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Criminal Justice Committee

Report on the Hate Crime and Public Order (Scotland) Act 2021 (Characteristic of Sex) (Amendment and Transitional Provisions) Regulations 2026 [draft]



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Criminal Justice Committee

To consider and report on matters relating to criminal justice falling within the responsibility of the Cabinet Secretary for Justice and Home Affairs, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

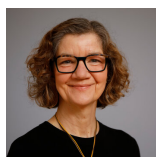


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Introduction

1. At its [meeting on 25 February 2026](#), the Criminal Justice Committee considered the following affirmative instrument:
 - [The Hate Crime and Public Order \(Scotland\) Act 2021 \(Characteristic of Sex\) \(Amendment and Transitional Provisions\) Regulations 2026 \[draft\]](#)

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

2. The Hate Crime and Public Order (Scotland) Act 2021 (Characteristic of Sex) (Amendment and Transitional Provisions) Regulations 2026 [draft] was laid before the Scottish Parliament on 28 January 2026 and referred to the Criminal Justice Committee.
3. The Hate Crime and Public Order (Scotland) Act 2021 (“the 2021 Act”) provides for the aggravation of offences by prejudice in relation to certain characteristics and offences relating to stirring up hatred against a group of persons defined in relation to certain characteristics.
4. The instrument adds the characteristic of ‘sex’ to the 2021 Act. The effect of this is to create a further offence of stirring up hatred within the 2021 Act based on sex and to provide that an offence can be aggravated by prejudice on the basis of sex.
5. The Scottish Government’s [Explanatory Note](#) sets out the following with regards to the instrument:
 - Section 1 of the 2021 Act makes provision in relation to the aggravation of offences by prejudice defined by reference to one or more characteristics listed in section 1(2). Regulation 2(2) adds the characteristic of “sex” to that list of characteristics.
 - Section 4(2) of the 2021 Act sets out an offence of stirring up hatred against a group of persons defined by reference to a characteristic listed in section 4(3). Regulation 2(3) adds the characteristic of “sex” to that list of characteristics.
 - Section 9 of the 2021 Act makes provision relative to the stirring up offence under section 4(2), to the effect that behaviour or material is not to be taken to be threatening or abusive in terms of that offence solely on the basis that it involves or includes discussion or criticism of a characteristic listed in section 9(a). Regulation 2(4) adds the characteristic of “sex” to that list of characteristics.
 - Section 11 of the 2021 Act makes provision relative to the interpretation of the characteristics listed in sections 1, 4, and 9. Regulation 2(5) adds provision relative to the definition of the characteristic of “sex”, as referred to in those sections. This Regulation provides that a group defined by reference to sex is a group of persons defined by reference to their biological sex being female or their biological sex being male. “Biological sex” is thereafter defined as meaning sex at birth. This aligns with the interpretation given to “sex” in the context of the Equality Act 2010 by the Supreme Court in *For Women Scotland v Scottish Ministers* [2025] UKSC 16 and mirrors the approach, set out in paragraph 7 of that Judgment, of using biological sex as a label carrying the meaning of sex of a person at birth. The groups that are protected by the

characteristic of sex under the 2021 Act, as now inserted by these Regulations, are the group of people who were, at birth, assigned female and the group of people who were, at birth, assigned male. Defining the characteristic of sex by reference to biological sex (sex at birth) ensures that there is no overlap between the scope of the characteristic of “sex” and the characteristic of “transgender identity” in the 2021 Act.

