

Criminal Justice Committee  
Wednesday 25 February 2026  
8th Meeting, 2026 (Session 6)

## **Note by the Clerk on the Hate Crime and Public Order (Scotland) Act 2021 (Characteristic of Sex) (Amendment and Transitional Provisions) Regulations 2026 [draft]**

### **Overview**

1. At this meeting, the Committee will take evidence from the Cabinet Secretary for Justice and Home Affairs and officials on the Hate Crime and Public Order (Scotland) Act 2021 (Characteristic of Sex) (Amendment and Transitional Provisions) Regulations 2026 [draft] before debating a motion in the name of the Cabinet Secretary inviting the Committee to recommend approval of the instrument.
2. This is a draft Scottish Statutory Instrument (SSI), which requires approval by resolution of the Parliament before it can become law. More information about the instrument is summarised below:

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

**Laid under:** Section 12 of the [Hate Crime and Public Order \(Scotland\) Act 2021](#)

**Laid on:** 28 January 2026

**Procedure:** Affirmative

**Lead committee to report by:** 8 March 2026

**Commencement:** 5 April 2027

### **Procedure**

3. Under the affirmative procedure, an instrument must be laid in draft and cannot be made (or come into force) unless it is approved by resolution of the Parliament.
4. Once laid, the instrument is referred to:
  - the Delegated Powers and Law Reform (DPLR) Committee, for scrutiny on various technical grounds, and
  - a lead committee, whose remit includes the subject-matter of the instrument, for scrutiny on policy grounds.

5. The lead committee, taking account of any recommendations made by the DPLR Committee (or any other committee), must report within 40 days of the instrument being laid.
6. The normal practice is to have two agenda items when an affirmative instrument is considered by the lead committee:
  - an evidence session with the Minister and officials, followed by
  - a formal debate on a motion, lodged by the Minister, inviting the lead committee to recommend approval of the instrument.
7. Only MSPs may participate in the debate, which may not last for more than 90 minutes. If there is a division on the motion, only committee members may vote. If the motion is agreed to, it is for the Chamber to decide, at a later date, whether to approve the instrument

## **Delegated Powers and Law Reform Committee consideration**

8. The DPLR Committee (“the DPLRC”) considered the instrument on 17 February 2026 and reported on it in its [19th Report, 2026](#).
9. 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
10. 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.
11. 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.
12. 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.
13. The DPLRC considers that the transitional provisions should only be used where necessary to address genuinely transitional scenarios, though it does not consider that the provisions impede the delivery of any policy intention. It is also noted that

the inclusion of such provision “to put beyond doubt”<sup>1</sup> the commencement of an instrument appears to run the risk of creating more uncertainty than it alleviates.

14. **The DPLRC’s report draws the instrument to the attention of the Parliament on reporting ground (g), on the basis that it appears 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.**

15. **It also notes 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.**

16. Separately, the DPLRC notes 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.

17. The DPLRC notes 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 is content that the provision made by this instrument falls within the scope of the power it is made under. However, it notes 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.

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

19. The relevant extract from the DPLRC’s report can be found in **Annexe B**.

## **Purpose of the instrument**

20. 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.

21. 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.

22. The Scottish Government’s [Explanatory Note](#) sets out the following with regards to the instrument:

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<sup>1</sup> [https://www.parliament.scot/~media/committ/12531/P2\\_Instrument-responses-accessible](https://www.parliament.scot/~media/committ/12531/P2_Instrument-responses-accessible)

- 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.

23. The Policy Note accompanying the instrument is included in **Annexe A**. It includes a summary of consultation undertaken on the instrument and the anticipated financial effects. The following impact assessments have been carried out:

- [Equality Impact Assessment](#)
- [Child Rights and Wellbeing Impact Assessment](#)

## Report

24. Following today’s proceedings, a draft report will be prepared by the clerks.

25. **The Committee is invited to delegate to the Convener and clerks responsibility for drafting a report and finalising it for publication.**

**Clerks to the Committee**  
**February 2026**

## **Annexe A: Scottish Government Policy Note**

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

#### **SSI 2026/XXX**

1. This instrument is made in exercise of the powers conferred by Section 12 of the Hate Crime and Public Order (Scotland) Act 2021 (“the 2021 Act”). The instrument is subject to the affirmative procedure.

#### **Summary Box**

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. These Regulations add 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.

These Regulations take effect from 5 April 2027.

