

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

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

Note by the Clerk

Introduction

1. This paper sets out some of the background and wider context of the Scottish Government's proposal to add sex to the characteristics covered by the [Hate Crime and Public Order \(Scotland\) Act 2021](#). Section 12 of the 2021 Act allows the Scottish Government, using secondary legislation, to extend hate crime to cover the characteristic of sex (male and female).
2. Criminal behaviour involving hatred or prejudice towards people because of their sex is not currently classified as a hate crime in the same way as crime linked to a range of other characteristics, such as race or disability.
3. Whether sex should be treated in a similar way to those other hate crime characteristics was debated during parliamentary scrutiny of the Bill which became the Hate Crime and Public Order (Scotland) Act 2021.
4. During the passage of the Bill, it was agreed not to add the characteristic of sex to the relevant provisions of the then Bill, with the Scottish Government indicating it would work towards a separate standalone offence of misogyny.

Previous scrutiny

5. An independent Misogyny and Criminal Justice Working Group, chaired by Baroness Helena Kennedy, was then established in February 2021. The Working Group's report, [Misogyny – A Human Rights Issue](#) was published in March 2022. It recommended separate criminal justice legislation focused on tackling misogyny in preference to adding sex to the characteristics covered by the 2021 Act.
6. Following the recommendation of the Working Group, a commitment to introduce a bill criminalising misogynistic conduct was set out in the Scottish Government's Annual Programme for Government 2023-24. This commitment also appeared in the Programme for Government for 2024-25, but not in the one for 2025-26.

7. In response to a parliamentary question seeking an update on its legislative programme, the Scottish Government confirmed that it would no longer be introducing a Misogyny Bill owing to “insufficient time for a Bill to be finalised and introduced in this [parliamentary] session.” The Scottish Government said:

“To ensure there are protections for women and girls in law, we will therefore lay an SSI by September to add the protected characteristic of sex to the Hate Crime and Public Order (Scotland) Act 2021 so that they have the same protections as other groups protected by that Act. This SSI is subject to the super affirmative process and will therefore be subject to consultation.”

8. On [24 September 2025](#), the Committee took evidence from Angela Constance MSP, Cabinet Secretary for Justice and Home Affairs on the Scottish Government’s consultation on a draft of the Scottish Statutory Instrument (SSI). The Cabinet Secretary did not rule out a future legislation criminalising misogyny, stating: “That does not mean that a future Government will not take forward a misogyny bill but...I am not having a gap in the law for women.”¹
9. On 28 August 2025, the Scottish Government published a [consultation paper](#) on a draft SSI to add sex to the characteristics already covered by the 2021 Act. The consultation closed on 10 October 2025; there were 296 responses and these are [published online](#) alongside a [consultation analysis](#).
9. The [policy note](#) published along with the draft SSI states that no changes were made as a result of the consultation, commenting that:

“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.” (para 43)

Additional evidence

10. The Committee received written submissions from the Equality Network and Engender. These are reproduced in **Annexe A**.
11. The Committee received correspondence from the Scottish Government in response to the concerns raised by the Equality Network. This is also reproduced in Annexe A.

Today’s meeting

12. The Committee will consider the SSI under the usual process for scrutinising an affirmative instrument. The details of this are set out in Paper 1.
13. Members may wish to explore the following matters with the Cabinet Secretary for Justice and Home Affairs:

¹ Scottish Parliament Criminal Justice Committee, Official Report, 24 September 2025, col. 33.

- In relation to the principle of adding sex to existing hate crime characteristic, the analysis of responses to the Scottish Government's consultation on the draft statutory instrument notes that around half of the organisations responding were in support and around half were not. Members could explore then the main issues raised in support of these different positions and the Scottish Government position.
- Members could explore how a statutory hate crime aggravation based on the characteristic of sex might be used in relation to offences which are already seen as forms of violence against women and girls (e.g. domestic abuse and rape).
- Members could explore whether the provision in the draft statutory instrument stating that the characteristic of sex is to be interpreted as referring to 'biological sex' leaves the interpretation of the term 'sex' where used elsewhere in the Act uncertain (e.g. in relation to the definition of sexual orientation). Members could explore whether the Scottish Government have a view on how 'sex' should be interpreted in relation to sexual orientation.
- The draft statutory instrument states indicates that it would come into force in April 2027. Members could explore what work the Scottish Government will be doing, along with Police Scotland and other stakeholders, in advance of this to ensure that necessary resources and guidance are in place.
- Members could explore whether the Scottish Government still sees a need for separate legislation to address harmful conduct which is rooted in misogyny (as recommended by the independent working group chaired by Baroness Helena Kennedy).