- Section 14 of the Act places a duty on the Scottish Ministers to publish reports on convictions for offences under the 2021 Act, and for offences aggravated by prejudice in terms of section 1 of the 2021 Act. Subsection (3) requires that Scottish Ministers establish whether supplementary information can be provided about any subgroups to which the offences relate, as set out in paragraph (a). Each of sub-paragraphs (i) to (vi) sets out the information at issue in respect of each characteristic. Regulation 2(6) adds an entry to the end of the list, to the effect that, in respect of the characteristic of sex, the relevant information is whether the offence relates to the female sex or the male sex.
- Section 15 of the 2021 Act places a duty on the Scottish Ministers to publish reports on cases categorized by the Police as offences under the 2021 Act, and as offences aggravated by prejudice in terms of section 1 of the 2021 Act. Subsection (4) provides that the report must include (to the extent that these details have been recorded) the particular characteristic and such other information depending on the particular characteristic. Regulation 2(7) adds an entry regarding information where the particular characteristic is “sex”, providing that the information required is whether the sex that is recorded as being targeted is the female sex or the male sex.
- These Regulations are made under section 12 of the 2021 Act. Section 12 only permits the addition of the protected characteristic of “sex” and related matters to the 2021 Act. It does not permit the modification of the offences to which the characteristic may apply in terms of aggravation, nor does it permit the modification of the definition of any of the other protected characteristics.
- Regulations 3 and 4 make transitional provision. Regulation 3 provides that section 1 (aggravation of offences by prejudice) of the 2021 Act will apply to offences committed on or after the coming into force date. Where the offence is committed by a course of conduct, all the conduct must have occurred on or after that date. Regulation 4 provides that section 4 (offence of stirring up hatred) of the 2021 Act will apply to acts done or omissions made on or after the coming into force date. Where the offence is committed by a course of conduct, all the conduct must have occurred on or after that date.

Consideration by the Delegated Powers and Law Reform Committee

6. The DPLR Committee (“the DPLRC”) considered the instrument on 17 February 2026 and reported on it in its [19th Report, 2026](#).
7. The [DPLRC wrote to the Scottish Government](#) with a number of queries relating to the transitional provisions in the instrument (regulations 3 and 4). The responses from the Scottish Government are also set out in the correspondence
8. The DPLRC asked the Scottish Government why the provisions are necessary, given the instrument already limits the application of the regulations to after 5 April 2027. It also sought further clarification on whether the provisions might have an unintended effect on the application of sections 1 and 4 of the 2021 Act as they currently apply in respect of all other characteristics.
9. In its response, the Scottish Government stated that its intention is to make clear that actions or conduct that took place prior to the commencement of the provisions will not fall within the scope of the new offence, noting that offences under the 2021 Act can consist of a single act or a course of conduct.
10. It also stated that the instrument cannot have any legal impact on sections 1 and 4 for the purposes of the other characteristics, as the enabling power lacks the necessary express power to make retrospective provision. The DPLRC accepts this response, but considers that the provisions as currently drafted are unclear and unnecessary.
11. The DPLRC considered that the transitional provisions should only be used where necessary to address genuinely transitional scenarios, though it did not consider that the provisions impede the delivery of any policy intention. It was also noted that the inclusion of such provision “to put beyond doubt”ⁱ the commencement of an instrument appears to run the risk of creating more uncertainty than it alleviates.
12. **The DPLRC’s report drew the instrument to the attention of the Parliament on reporting ground (g), on the basis that it appeared to be an unusual or unexpected use of the power conferred by the parent statute to make transitional provision, as it is not clear that the transitional provisions perform a transitional function.**
13. **It also noted that the Scottish Government intends to revise the Policy Note (in particular, paragraph 27) to correct an erroneous assertion in relation to the transitional provision.**
14. Separately, the DPLRC noted the Scottish Government's statements in the Explanatory and Policy Notes regarding the policy behind the interpretive provision added in respect of the characteristic of sex. It states that it is intended to achieve equivalence with the meaning of sex in the Equality Act 2010, as determined by the Supreme Court in *For Women Scotland v Scottish Ministers* [2025] UKSC 16.

ⁱ https://www.parliament.scot/~media/committ/12531/P2_Instrument-responses-accessible

15. The DPLRC noted that the power to make interpretative provision is limited to making such provision in respect of the characteristic of sex and does not allow for, more generally, the modification of other definitions in the 2021 Act. The DPLRC was content that the provision made by this instrument falls within the scope of the power it is made under. However, it noted that the fact that there now exists a definition for “biological sex” in this location might cause uncertainty as to how the term “sex” is to be interpreted in relation to the other characteristics, in the absence of an equivalent or alternative definition.