#### **Policy Objectives**

2. These Regulations will deliver new legal protections for women and girls within the hate crime legal framework. Protections will also be provided for men and boys..
3. These Regulations will achieve this by:
  - Adding the characteristic of sex to the list of characteristics to which the offences of stirring up hatred in the 2021 Act apply;
  - Adding the characteristic of sex to which the aggravation of offences by prejudice in the 2021 Act applies;
  - Providing that the provision concerning protection of freedom of expression in relation to the offence of stirring up hatred applies to the characteristic of sex in the same way that it does to the characteristics of age, disability, sexual orientation, transgender identity and variations in sex characteristics;
  - Making interpretative provision as to the meaning of the characteristic of sex in the 2021 Act; and

- Making provision concerning the information which requires to be included in reports published by the Scottish Ministers on hate crime convictions relating to the characteristic of sex, and hate crime recorded by the police relating to the characteristic of sex.

*Regulation 2(2) and (3)*

Addition of characteristic of sex

4. Regulation 2(2) and (3) adds the characteristic of sex to the list of characteristics to which the statutory aggravation of offences by prejudice and the offence of 'stirring up hatred' (contained in sections 1 and 4(2) of the 2021 Act) apply.
5. The commission of a criminal offence will be aggravated if the offender demonstrated malice and ill-will towards the victim because of their sex in committing the offence, or was motivated to commit the offence by malice and ill-will towards a group of people defined by reference to their sex.
6. It will be an offence to stir up hatred against a group of people defined by reference to their sex.
7. The primary intention of this approach is to provide greater protections in criminal law for women and girls from crimes motivated by malice and ill-will relating to their sex, and to criminalise stirring up hatred of women and girls. Adding sex as a protected characteristic to the 2021 Act will ensure that women and girls are protected in line with other groups covered by the 2021 Act.
8. While it is anticipated that the great majority of cases will relate to women and girls, the inclusion of sex as a protected characteristic means that it will also be a criminal offence to stir up hatred against men and boys, and enable an offence to be aggravated by prejudice relating to the male sex.

*Regulation 2(4)*

Modification of provision concerning protection of freedom of expression

9. Regulation 2(4) adds the characteristic of sex to the list of characteristics covered by the provision concerning protection of freedom of expression at section 9 of the 2021 Act.
10. Section 9 provides that behaviour is not to be taken to be threatening or abusive solely on the basis that it involves or includes discussion or criticism of matters relating to age, disability, sexual orientation, transgender identity or variations in sex characteristics.
11. It is considered that the value of the freedom of expression protection is the same in relation to the characteristic of sex as with other characteristics. This ensures that, as is the case with the other characteristics listed at section 9 of the 2021 Act, in order for the offence to be committed, the accused's communication or behaviour must be threatening or abusive and intended to stir up hatred.

12. The operation of the stirring up hatred offence has a high threshold for criminality. It is a requirement for the accused to intend to stir up hatred, a requirement for their behaviour to be threatening or abusive, and there is a defence where the accused can demonstrate that their behaviour or communication was, in the circumstances, reasonable.
13. In addition, section 4(5) of the 2021 Act requires the court to have particular regard, when determining whether particular behaviour or communication was reasonable, to the importance of the right to freedom of expression by virtue of Article 10 of the European Convention on Human Rights, including the general principle that the right applies to the expression of information or ideas that offend, shock or disturb.

*Regulation 2(5)*

Interpretative provision relating to the characteristic of sex

14. Article 2(5) amends section 11 of the 2021 Act to add interpretative provision relating to the meaning of the characteristic of sex. It provides that sex means

A group defined by reference to sex is a group of persons defined by reference to—

- (a) their biological sex being female, or
- (b) their biological sex being male,

and references to sex are to be construed accordingly.

In this section, “biological sex” means sex at birth.

15. The power to add the characteristic of sex to the 2021 Act includes the power to modify section 11 of the 2021 Act to make interpretative provision relating to its meaning. The interpretative provision 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.
16. The policy behind this interpretative provision is to achieve equivalence with the meaning of sex in the Equality Act 2010<sup>2</sup>, as determined by the Supreme Court in *For Women Scotland v Scottish Ministers* [2025] UKSC 16 (“FWS”)<sup>3</sup>. Because there is no definition of sex in the Equality Act 2010, the definition of sex cannot be incorporated by reference and instead wording is used to give effect to the definition as determined by the Supreme Court.
17. The Supreme Court in *FWS*, held that for the purposes of the Equality Act 2010, “the words “sex”, “woman” and “man” in sections 11 and 212(1) mean (and were always intended to mean) biological sex, biological woman and biological man.”