**Clerks to the Committee
February 2026**

Annexe A: Letter from the Equality Network

Dear Members of the Criminal Justice Committee,

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

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. We understand that our partners in the women's sector have raised concerns in their consultation responses regarding this approach as being contradictory to other efforts to improve women's safety, such as Equally Safe. We also note that this approach goes against international evidence suggesting that recognising sex in hate crime legislation is not necessarily an effective way of reducing violence against women and girls. We support their concerns. The issues we wish to raise here, however, are with the way that sex is being defined in the SSI.

Technical issues

Preventing overlap of protected characteristics

The [Explanatory Note](#) of the proposed SSI says that defining sex as 'biological sex at birth' will ensure 'that there is no overlap between the scope of the characteristic of sex and the characteristic of transgender identity'. Paragraph 19 of the [Policy Note](#) says much the same. In our view, ensuring there is no overlap between different characteristics is not a reasonable goal, as every individual has more than one characteristic in the HCPOA including sex, however it is defined. It is also not unusual for a perpetrator to express malice and ill will on the basis of more than one characteristic. Attempting to avoid 'overlap' would contradict years of work across all strands of policy to mainstream an intersectional approach to tackling gender inequality.

We also do not agree that the proposed definition would successfully prevent overlap between the protected characteristics of sex and transgender identity. We accept that the definition proposed would not prevent trans people from protection from crimes motivated by sex-based prejudice, as this is determined by the motivation of any offender. However, it would mean the legislation used a definition of 'sex' that unnecessarily excludes trans people from being recognised in line with their gender identity, with no clear positive policy rationale for doing so.

In our view it is not possible to define 'sex' in a way that completely prevents an overlap between the characteristics of 'sex' and 'transgender identity'. In jurisdictions around the world with less explicit legal protections for LGBT+ people, the vast majority of legal protections on the basis of sexual orientation or trans status/gender

identity are won in Courts and flow from protections from sex discrimination – a good example of this is in the US. Indeed, one of the first instances of trans people gaining legal protections in the UK was in the case of P v S & Cornwall Country Council, which was decided at the European Court of Justice. It found that a trans woman was protected from gender reassignment discrimination in the workplace because of the EU Gender Directive that prohibited sex discrimination.

This is because discrimination and prejudice faced because of sexual orientation or gender identity are fundamentally connected and linked to sex discrimination. Homophobia and biphobia are experienced because of sexist assumptions about who are and are not acceptable romantic or sexual partners, and what is or is not deemed acceptable behaviour for men and women. Transphobia is experienced because of sexist assumptions about acceptable and unacceptable gender identity and gender expression. There will always be overlap between the characteristics of ‘sex’ and ‘transgender identity’ (and indeed between ‘sex’ and ‘sexual orientation’ and, in the specific context of the HCPOA, between ‘sex’ and ‘variations in sex characteristics’). Such overlap is completely unavoidable.

Impact on definition of sexual orientation

It is unclear how 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 this 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 SC judgment does not apply outwith the Equality Act 2010, the Gender Recognition Act 2004 currently applies to the meaning of words in section 11(6). Changing the definition of sex throughout the HCPOA 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 agreed by the parliament 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, so this uncertainty needs to be explicitly resolved in the newly added provisions. 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” 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 GRA 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.

Contradictions with ‘variations in sex characteristics’ in the Act

It should be noted that there is a clear incompatibility between the definition of sex provided by the proposed SSI regulation 2(5), as new section 11(9) of the HCPOA, and the definition of variations in sex characteristics already in section 11(8) of the HCPOA. The latter explicitly recognises and states that a person can be born with physical and biological sex characteristics which, taken as a whole, are neither typically male nor female.

The definition of variations in sex characteristics in section 11(8) is based on a person being

“...born with physical and biological sex characteristics which, taken as a whole, are neither—

(a) those typically associated with males, nor

(b) those typically associated with females...”

It is completely inconsistent with that, to add a definition of sex in the very next subsection, which claims to define a person’s sex on the basis of:

“(a) their biological sex being female, or

(b) their biological sex being male,”

... with “biological sex” defined as “sex at birth”.

There is a fundamental incompatibility between the definition used in the SSI that everyone has a binary “biological sex” without variation, that is considered to be

typically only either male or female, that is fixed at birth and immutable, and the fact of the existence of intersex people / people with VSCs, that is already explicitly recognised in section 11(8) of the HCPOA.

