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[The Hate Crime and Public Order \(Scotland\) Act 2021 \(Characteristic of Sex\) \(Amendment and Transitional Provisions\) Regulations 2026](#)

Equality Network is a leading Scottish LGBTI+ equality and human rights charity. *Scottish Trans* is the project of Equality Network focusing on the equality, human rights and inclusion of trans people.

We are wholly supportive of the protection of women and girls from hatred, sexism and violence. Whilst we believe that the previously proposed Misogyny Bill would have protected women and girls in a broader, more holistic way from misogynistic behaviour, harassment and abuse, we welcome steps to improve women's protection under the law.

We do, however, have several concerns with the approach being taken. Specifically, with relevance to your committee, we are concerned that the definition of 'sex', given in regulation 2(5) of the SSI, is "biological sex at birth". This is, in our view, likely to modify the existing definition of sexual orientation, and that places the SSI, as worded, beyond powers. This is because the power to make this SSI, given by section 12 of the Hate Crime and Public Order (Scotland) Act (HCPOA), does not allow amendment of the meaning of existing HCPOA protected characteristics (see the penultimate paragraph of the SSI Explanatory Note).

We believe that the definition of sex in new subsection (9) inserted into section 11 of the HCPOA by regulation 2(5) of the proposed SSI will affect other parts of Section 11.

We are particularly concerned about the definition applying to the meaning of 'sex' in existing subsection (6), the definition of sexual orientation. Once the SSI has taken effect, there will be no indication in the amended HCPOA that subsection (9) was added later, and the Act will be read as an integrated whole.

In our view, therefore, the general definition of 'sex' in subsection (9) will apply to the use of the word in subsection (6). That would retrospectively change the definition of sexual orientation.

As the Supreme Court judgment in *For Women Scotland Ltd v The Scottish Ministers* does not apply outwith the Equality Act 2010, the Gender Recognition Act 2004 currently applies to the meaning of words in section 11(6). This means that ‘sex’ in s11(6) currently takes a meaning as amended by Gender Recognition Certificates (what the Supreme Court called “certificated sex”). Changing the definition of sex throughout the HCPOA, to “biological sex at birth”, would not only render the definition of sexual orientation different to the definition understood by most LGBTQ+ people, but it would also be different to the definition passed by the parliament when the HCPOA was considered in 2020/1.

The SSI-making power in section 12 of the HCPOA does not extend to altering the meaning of any existing part of section 11. We have real concerns about how this would be interpreted by Courts.

The words that start and end proposed new section 11(9) – “A group defined by reference to sex is... and references to sex are to be construed accordingly” – could clearly be taken to apply to section 11(6) (the definition of sexual orientation), because 11(6) says:

“A reference to sexual orientation is a reference to sexual orientation towards—

- (a) persons of the same sex,
- (b) persons of a different sex, or
- (c) both persons of the same sex and persons of a different sex.”

Clearly that is defining groups by reference to sex, and currently no definition of sex is included in the Act. We cannot see how this would not therefore result in the “biological sex at birth” definition also applying to this sexual orientation definition. That is a change to the sexual orientation definition – because it is clear that section 9(1) of the Gender Recognition Act (“certificated sex”) applies at the moment (it applies for “all purposes” unless contrary provision – explicit or implicit – is made, and there is none in the HCPOA).

We therefore think that the proposed SSI as worded is beyond powers, because the power to make it, given by section 12 of the HCPOA, does not allow amendment of the meaning of existing HCPOA provisions.