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<sup>2</sup> Equality Act 2010 - <https://www.legislation.gov.uk/ukpga/2010/15/contents>

<sup>3</sup> For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent) - [https://supremecourt.uk/uploads/uksc\\_2024\\_0042\\_judgment\\_updated\\_16f5d72e76.pdf](https://supremecourt.uk/uploads/uksc_2024_0042_judgment_updated_16f5d72e76.pdf)

(paragraph 264 of the Judgment). As set out in the Terminology section of the Judgment, these three terms are shorthand expressions:

- a. A person who is a biological man is a person who was at birth of the male sex,
  - b. A person who is a biological woman is a person who was at birth of the female sex,
  - c. Biological sex is used to describe the sex of a person at birth.
18. 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. Every person will belong to one of those two groups. A person cannot change that they were once assigned to such a group through a process of subsequently obtaining a Gender Recognition Certificate or through any other process associated with transitioning to a person's acquired gender. The interpretative provision included in the Act by these Regulations rests on these principles.
19. The 2021 Act includes the characteristic of transgender identity. As such, there is a statutory aggravation in relation to the characteristic of transgender identity and a stirring up hatred offence relating to transgender identity. Defining the characteristic of sex by reference to biological sex ensures that there is no overlap between the scope of these two characteristics in the Act.
20. It should also be noted that the statutory aggravation applies in relation to the perpetrator's perception of the victim's identity, irrespective of the victim's actual identity. As such, in the same way that the sexual orientation aggravation would apply where a victim is targeted by a perpetrator who assumes them to be e.g. gay or bisexual regardless of their actual sexual orientation, the aggravation concerning the characteristic of sex would apply to someone who directs e.g. misogynistic abuse at anyone whom the perpetrator has assumed to be female.
21. The framing of sex as biological sex does not mean that the malice and ill-will must be based on the characteristics that has led someone to have a particular biological sex, rather it must be based on the fact of someone having that biological sex. It will therefore capture conduct that is based on the victim or a group not conforming to gender stereotypes. The hatred can also be about characteristics typically associated with biological sex, rather than only hatred based on something which, as a matter of biology, only those with that biological sex can have (so it is not restricted to e.g. malice and ill-will relating to breast-feeding or menstruation but could also include, for example hatred based on prejudice against women who play football).

#### *Regulation 2(6) and (7)*

#### Reports relating to hate crime

22. Regulation 2(6) and (7) amends sections 14 and 15 of the 2021 Act, which relate to the publication by the Scottish Ministers of reports on data collected by the police and courts about hate crime.

23. Sections 14 and 15 require publication of reports on convictions under the 2021 Act and of police recording of crimes under the 2021 Act. It requires such reports to contain statistical information about the characteristics in respect of which an offence is aggravated, or an offence of stirring up hatred is committed.
24. An example of what is required includes that where the characteristic is that of race, colour, nationality or ethnic or national origins, the 2021 Act requires that information is recorded about the particular race, colour, nationality or ethnic or national origins recorded as having been targeted. A further example under the 2021 Act is where the characteristic is sexual orientation, it requires information to be recorded as to whether the sexual orientation targeted is sexual orientation towards persons of the same sex, towards persons of a different sex, or towards both persons of the same sex and persons of a different sex.
25. Regulation 2(6) and (7) amends sections 14 and 15 so as to introduce a requirement that, where the characteristic is sex under the 2021 Act, information is provided about whether the sex being targeted is female or male. This will ensure that statistical information is available about the extent to which both the stirring up hatred offence and the aggravation of offences by prejudice on grounds of sex relate to prejudice against women and girls, or against men and boys.

#### *Regulations 3 and 4*

#### Transitional provision

26. Regulations 3 and 4 make transitional provision. Regulation 3 provides that section 1 (aggravation of offences by prejudice) of the 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 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.
27. This makes clear, for the avoidance of doubt, that where offending consists of a course of conduct, both the aggravation and the offence concerning the stirring up of hatred only apply in relation to conduct occurring after the coming into force date. This is consistent with regulations 3 of the Hate Crime and Public Order (Scotland) Act 2021 (Commencement and Transitional Provision) Regulations 2024.

#### **Background**

28. In 2017, the Scottish Government appointed Lord Bracadale to conduct an independent review of hate crime law in Scotland. Lord Bracadale published his

report in May 2018<sup>4</sup>. This report recommended that laws concerning the aggravation of offences by prejudice should be consolidated and standardised. It also recommended that there should be new stand-alone offences of stirring up hatred applying to all the characteristics covered by the aggravation of offences by prejudice. Lord Bracadale's report recommended that hate crime legislation should cover the characteristic of 'gender'.