Whilst many people with a variation in sex characteristics identify with the sex that was assigned to them at birth, it still remains that sex characteristics are varied and often not binary, and many people with a variation in sex characteristics do not identify with their assigned sex, nor the sex characterised by (often non-consensual) 'corrective' surgery to alter their primary and secondary sex characteristics in order to align with binary expectations of a typically male or female body. It is clear that people with an I/VSC were not considered when developing the definition of sex within proposals.

Biological sex refers directly to sex characteristics, whether typical or not. Variations in sex characteristics within the HCPOA refers to variations in biological sex characteristics. It is clear that biological sex is not, as this new definition would suggest, binary, nor always clear at birth on assigning. There are over 46 different variations in sex characteristics.

In short, there will be some people with variations in sex characteristics who do not match the proposed definition of sex at all.

Despite the Supreme Court using "biological sex" as a convenient short term, in contrast to "certificated sex", in reality the meaning of those words is not at all well defined, especially in the context of section 11(8) of the HCPOA saying something directly incompatible. That is presumably why the [Explanatory Note](#) for the SSI needs to explain that actually what is meant is "the group of people who were, at birth, assigned female, and the group of people who were, at birth, assigned male." In contrast to "biological sex", those groups are well-defined, because everyone is allocated a birth certificate shortly after birth, which assigns their sex. Of course, the Gender Recognition Act 2004 (itself a requirement of the European Convention on Human Rights) recognises that that assignment is in some cases flawed and allows a person's birth certificate to be amended.

The incompatibility between new section 11(9) and existing section 11(8) could have been avoided by defining 'sex' directly in (9) as 'sex assigned at birth'. But because that is only mentioned in the Explanatory Notes, the actual Act will be self-contradictory.

Interaction with Equality Act and UKSC Ruling

HCPOA already defines PCs differently to the Equality Act 2010

The [Explanatory Note](#) for the SSI says that new section 11(9) 'aligns with the interpretation given to "sex" in the context of the Equality Act 2010 by the Supreme Court', and paragraph 16 of the [Policy Note](#) says much the same. Such alignment is unnecessary and is inconsistent with the rest of the HCPOA.

The HCPOA is fully devolved; unlike the Gender Representation on Public Boards Act (GRPBA), the HCPOA was not enacted thanks to a specific

exception from the reservation of equal opportunities. Unlike the GRPBA, the HCPOA does not fall at all under the reservation of equal opportunities in schedule 5 to the Scotland Act.

Therefore, there is no need for the HCPOA to follow the definitions of protected characteristics in the Equality Act 2010. As you will be aware, it already diverges from the definitions in the Equality Act for a number of the protected characteristics. The definitions of sexual orientation, disability and transgender identity are different from the Equality Act definitions. The HCPOA also includes the characteristic of variations in sex characteristics, which is of course not a protected characteristic under the Equality Act.

SC Ruling only applies to EA 2010

The Supreme Court were clear that the judgment in *For Women Scotland v Scottish Ministers* applied only to the Equality Act 2010 and was based on the specific wording and specific uses of that piece of legislation. Para 2 of the judgment says ‘It is not the role of the court to adjudicate on the arguments in the public domain on the meaning of gender or sex, nor is it to define the meaning of the word “woman” other than when it is used in the provisions of the Equality Act 2010’. Similarly, para 265 is the summary of the court’s ruling. In sub-para (i) it says ‘The question for the court is a question of statutory interpretation: we are concerned with the meaning of the provisions of the Equality Act 2010 in the light of section 9 of the Gender Recognition Act 2004’.

Precedents

The only legislation in the UK that uses this definition

To define sex in statute as ‘biological sex at birth’ would be a novel development in any part of the UK. No legislation has ever used this definition. This not only risks the HCPOA being out of step with other Scottish legislation, but setting Scotland on a more regressive, restrictive track than other parts of the UK.

Baroness Kennedy said, in reference to whether a Misogyny Bill would have required a definition of ‘women and girls’, that it was ‘a matter for the legislature’. It is striking that there has been only a brief consultation on this SSI when the potential impacts of introducing this specific definition are both historic and widespread. And as an SSI, rather than a bill, especially one laid so close to the dissolution of parliament, the scope for consideration of the change is necessarily limited.

Other attempts to define sex as “biological sex at birth”

There have been unsuccessful attempts at Westminster to define sex as ‘biological sex at birth’ in other pieces of legislation. Most recently, there were attempts to insert a similar definition into the UK Data (Use and Access) Bill in 2025, after the UK Supreme Court ruling. These attempts were voted down with 363 votes against to 97 for.

