexuality; and where a person has changed gender in terms of the Gender Recognition Act 2004. However, the definition also extends expressly to cover other persons under the generality of broad

reference to non-standard gender identity. For example, those who are androgynous, of a non-binary gender or who otherwise exhibit a characteristic, behaviour or appearance which does not conform with conventional understandings of gender identity.'

The Justice Committee was designated as the lead committee for the Bill and the Equal Opportunities Committee the designated secondary committee. The [call for evidence](#) at Stage 1 was made jointly by both committees.

Justice Committee's scrutiny of 2009 Act

The Justice Committee was tasked with considering the Bill's main proposals to extend hate crime legislation to cover sexual orientation, transgender identity and disability. The Committee received written submissions from a total of 25 organisations, including the [Equality Network](#), [Stonewall](#), [Scottish Trans Alliance](#), [LGBT Youth Scotland](#) and [Equality and Human Rights Commission](#), none of which mentioned transvestism or cross-dressing and its inclusion in the Bill's definition of transgender identity.

The Justice Committee held three oral evidence sessions on the Bill on 13, 20 and 27 January 2009. The inclusion of transvestism in the Bill's definition of transgender identity was not discussed at any of the sessions. It was not raised by Patrick Harvie, the Bill's sponsor, when he gave [evidence](#) to the Committee. Nor was it referred to in the Committee's [Stage 1 report](#) on the Bill.

Equal Opportunities Committee

The Equal Opportunities Committee agreed to focus its consideration of the Bill on whether similar provisions concerning age and gender should also be included in the Bill. The Committee received [15 submissions](#) on the draft Bill and held two oral evidence sessions on 4 and 18 November 2008. Perhaps unsurprisingly, given the limited remit of the Committee, the inclusion of transvestism in the definition of transgender identity in the Bill was not discussed at all at either session. Nor was it mentioned in the Committee's [report](#).

Parliamentary debates

The inclusion of transvestism in the definition of transgender identity was not discussed during either the [Stage 1 debate](#), which took place on 18 March 2009, or the [Stage 3 debate](#), which took place on 3 June 2009. (The bill was passed at Stage 2 on 28 April 2009 without any amendments and without any debate in Committee.)

On resuming—

Offences (Aggravation by Prejudice) (Scotland) Bill: Stage 2

The Convener: Item 3 concerns stage 2 of the Offences (Aggravation by Prejudice) (Scotland) Bill. As there are—uniquely, in my experience—no stage 2 amendments, the committee is simply required to agree to the sections and the long title.

Sections 1 to 3 agreed to.

Long title agreed to.

The Convener: That concludes stage 2 proceedings. That must be some kind of record.

As far as we have been able to establish, at no stage in the [parliamentary process](#) - from the point that the Bill was introduced to the date it received Royal Assent - did MSPs discuss the inclusion of transvestism in the definition of transgender identity that features in the 2009 Act.

In the current Bill process, the only references to this issue in the Justice Committee's [Stage 1 report](#) record the concerns raised by For Women Scotland; there is no other discussion of the inclusion of this group in the report, and no other witness appears to have been questioned about it or raised it in the oral evidence sessions.

5. Conclusion

The Scottish Government has refused to define who the protection for cross-dressers is intended for. Nor can it provide any evidence to justify its inclusion under hate crime law.

As was pointed out during the Stage 1 oral evidence sessions, it is very hard to understand why a sartorial choice made by a small sub-set of men – some of whom are likely to be motivated by a recognised sexual disorder - should be afforded specific protection under hate crime law, over and above other sartorial choices. The inclusion of cross-dressers within the current Bill also brings into even sharper relief the exclusion of sex as a protected characteristic, first rejected for coverage in 2009 and now, over a decade later, put off still further to a working group to consider. If the Scottish Parliament continues to see crimes motivated by hatred against men dressing as women as more serious than hatred against women, it will send a particularly stark message to women and girls in Scotland about political priorities.

The Government's sole justification for including 'cross-dressers' in the Bill is because 'transvestism' was included in the definition of transgender identity in the 2009 Act, with no specific consideration or even acknowledgement by MSPs during that process.

Unless an MSP brings forward an amendment at Stage 2 or 3 of the Bill, it seems likely that this protection will be cemented in law under Hate Crime and Public Order Bill.