16. **The DPLRC suggested that the lead committee consider whether further amendment of the parent act is required in consequence of this instrument in respect of other references to the term ‘sex’.**

Consideration by the Criminal Justice Committee

17. Motion S6M-20601 was lodged proposing that the Committee recommended approval of the instrument. The Committee took oral evidence from Angela Constance MSP, Cabinet Secretary for Justice and Home Affairs ("the Cabinet Secretary") and Scottish Government officials at its [meeting of 25 February 2026](#).
18. During the evidence session, the Cabinet Secretary outlined the purpose of the Regulations to the Committee.
19. Members asked a number of questions relating to the Scottish Government's approach to implementing the recommendations made in Baroness Kennedy's report [Misogyny - A Human Rights Issue](#) and raised concerns that a misogyny bill had not been introduced during the current Parliamentary session. In response, the Cabinet Secretary told the Committee she does not believe that the approach of adding sex as a characteristic to the 2021 Act is a 'poor second'ⁱⁱ to having a misogyny bill. She stated that in her view, the 2021 Act is a proven model for providing legal protections for characteristics such as age, religion, sexual orientation and disability and that it is important that sex is included in those protections. However, she also indicated that she believes that the Regulations will not be the last step taken in tackling misogynistic behaviour but that it would be an issue for the next Parliament to take forward.
20. With regards to a misogyny bill, the Cabinet Secretary also told the Committee that although a consultation was carried out and a draft bill produced further policy work would have been required following the Supreme Court judgment. She advised that there were issues relating to, if and how a misogyny offence would apply to trans women and trans men, that weren't addressed by the working group led by Baroness Kennedy and that there was insufficient time to undertake the work required and progress the bill through the Parliament before the end of the current session.
21. Members questioned the Cabinet Secretary on the length of time being taken to commence the Regulations. In response, the Cabinet Secretary stated that Police Scotland requires time to train officers in identifying offences and applying the changes to the legislation and after discussions with Police Scotland, it was agreed that a commencement date of 5 April 2027 was an achievable timescale.
22. In relation to this, the Cabinet Secretary also told the Committee that there is a hate crime strategic partnership group that provides an opportunity for wider engagement between justice stakeholders to prepare for implementation and commencement of hate crime legislation. Patrick Down, Criminal Law, Procedure and Sentencing Team, Scottish Government told the Committee that the group is made up of prosecutors, Police Scotland and groups supporting victims of hate crime. The Cabinet Secretary agreed to write to the Committee with further information on the group's role and its membership.

ii [Criminal Justice Committee Official Report, 25 February 2026](#) (col 3)

23. When questioned on whether the Regulations will create a situation where there are different definitions of sex in different parts of the Hate Crime and Public Order (Scotland) Act 2021, due to the use of the terms “sex” and “biological sex”, the Cabinet Secretary told the Committee that the definition of sex that has been used relates to section 12 of the 2021 Act. This means that “we are enabled to give a definition of sex only for the purpose of the characteristic of sex”ⁱⁱⁱ. She indicated that it is made clear that sex is defined as biological sex, which is equivalent to sex at birth and that is the definition of the characteristic of sex that is to be used for the purposes of the Act.
24. Jasmin Hepburn, Legal Directorate, Scottish Government told the Committee that when the Scottish Government considered which power to use in order to add sex as a characteristic, they looked at other provisions including an ancillary provision in section 17 of the 2021 Act but came to the view that the power in section 12 was the appropriate one to use, and that power is limited to amending only the characteristic of sex and the associated interpretive provision at section 11.
25. With regards to questions on how “sex” should be interpreted elsewhere in the act, such as in relation to sexual orientation, the Cabinet Secretary emphasised that the definition of sex, for the purposes of the instrument is specific only to the characteristic of sex. She indicated that the Scottish Government's view on any interplay with the interpretive provision concerning sexual orientation is that it would have no significant practical effect on the operation of the 2021 Act. For example, she told the Committee that if someone was targeted for being gay, bisexual or heterosexual, the sexual orientation aggravation or stirring up hatred offence would be available, regardless of whether they defined their sexual preferences by reference to birth sex or lived-in gender. Similarly, if an individual was targeted because they were relationship with a trans person, that could be covered by the transgender characteristic, as they would be targeted because of their association with that characteristic.
26. Following a debate on the instrument, the Cabinet Secretary moved the motion:
- S6M-20601 —That the Criminal Justice Committee recommends that the Hate Crime and Public Order (Scotland) Act 2021 (Characteristic of Sex) (Amendment and Transitional Provisions) Regulations 2026 [draft] be approved.
27. The motion was agreed to.

- 28. The Criminal Justice Committee recommends to the Scottish Parliament that it approve the Hate Crime and Public Order (Scotland) Act 2021 (Characteristic of Sex) (Amendment and Transitional Provisions) Regulations 2026 [draft].**