Potential Consequences

We understand that the detailed definition of 'sex' is likely to make little difference in practice to the application of the HCPOA to most sex-based hate crimes. That is in part because, where there is a specific victim, the aggravation is based on the characteristic(s) presumed by the offender, rather than the actual characteristic(s) of the victim. And it is in part because, in most cases, the offender will be making no distinction between different details of possible definitions of the sex of the victim or the targeted group – the offence will simply be targeted at a woman or women generally.

However, the definition used in this SSI has a much broader implication. The Supreme Court ruling has caused huge distress to trans people because it has, at the very least, undermined their fundamental right (see *Goodwin v UK* at the European Court of Human Rights) to gender recognition for those trans people with Gender Recognition Certificates. Some of the subsequent changes that have already occurred as a result of that ruling, or that may occur, may have even wider impacts on how trans people can go about their daily lives, such as whether they can safely access toilet facilities, and whether they are required to out themselves as trans at work and when accessing services (potentially impacting on a range of human rights that we have outlined in some detail in our human rights analysis of the judgment: <https://www.equality-network.org/wp-content/uploads/2025/07/The-Erosion-of-Trans-Rights-in-the-UK-a-human-rights-analysis.pdf>).

At present, the Supreme Court ruling is limited to the interpretation of the Equality Act. For the first time, the SSI as proposed would extend its meaning to another area of law altogether and would solidify it onto the face of legislation. The result is a further undermining of the Gender Recognition Act 2004, and with it, the most fundamental right that is specific to trans people.

Written submission from Engender

Engender Parliamentary Briefing for the Criminal Justice Committee on the SSI to add 'sex' as a protected characteristic to the Hate Crime and Public Order (Scotland) Act 2021

February 2026

BACKGROUND

Engender is a leading feminist policy and advocacy organisation working to secure women's social, political and economic equality and realise women's rights in Scotland. We aim to make visible the impact of structural inequalities on women and wider society, and work at Scottish, UK and international levels to produce research, analysis and recommendations for intersectional feminist legislation and policy. Our work on eradicating violence against women and girls (VAWG) focuses on ['primary prevention'](#) that focuses on addressing the gendered biases and norms underpinning VAWG in our society. We work closely with Scotland's VAWG organisations, who see first-hand the disturbing extent to which many women and girls live with the everyday impacts of this violence, abuse and misogyny.

We are clear that a *credible, evidence-based and proportionate* criminal justice response is required to address VAWG. Alongside many women's organisations, we have worked for years with the Scottish Government on this issue and most recently, with the Independent Working Group on Misogyny and Criminal Justice in Scotland. The Working Group was commissioned by the Scottish Government and chaired by Baroness Helena Kennedy KC.

This is why we [welcomed the Scottish Government's proposals](#) for a new Misogyny Bill in 2023. We communicated that we were ready to work with Scottish Ministers to find a legislative way forward for the Working Group's recommendations. We were then [disappointed and deeply concerned](#) when the Bill was abruptly dropped, in favour of the far more limited approach of adding 'sex' as a protected characteristic to the Hate Crime and Public Order (Scotland) Act 2021. An approach that had been robustly discounted by the Working Group.

We [submitted evidence to the subsequent consultation](#) on the draft SSI, making clear the many concerns we have about the Scottish Government's U-turn on this issue and our confusion about the rationale, given that there has been no material change to the evidence base outlined by Baroness Kennedy.

PURPOSE OF THIS BRIEFING

We want to urgently bring to the Committee's attention the following points in relation to why we do not think the SSI to add 'sex' as a protected characteristic to the Hate Crime and Public Order (Scotland) Act 2021 should progress:

- 1. Extensive evidence from decades of research and consultation in this policy area is being actively ignored by the Scottish Government. It**

clearly demonstrates that adding ‘sex’ as a protected characteristic within Hate Crime laws cannot effectively address violence against women and girls and misogyny. The [international evidence from the few jurisdictions](#) that have taken this approach is not encouraging. Only a handful of states or territories globally have added sex to hate crimes legislation, and none have documented meaningful impact or trends in prosecution.