29. The majority of Lord Bracadale's recommendations were accepted by the Scottish Government and formed the basis of the 2021 Act. However, informed by responses to the Scottish Government's consultation on Lord Bracadale's report, the Scottish Government did not follow the recommendation on gender.

30. Instead, a power was included in the 2021 Act to enable Ministers to make Regulations to add the characteristic of sex to that Act.

31. The Scottish Government appointed Baroness Helena Kennedy to lead a Working Group on Misogyny and the Criminal Law to consider how the criminal law deals with misogynistic behaviour, including whether there are gaps in legislation that could be filled with a specific offence or offences relating to misogyny and/or whether the characteristic of sex should be added to the 2021 Act.

32. Baroness Kennedy's report was published in 2022 and recommended:

- Creating a new Statutory Misogyny Aggravation which operates outside of the Hate Crime and Public Order (Scotland) Act 2021;
- Creating a new offence of Stirring Up Hatred Against Women and Girls;
- Creating a new offence of Public Misogynistic Harassment; and
- Creating a new offence of Issuing Threats of, or Invoking, Rape or Sexual Assault or Disfigurement of Women and Girls online and offline.

33. The Scottish Government previously planned to introduce a stand-alone Misogyny Bill to implement these recommendations. However in response to a Parliamentary Question on 2 May 2025, the Scottish Government stated<sup>5</sup> that *"[t]his is a complex area of policy and law, and it would be necessary that any Bill which brought misogyny into criminal law contained clear and unambiguous provisions in regard to the circumstances in which they apply. This would include the implications of the recent Supreme Court Judgment. Given the short time left in this parliamentary session, there is insufficient time for a Bill to be finalised and introduced in this session, therefore the Scottish government has decided not to proceed with this Bill in this parliamentary session."*

34. In view of this, the Scottish Government decided to take forward these Regulations to ensure that women and girls have the same protections in relation to hate crime as people with the characteristics of age, disability, sexual

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<sup>4</sup> Independent review of hate crime legislation in Scotland: final report - <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>

<sup>5</sup> See Written question and answer: S6W-37425 | Scottish Parliament Website - <https://www.parliament.scot/chamber-and-committees/questions-and-answers/question?ref=S6W-37425>

orientation, transgender identity or variations in sex characteristics, as already covered by the 2021 Act. It also in effect implements the first two recommendations of Baroness Kennedy's report, but in a gender neutral-way, reflecting the nature of the power to add the characteristic of sex to the Act.

35. This SSI is therefore laid in order to allow for protections for women and girls (and men and boys) that are equivalent to those which are in place for the characteristics of age, disability, sexual orientation, transgender identity or variations in sex characteristics, as already covered by the 2021 Act, to be put in place.

### **UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 Compatibility**

36. The Scottish Ministers have made the following statement regarding children's rights.

37. In accordance with section 23(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, the Scottish Ministers certify that, in their view, the Hate Crime and Public Order (Scotland) Act 2021 (Characteristic of Sex) (Amendment and Transitional Provisions) Regulations 2026 is compatible with the UNCRC requirements as defined by section 1(2) of the Act.

### **EU Alignment Consideration**

38. This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

### **Consultation**

39. To comply with the statutory requirement at section 12(5) of the 2021 Act, the Scottish Government laid a draft of the SSI in Parliament on 28 August 2025. The Scottish Government also undertook a public consultation on that draft using the Citizen Space platform to allow people to make representations.

40. The consultation found that there was support from a large majority of consultation respondents for the adding of the characteristic of sex to the 2021 Act. However, there was a significant divergence of views between individual respondents, where nearly 90% of respondents supported this, and organisation respondents, where around half of respondents supported this and half did not. A small minority of respondents (around 3%) supported adding the characteristic of sex to the statutory aggravation but not to the offence of stirring up of hatred.

41. Many of those who supported the characteristic of sex to the 2021 Act expressed the view that it was important that women and girls who were victims of misogynistic crimes had the same protections as other groups protected by the Act. By contrast, many of the (mainly organisations) who opposed the addition of the characteristic of sex to the 2021 Act were of the view that the 'hate crime'

legislative framework was ill-suited to dealing with misogynistically motivated crime.

42. There was also a range of views expressed in relation to the interpretive provision concerning the characteristic of sex. Many consultees supported the fact that the SSI adopts the same approach to the meaning of the characteristic of sex while others argued that the meaning of 'sex' should be wider and encompass a person's lived gender identity.
43. No changes have been made to the SSI as a result of the consultation. This reflects the fact that while there were a range of views expressed by consultation respondents in relation to the underlying policy provided for by the SSI, it was not considered that any specific problems were identified by consultees that required changes to be made to the SSI.
44. A full list of those consulted and who agreed to the release of this information is attached to the consultation report published on the Scottish Government website.

