POLICY NOTE

THE HATE CRIME AND PUBLIC ORDER (SCOTLAND) ACT 2021 (CHARACTERISTIC OF SEX) (AMENDMENT AND TRANSITIONAL PROVISIONS) REGULATIONS 2026

SSI 2026/150

Introduction

1. This instrument is made in exercise of the powers conferred by section 12(1), (2) and (3) 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)

<u>Interpretative provision relating to the characteristic of sex</u>

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[1], as determined by the Supreme Court in *For Women Scotland v Scottish Ministers* [2025] UKSC 16 ("*FWS*")[2]. Because there is no definition

[1] https://www.legislation.gov.uk/ukpga/2010/15/contents
[2] https://supremecourt.uk/uploads/uksc_2024_0042_judgment_updated_16f5d72e76.pdf

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."* (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. There may be circumstances in which actions which take place before the statutory aggravation and offence come into effect are pled in aid to support a charge in relation to other actions that occurred after it came into force, where those latter actions may require to be narrated in combination with the earlier actions in order to establish the offence/aggravation. The purpose of these provisions is therefore to provide legal certainty to put beyond doubt the application of these provisions in the context of course of conduct offences .

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[3]. 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.

[3] https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/

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[4] 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 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

[4] See Written question and answer: S6W-37425 | https://www.parliament.scot/chamber-and-committees/questions-and-answers/question?ref=S6W-37425

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 socio-economic 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.[5]

Scottish Government
Justice Division
Criminal Law, Practice and Licencing

[5] https://www.parliament.scot/-/media/files/legislation/bills/s5-bills/hate-crime-and-public-order-scotland-bill/stage-2/supplementary-financial-memorandum.pdf