2. The findings of the ‘Independent Working Group on Misogyny and Criminal Justice in Scotland’, commissioned by the Scottish Government and chaired by Baroness Helena Kennedy KC, examined in detail the most effective approaches for addressing misogyny in the criminal law. [The final report in 2022](#) concluded that a sex or gender aggravation in the Hate Crime and Public Order (Scotland) Act 2021 would be ineffective at reducing the abuse experienced by women.
3. We urge the Committee to seriously consider the value of the SSI proposed, given that it directly [contradicts the Scottish Government’s own response to the Independent Working Group’s findings](#), which endorsed and accepted the recommendations for standalone, gendered legislation.
4. We also ask members to question why the Scottish Government claims, incorrectly, in the [policy note for the proposed SSI](#), that it will “*in effect implement the first two recommendations of Baroness Kennedy’s report, but in a gender-neutral way.*” This is a gross misrepresentation of the findings, which were clear that the most effective way to protect women and girls from such abuse is through an asymmetric approach, with targeted and gendered laws.
5. The approach taken with the SSI to add ‘sex’ as a protected characteristic to the Hate Crime Act also risks significant regression in Scotland’s approach to tackling VAWG and contradicts our world-leading Equally Safe strategy. It is at odds with international human rights standards and directives on how States should address VAWG, set out in both the [CEDAW](#) and [the Istanbul Conventions](#), to which the UK is party.
6. Both the CEDAW and Istanbul Conventions require states to use asymmetric approaches to VAWG. This means refraining from developing law and policy that applies symmetry between men’s and women’s experiences of gender-based violence. Instead, they require approaches that reflect the deep inequality, structural injustice and power imbalances that drive VAWG. Men do not experience endemic levels of harm from women and girls, nor is this harm rooted in maintaining men’s inequality. Yet the SSI will embed a parallel relationship between misogyny and misandry in law, which we believe is harmful.

7. We are also concerned about the Scottish Government's presentation of the findings from the recent public consultation on the SSI as being overwhelmingly supportive. The presentation of submissions disingenuously weighs the larger number of individual responses against the smaller number from organisations with significant expertise on this area of policy. The Committee should be aware that over half of the organisations that responded to the consultation disagree with the introduction of this SSI. Furthermore, organisations across the VAWG Sector in Scotland are united in their opposition to this approach.
8. We ask members to recognise the significant concerns related to the definition of 'sex' as meaning 'biological sex' in the interpretive provision of the SSI. Defining 'sex' in this way in the Hate Crime Act risks undermining the centrality of 'gender' in VAWG policymaking and in efforts to address women's inequality. As recognised in Equally Safe, VAWG responses must look to address gendered barriers and injustice beyond those linked solely to biological differences.

We urge Committee members to robustly consider the significant concerns of the women's sector in Scotland with the SSI. Alongside many others, we have worked for years with the Scottish Government and the independent expert review of Hate Crime laws to develop a robust evidence base that is now being dismissed and ignored without justification. Instead of focusing on bringing the proposed Misogyny Bill forward, which had a much greater scope to improve women and girls' experiences of misogyny, the Scottish Government is instead opting for an un evidenced 'quick fix'. Women and girls in Scotland deserve better.

SPECIFIC CONSIDERATIONS

1. Violence against women and girls is an increasing threat

We reiterate to members the widespread and endemic nature of misogynistic behaviour, harassment, and abuse in Scotland. These behaviours, along with all forms of VAWG, are increasing:

- Nearly three-quarters (71%) of women in the UK have experienced some form of harassment in a public space; this number rises to 86% among 18–24-year-olds.
- Research by Zero Tolerance shows that misogynistic extremism is spreading amongst young people online, which is a growing concern in Scotland.
- Research by the Young Women's Movement found that young women increasingly feel anxious and unsafe, especially online, where misogynistic harassment, bullying, and abuse are increasingly common.

In this context of growing threats women and girls are facing, we ask members to recognise our deep concern that the Scottish Government has chosen to suspend plans for more comprehensive legal reform that would enhance redress for misogyny offences. Women and girls deserve evidence-based, effective and meaningful action from the Scottish Government, not 'quick fixes.'

2. Evidence-based policymaking

A stated, existing evidence demonstrates clearly that adding sex or gender as a category to hate crime law will not be effective or adequate in addressing the gendered violence and misogyny that women and girls are increasingly facing. Our [2019 report, 'Making Women Safer in Scotland'](#), outlined how hate crime legislation offers an inadequate legal vehicle for dealing with the expansive and escalating challenge of misogyny. This work included reviewing international examples of existing hate crime laws that have integrated sex or gender aggravations in a state's criminal law. **When exploring laws in countries including Belgium, Spain, and the United States, we found no evidence that adding gender to hate crimes legislation in any jurisdiction increased protections, improved the justice system, or enhanced state responses to VAWG.**

The 'Independent Working Group on Misogyny and Criminal Justice in Scotland' was then commissioned by the Scottish Government, chaired by Baroness Helena Kennedy KC. This [two-year process examined in detail](#) the most effective approaches for addressing misogyny in the criminal law, reviewing multiple international case studies, taking oral evidence from over 20 leading experts. It also surveyed the lived experiences of [over 900 women and girls in Scotland](#).

