

## JUSTICE COMMITTEE

### HATE CRIME AND PUBLIC ORDER (SCOTLAND) BILL

#### SUBMISSION FROM PETER HEGARTY, PROFESSOR OF PSYCHOLOGY, THE OPEN UNIVERSITY

Evidence regarding the inclusion of “I/VSC” in the proposed Hate Crime and Public Order (Scotland) Bill following oral evidence presented to the Justice Committee of the Scottish Parliament, 17<sup>th</sup> November, 2020.

Sex has been legislated in Scotland, hitherto, as if it were a mutually exclusive and exhaustive binary ground in one dimension. Variations in sex characteristics along several dimensions (e.g., hormonal, anatomical and genetic dimensions) in human populations are rare, but more common than many people think. People with I/VSC in our society evidence the difference between (1) who the diverse Scottish people are with regard to their sex characteristics, and (2) how the Scottish people are recognized by the current legal category of sex. The question under debate is whether the new hate crimes legislation would do better to (1) recognize I/VSC or (2) make no recognition of I/VSC at all. The reality of the diversity of human sexed embodiment is increasingly recognized in psychology and related fields (e.g., Fausto-Sterling, 2019; Hyde et al., 2019; van Anders, 2015). Legal opinion suggests that moves towards substantive equality for people with I/VSC will require anti-discrimination law as one of its components (Garland & Travis, 2018).

The sex characteristics of people with I/VSC do render them vulnerable to stigmatization in ways that other women and men with entirely normative sex characteristics do not experience, and are unlikely to appreciate. Historically, the medical profession has been the institution in our culture which has had all-but exclusive responsibility for supporting the flourishing of people with variations of sex characteristics, including protecting them from others’ hatred (e.g., Dreger, 1998; Mak, 2013). Variable sex characteristics can require medical intervention for vital reasons, and some interventions are performed to increase the possibility of fertility. However, there is disagreement now, and in the past, about where to “draw the line” between medicalization that is essential, and medicalization performed for cosmetic or socially normalizing reasons (Hegarty, Prandelli et al., 2020). Regardless of where this line is drawn, non-vital medical interventions have long been conducted because VSC are *assumed* to bring a *risk* of stigma. In other words, medical interventions are performed *on the assumption that stigmatization exists*.

An objection to the inclusion of I/VSC in the legislation could be that the category does not include everyone because of patterns of social identity. Indeed, empirical research supports the point that not everyone with VSC identifies as ‘intersex’ or ‘dsd,’ any other umbrella terms, but that risk of stigmatization leads to contextual and careful language use for describing VSC in oneself or a family member. There is no available language that perfectly or equally represents all people whom the

law would seek to recognize. The question is whether the law greater harm through misrecognition is risked by (1) adopted imperfect language with appropriate caveats or (2) failing to recognize the class of people in need of recognition. In medicine, advocacy and academic research, the first option is usually chosen. My team's research on public understanding of these terms suggests that for the UK public the term 'disorders of sex development' refers more to children in families, whilst 'intersex' calls to mind adult social identities (Hegarty, Donnelly et al., 2020).

A further reason to object to the inclusion of I/VSC could be that the category is not a "natural kind" with clearly defined boundaries that define which people do and do not belong in the category (Dreger et al., 2005). There is long-standing debate between biomedical disciplines about the weight of genetics vs. anatomy in defining membership in the category DSD (Griffiths, 2018), and in the extent to which the term 'DSD' is an adequate tool for delivering patient-centred care (Delimata et al., 2018). I/VSC and dsd are defined by being *not* typical, expected or normative, so that these categories – however labelled - are grounded in social norms about what range of sexed bodies *are* typical, expected or normative. Whilst umbrella terms such as 'intersex' and 'DSD' are not natural kinds, they have long been coherent enough to serve the goal of organizing healthcare, advocacy and research (consider the advocacy group *DSD Families*, for example). Hate crime law can react on the basis of the *perceived* membership of a category and has less need of a natural kind than some of these existing social responses on behalf of people with I/VSC. The somewhat social, somewhat natural basis of 'intersex' and 'DSD' as categories need not forbid legal recognition of the hatred that VSC is known to engender.

Accordingly, legal recognition of stigma might reduce what our society asks of medicine. This would support substantive equality as studies of healthcare experiences across multiple countries show that current healthcare delivery, on its own, does not undo the risk of social stigma, and can increase it (Roen, 2019). Irreversible medical interventions on VSC are thought to risk human rights to bodily integrity and self-determination by many leading human rights bodies including the United Nations, Council of Europe, Amnesty International and Human Rights Watch. Indeed, Lurie Children's Hospital, linked to Northwestern University, and Boston Children's Hospital, linked to Harvard University) both desisted from performing some class of interventions on VSC earlier in 2020 out of bioethical concern. These concerns, coupled with a weak evidence base in support of some medical interventions, are occasioning a current open call to stakeholders to consult on the commission of surgical services for dsd (differences of sex development) in NHS England. Using the law to protect people with I/VSC throughout their lifespan could work in partnership – not opposition – to healthcare that people with I/VSC want and need to support their full social participation and citizenship.

Finally, it could be argued, that I/DSD do not occasion any forms of hatred that are not already covered by disability legislation. However, this response would require that people with I/DSD identify as disabled to access the law, and this may be

prejudicial. Finally, for the avoidance of confusion, it should be noted that the vast majority of adults with I/VSC do identify as either men or as women, but some identify as non-binary also (as with any diverse social group of people). People with I/VSC may have any sexual identity. Therefore recognizing I/VSC is at right-angles to questions about LGBT recognition.

On this basis I support the inclusion of “I’VSC” in the proposed Hate Crime and Public Order (Scotland) Bill.

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This opinion is my own and not that of my employer.

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