### **Impact Assessments**

45. The Scottish Government has published an Equality Impact Assessment (EQIA). A separate Data Protection Impact Assessment (DPIA) was not considered necessary as the addition of the characteristics of sex to the 2021 Act does not raise new data protection issues not already considered in the DPIA published when the Hate Crime and Public Order (Scotland) Bill was introduced. A full Fairer Scotland Duty Impact Assessment, Island Communities Impact Assessment and Strategic Environmental Assessment have not been prepared as the SSI does not have any impact or differential impact on socioeconomic inequality, island communities or the environment.

### **Financial Effects**

46. A Business and Regulatory Impact Assessment (BRIA) to accompany the SSI has been published. The estimated financial costs of the Act, including the effects of adding the characteristic of sex to the Act, were detailed in the Financial Memorandum for the Bill and the BRIA provides an update of those figures.<sup>6</sup>

Scottish Government  
Justice Division  
Criminal Law, Practice and Licencing  
January 2026

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<sup>6</sup> Financial Memorandum - <https://www.parliament.scot/-/media/files/legislation/bills/s5-bills/hate-crimeand-public-order-scotland-bill/stage-2/supplementary-financial-memorandum.pdf>

## **Annexe B: extract from DPLR Committee report on the instrument**

### **Hate Crime and Public Order (Scotland) Act 2021 (Characteristic of Sex) (Amendment and Transitional Provisions) Regulations 2026 (SSI 2026/Draft)**

4. This draft instrument is to be made under [sections 12\(1\), \(2\) and \(3\) of the Hate Crime and Public Order \(Scotland\) Act 2021](#) (“the 2021 Act”).
5. The 2021 Act provides for the aggravation of offences by prejudice in relation to certain characteristics, and for offences relating to stirring up hatred against a group of persons also defined in relation to certain characteristics. This instrument adds the characteristic of “sex” to the list of characteristics currently provided for by the 2021 Act.
6. The instrument also inserts interpretative provision for the term “sex”. 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 defined as sex at birth.
7. The power to add the characteristic of sex is subject to what is commonly referred to as a ‘super affirmative procedure’. In this case, that requires that a proposed draft is laid before the Parliament for a period of 40 days before a draft can be laid. The Scottish Ministers are to have regard to any representations made to them during this time. That requirement was fulfilled, and the Committee considered the proposed draft on [16 September 2025](#).
8. This instrument is in the same terms as the proposed draft except for the addition in this instrument of two ‘transitional provisions’, which are discussed below. It is now subject to the affirmative procedure and, if approved by the Parliament, will come into force on 5 April 2027. The lead committee for this instrument is the Criminal Justice Committee.
9. In [correspondence with the Scottish Government](#), the Committee asked the Committee asked about the transitional provisions in the instrument. Transitional provisions can be necessary when one legislative system ends, and another begins. They make provision to specifically address those cases that straddle the transition. The transitional provisions in this instrument provide that sections 1 and 4 of the 2021 Act apply in respect of offences committed by acts done or omissions made on or after 5 April 2027.
10. Amongst other questions, the Committee asked why the provisions are necessary, given the instrument already, through the commencement provision, limits the application of the regulations to after 5 April 2027.
11. The Committee 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.

12. The Scottish Government acknowledges in its response that there is no “old law” regarding sex-based prejudice. It states 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. It also states 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 Committee accepts this response, but considers that the provisions as currently drafted are unclear and unnecessary.
13. The Committee considers that transitional provisions should only be used where necessary to address genuinely transitional scenarios, though it does not consider that the provisions impede the delivery of any policy intention. The inclusion of such provision “to put beyond doubt” the commencement of an instrument appears to run the risk of creating more uncertainty than it alleviates.
14. **The Committee draws the instrument to the attention of the Parliament on reporting ground (g), on the basis that it appears 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.**
15. **The Committee notes that the Scottish Government intends to revise the Policy Note to correct an erroneous assertion in relation to the transitional provision.**
16. Separately, the Committee notes 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 is 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.
17. The Committee notes 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 Committee is content that the provision made by this instrument falls within the scope of the power it is made under. However, it notes 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.
18. **The Committee suggests that the lead committee considers whether further amendment of the parent act is required in consequence of this instrument in respect of other references to the term ‘sex’.**