The final report concluded that adding 'sex' as a protected characteristic to the Hate Crime Act would be ineffective for multiple reasons, including that:

- Hate crime legislation is principally designed to protect minorities, and women are not a minority group.
- Adding 'sex' to the Act fails to recognise that misogynistic violence is a consequence of structural sexism, where women are discriminated against to maintain patriarchal power relations.
- There is no equivalent form of engrained, generational, systemic discrimination and violence against men on the basis of their sex and gender, equivalent to that of misogyny. The SSI implies, and will in effect establish in law, that there is.
- 'Hate' is not always a helpful concept for describing the harmful conduct that men direct at women and does not fully cover the attitudes that underpin their actions.

On publication in 2022, [the Scottish Government fully accepted the Group's recommendations](#) and committed to creating specific, gendered legislation, which led to the [publication of draft legislation](#) (aka the 'Misogyny Bill') in early 2025: *"The report does not recommend adding a sex characteristic to the Hate Crime and Public Order (Scotland) Act 2021. **We accept that these recommendations represent a new and necessary departure, in that they specify women and girls as requiring specific protection of the criminal law, and are pivotal in challenging society's tolerance of misogyny.**"*

We urge the Committee to question the Scottish Government on what basis and evidence it is using to reverse its position and propose the SSI to add 'sex' to the Hate Crime Act.

We are also concerned that the [Equality Impact Assessment \(EQIA\)](#) published alongside the SSI ignores evidence raised in the recent consultation process about the weaknesses of the approach to address the violence that women and girls experience. **In fact, the EQIA fails to include any reference to evidence provided by women’s organisations in Scotland to the SSI consultation and does not engage with the extensive evidence, including detailed lived experience findings, gathered as part of the Independent Working Group process.**

3. Importance of gendered policy-making and coherence with Equally Safe
The weaknesses in using a Hate Crime approach to address VAWG mean the proposed SSI is incompatible with [Scotland’s Equally Safe Strategy](#). The central reason the Strategy is seen as a global gold standard approach to ending VAWG is because of Equally Safe’s gendered analysis of this violence. Equally Safe recognises and replicates international best practice and human rights standards on VAWG in both the CEDAW and the Istanbul Conventions. A gendered approach to tackling VAWG recognises that women and girls’ experiences of this violence are not symmetrical to men’s.

We urge the Committee to consider how the SSI to add ‘sex’ to the Hate Crime Act sets a concerning precedent of dealing with a deeply gendered issue through a reductive, gender-neutral ‘sex’ protections framework. This type of symmetrical, gender-neutral approach in policymaking creates false equivalences in law between the experiences of men and women, frames misogynistic crimes against women as individual, isolated cases of hate, rather than contextualising acts of VAWG as driven by societal norms and stereotypes that women are subordinate to men.

It is also unclear whether the new sex aggravation in the Hate Crime Act would be used in conjunction with existing VAWG crimes set out in criminal law. Applying a sex aggravation to some existing sexual offences or domestic abuse cases, but not others, could contradict Equally Safe’s analysis that all forms of VAWG are gender-based and rooted in gender inequality. This could create unhelpful inconsistencies in how the justice system deals with gendered crimes. It would, for example, leave it up to judges to determine whether an individual case of sexual assault or stalking meets the threshold for a sex-aggravated hate crime when these crimes against women are always inherently gendered forms of violence. Baroness Kennedy’s proposals recommended that a misogyny aggravation should only be used in offences that are not already inherently misogynistic; for example, it should not apply to rape, other sexual offences or domestic abuse.

We urge the Committee to question why this basic level of analysis on VAWG has not been applied in the Scottish Government’s proposals.

4. Interpretive provision on biological sex
We ask the Committee to recognise significant concerns raised with the interpretive provision in the SSI to rely wholly on a definition of ‘biological sex’.

The Scottish Government states that it aims to “achieve equivalence with the meaning of sex in the Equality Act 2010 (EA), as determined by the Supreme Court

in *For Women Scotland v Scottish Ministers*.” **The UK Supreme Court stated its judgment should not be used to define the category of a “woman” for broader purposes, beyond the definition of ‘sex’ in the Equality Act 2010 (EA). The judgment does not affect or require the definitions in the EA to be used consistently across existing and developing policies and legislation in other areas.**

Furthermore, final guidance from the Equality and Human Rights Commission has yet to be approved by the UK Parliament. There has been significant criticism that the EHRC's approach to the ruling to date, including that the changes to the Code of Practice guidance would be difficult to implement in practice and may be in [contravention of the Human Rights Act 1998](#). The interpretive provision risks being an overly expansive application of the Supreme Court judgment, which clearly stated that the [Gender Recognition Act 2004](#) should continue to apply in other legal contexts.

It is our view that the Equality Act represents the floor, not the ceiling, of what we need to achieve in equality as a society. The existing Scottish Hate Crime and Public Order (Scotland) Act 2021 uses a broader range of protected characteristics than those listed in the Equality Act to ensure hate crime protections reach minorities most likely to be at risk. For example, protecting people with variations in sex characteristics, a group that does not appear on the EA's list of protected characteristics.

We are concerned that expanding the scope of the Supreme Court's decision beyond the EA further increases the threat to gender-based policymaking. There is a strong global consensus, underpinned by international institutions [including the United Nations](#) and [the Council of Europe](#), that the root cause of all forms of gender-based violence is *gender inequality*.

The CEDAW Committee (in [General Recommendation No. 19](#)) has **made clear that women require protection from discrimination on the grounds of both their biological differences from men and the unequal impacts they experience due to socially constructed conceptions of gender**. Such roles shape social norms and behaviours and determine women's access to social and economic power and resources through processes of gender stereotyping. **This understanding goes beyond biological differences between men and women.**

CONCLUSION

We supported the Scottish Government's proposals to reform the criminal law to address misogyny through a standalone Bill and remain clear that this is the approach that should be pursued. Rather than backing away from tackling misogyny at a time of rising threats, we need the next Scottish Government to take bold action by committing to meaningful legal reforms. This should occur alongside continued investment in a robust national strategy on primary prevention of VAWG. We need a legal framework and system that recognises the impact of sexism, misogyny and violence against women by design – not as an add-on to existing gender-neutral legislation.

We ask Committee members to take this opportunity to join us in pushing back against the proposed SSI to add 'sex' to the Hate Crime Act and assert that women and girls in Scotland deserve policy responses that will make a meaningful difference to their lives.

The presentation of this SSI by the Scottish Government as a means to plug a 'gap' in the law is undermined by their own evidence-gathering exercises, which have shown time and again that adding 'sex' to Hate Crime law will not work in practice to make women's and girls' lives safer.

FOR FURTHER INFORMATION

Email: info@engender.org.uk

ABOUT US

Engender is Scotland's feminist policy and advocacy organisation, working to increase women's social, political and economic equality, enable women's rights, and make visible the impact of sexism on women and wider society. We work at Scottish, UK and international level to produce research, analysis, and recommendations for intersectional feminist legislation and programmes.

Letter from the Cabinet Secretary for Justice and Home Affairs

16 February 2026

Dear Convener

I am writing in response to the Committee Clerks' email to Scottish Government officials asking for the Scottish Government to provide a written response to the Equality Network and Scottish Trans' submission on the SSI to add the characteristic of sex to the Hate Crime and Public Order (Scotland) Act 2021 ("the 2021 Act") ahead of the Committee session on 25 February where I am happy to answer questions regarding the SSI.

The government is committed to making Scotland a leader in equality and human rights, increasing fairness, tackling inequality, and removing societal and cultural disadvantages. We continue to take action to tackle persistent inequality and to advance equality of opportunity for everyone, supporting those who are most disadvantaged and who face the greatest barriers to realising their rights. The intention of this SSI is to further this commitment and ensure greater coverage within the 2021 Act.

Turning to the issues raised in the submission by the Equality Network and Scottish Trans, I will address each of the following aspects; an overlap between sex and the characteristics of transgender or non-binary identity, variations in sex characteristics, and sex.

We consider clarity of approach under the criminal law is essential given the consequences that can flow from a breach of the criminal law. Within this important context and as the Committee is aware, the characteristics of transgender or non-binary identity and variations in sex characteristics are of course already covered by the 2021 Act. We therefore consider it desirable insofar as possible to ensure that there is a clear delineation between hate crimes covered by these characteristics and the characteristic of sex. We consider this is best achieved by defining the characteristic of sex as biological sex, meaning sex at birth. This decision was made with specific focus on the operation of hate crime law and reflects the fact that this Act already makes separate provision for the characteristics of transgender or non-binary identity and variations in sex characteristics and has no wider read across to other areas of policy or legislation where decisions will be made on a case by case basis relevant to each specific policy context.

To provide further explanation, if the characteristic of sex were defined in such a way that it included both birth sex and self-identified gender, the sex aggravation would cover all hate crime motivated by transphobia. As such, where a trans or non-binary person is harassed because of their gender identity, this would be covered by both the transgender aggravation and the sex aggravation, even if it is accepted that in practice it ought to be clear which aggravation is the intuitive one to use in any given case.

With regards to a degree of overlap, we accept that, there may be individual cases where, in practice it is not easy to determine whether an accused's malice and ill-will related to their perception of a victim's sex, a victim's transgender or non-binary identity or a victim's variations in sex characteristics, or some combination of these. However, we are clear these are distinct forms of prejudice which it makes sense to provide for separately in hate crime law. We also know that this is the case now with crimes motivated by hatred relating to race and religion and there may be cases where it is difficult to determine whether a crime is motivated by prejudice relating to a victim's age or disability where a victim is both old and infirm.

The Equality Network and Scottish Trans submission raises concerns that the approach taken to the definition of sex in the SSI will impact on the definition of sexual orientation in the 2021 Act. We do not agree. The power at section 12 of the 2021 Act is being used for the addition of sex, therefore it only enables 'sex' to be defined for the purpose of the characteristic of sex. We do not consider this will affect how a court would interpret the meaning of 'sex' in relation to the interpretive provision concerning the characteristics of variations in sex characteristics or sexual orientation.

The submission also states that the approach to the definition of sex in the SSI is in contradiction with the definition of variations in sex characteristics in the 2021 Act. We do not consider that there is any contradiction. The characteristics covered by the 2021 Act describe prejudices which may motivate the commission of hate crime. The definition of 'sex' in the SSI is concerned with hate crime motivated by or demonstrating malice and ill-will relating to a person's birth sex being male or female and the stirring up of hatred against a group of people defined by their birth sex being male or female. It does not impact in any way on hate crime which relates to people's variations in sex characteristics.

If a person is a victim of a hate crime relating to their actual or perceived variations in sex characteristics or intersex identity, the variations in sex characteristics aggravation can be applied. If the same person is targeted by someone because of their actual or perceived male or female sex, the aggravation relating to the characteristic of sex can be used, and if the same person is targeted by someone because of their perceived transgender identity, the transgender aggravation can be used.

This all applies regardless of the victim's actual identity, as the 2021 Act is only concerned with the prejudices that may motivate an offender to commit hate crime. For example, if a Sikh is a victim of a crime motivated by Islamophobic hatred, the fact that the victim is Sikh rather than Muslim does not change the fact that a crime motivated by Islamophobic prejudice occurred.

The submission also raises broader concerns about the decision to use a definition of sex that is in line with the Supreme Court's decision in the case of *For Women Scotland v. Scottish Ministers*. Whilst the obvious wider definition that could have been adopted to the definition of sex would have been to define by reference to either a person's biological sex, defined as sex at birth, or their self-identified gender, or both, this approach would have the effect of making the characteristic of

transgender or non-binary identity one that would also be wholly covered by the characteristic of sex. While in practice, we expect that where a crime was motivated by prejudice relating to a victim's actual or perceived transgender or non-binary identity, prosecutors would elect to libel the transgender aggravation, it would be entirely a matter for prosecutors in any individual case and would risk introducing uncertainty into reporting of the prevalence of different types of hate crime by undermining the consistency of approach in collecting statistics on hate crimes committed.

Fundamentally, the decision to adopt this approach to the definition of sex in the SSI reflects how the characteristic of sex sits alongside the other characteristics covered by the 2021 Act. It is specific to hate crime law and has no wider read across to other policy contexts where decisions would be required on a case by case basis focused on the specific policy area considerations.

More generally, we do not consider that the approach taken in the SSI in any way undermines trans people's rights under the Gender Recognition Act 2004 because, as explained above, hate crime legislation is concerned not with the victim's identity, but with the perpetrator's perception of a victim's identity. Equally, the approach does not affect in any way the protections for transgender identity contained in the 2021 Act

We note that the submission refers to the fact that an amendment to the Data (Use and Access) Bill in the UK Parliament which sought to introduce a definition of 'sex', defined as 'biological sex' in that legislation was voted down by the UK Parliament and opposed by the UK Government. However, it should be noted that UK Government Minister responsible for that Bill opposed the amendment in question on the basis that it did not relate to the particular definition of sex used in the amendment, but rather to the fact that the UK Government position was that there was no need to record people's sex at all in the policy context of that Bill. Therefore, no definition of sex was needed. That is not the situation with the hate crime SSI, which is criminal law, and as such, is not an appropriate comparison to make.

I hope this information is helpful to the Committee in assisting its consideration of the SSI.

Yours sincerely,

ANGELA CONSTANCE