

Scottish Government consultation on adding 'sex' as a protected characteristic to the Hate Crime and Public Order (Scotland) Act 2021

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The Young Women's Movement is Scotland's national organisation for young women and girls' leadership and rights. We are led by and for young women who want meaningful change in their lives and across society. Our research and policy work is shaped and informed by young women and girls to make sure their experiences and expertise are heard, valued and understood. This work is explicitly feminist and participatory, we co-design our research and policy work with young women from concept to delivery. We conduct this work with an intersectional lens, seeking to centre the voices of those at the greatest risk of systemic discrimination.

We welcome this opportunity to express our concerns about the proposed changes to the Hate Crime and Public Order (Scotland) Act 2021. The Young Women's Movement, and young women whose views we represent, strongly oppose the addition of sex as a protected characteristic in this legislation, as this will not protect women from misogynistic harassment. The gender-neutral approach that this legislation advances does not reflect the reality of gendered violence. In addition, we believe that adopting this biologicist definition of sex sets a dangerous precedent that will be harmful to trans women and non-binary people by reinforcing limiting and exclusionary narratives that do not contemplate the complexity of gender. We are deeply concerned that this amendment contradicts existing Scottish policy that tackles violence against women and girls. Most importantly, we fear that this legislation will become an obstacle to the development of gendered policy that centres women's experiences and is truly effective in tackling misogyny.

Responses to consultation questions

Question 1. Do you support the approach of extension of both the stirring up of hatred offence and the aggravation of offences by prejudice to cover the characteristic of sex?

No.

The Young Women's Movement strongly opposes the inclusion of 'sex' as a protected characteristic in the Hate Crime and Public Order Bill (2021) as this measure will not deliver outcomes of women and girls' safety. There is no precedent or international evidence that this approach results in meaningful improvement to the lives of women and girls. Evidence from similar legislation and practice, including from within the UK, shows that hate crime and hate speech are poorly understood in the context of women. Women often do not report gender motivated hate crimes, and these are not adequately investigated or prosecuted. Rushing to legislate risks entrenching those misunderstandings in our criminal justice system.

We share concerns with the broader women's sector that perpetrators of gendered violence may use the threat of criminality and the symmetrical protection of a 'sex' aggravation as part of a pattern of coercive control to prevent women from interacting with criminal justice systems. This gender-neutral approach puts women at greater risk as it leaves room to be used by men to make vexatious complaints against their partners, becoming an additional coercive behaviour within domestic abuse situations. A gender-neutral approach that sees men and women covered in the same way does not reflect the reality of gendered violence. This change to legislation implies that some incidents of violence against women are a product of sex-based discrimination and some are not. This approach undermines policy coherence with Equally Safe Scotland Strategy, as it fundamentally contradicts Equally Safe's understanding of that all violence against women and girls is a cause and consequence of women's inequality. Sentencing should therefore not treat some instances of violence against women as more aggravated on the basis of sex than others.

We stand in agreement with the wider women's sector in Scotland that adding 'sex' to hate crime law is not the most effective way of protecting women from crimes motivated by misogyny. We support the view from the expert Misogyny and Criminal Justice Working Group that addressing harmful misogynistic behaviour cannot be dealt with effectively within hate crime legislation and what is required is specifically gendered legislation. We support the creation of new gendered legislation in the shape of a Misogyny and Criminal Justice Act. We therefore do not support the addition of sex as a protected characteristic; we support the development of separate gendered legislation that centres women and girls' experiences.

Question 2. Do you agree that if the offence of stirring up hatred is extended to the characteristic of sex, the freedom of expression provision at section 9 should apply?

Not answered.

Question 3. Are you content with the interpretive provision relating to the characteristic of sex?

No.

The Young Women's Movement believes that using the Supreme Court ruling definition will mainstream the harm that has been caused by that ruling to women and girls, causing more segregation, harassment and exclusion. It will have a significant impact on trans people's human rights and right to gender recognition, making their lives harder and creating significant difficulties in accessing safe appropriate services and going about their daily lives. Copying this ruling into legislation will justify and encourage those harms.

There is no requirement for the Scottish Government to use the Supreme Court ruling definition to define 'sex' for the purposes of Scottish hate crime law. The Supreme Court explicitly stated that this definition applied exclusively to the Equality Act 2010. There are already protected characteristics in hate crime law that are defined differently from the Equality Act protected characteristics – including sexual orientation and disability.

The Scottish Government's justification for using the definition in the Equality Act 2010 is to avoid overlap between the characteristics of 'sex' and 'transgender identity'. However, there is no way to define sex that will not result in some overlap between these two characteristics, as they are inherently linked to one another; in many ways transphobia is a manifestation of sexism, deeming certain gender identities and gender expressions unacceptable. Cisgender and trans women and girls share common experiences of misogyny and sexism, and the proposed definition doesn't reflect this reality.

The category of biological sex as stated in this legislation leaves intersex people, whose variations in sex characteristics mean they cannot be distinctly categorised as male or female, completely unprotected under the law and effectively renders their existence invisible in legal terms. This exclusion violates basic human rights principles of equality and protection for all people.

Defining sex in this way will affect the existing protected characteristic of 'sexual orientation', which also refers to sex in its definition. It will change the meaning of that characteristic in a way that does not reflect how many LGBTQIA+ people define their own sexual orientation.

Question 4. Are you content with the provisions concerning data collection in relation to the characteristic of sex?

Not answered.

Question 5. Do you have any views on potential impacts of the proposals in this consultation on human rights?

Yes.

As stated in our answer to question three, the proposed definition of sex as a biological category leaves intersex people unprotected, whose variations in sex characteristics mean they cannot be distinctly categorised as male or female. Consequently, this creates discriminatory treatment against them, violating the human rights of all those who do not fit this narrow definition of biological sex. This would constitute a violation of ECHR Article 14, which prohibits discrimination as it would result in legislative discrimination against a considerable proportion of the population - an estimated 1.7% to 4%.

This proposal goes against human rights frameworks that Scotland is committed to, such as the Convention on the Elimination of All Forms of Discrimination against Women and the Istanbul Convention, which establishes that laws should be shaped around women's lived experiences.

Question 6. Do you have any views on the potential impacts of the draft SSI on equalities and the protected characteristics of age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and/or sexual orientation?

Yes.

As stated in our response to question 3, the inclusion of sex interpreted as biological sex in the Hate Crime Bill will have an impact on the protected characteristics of sex, gender reassignment and sexual orientation. Despite their separation in legislation, sex, gender reassignment and sexual orientation are inseparable in the lives of individuals, whose experiences of gender motivated harassment and violence cannot be separated from their gender expression or sexual orientation.

Question 7. Do you have any views on the potential impacts of the draft SSI on children and young people as set out in the UN Convention on the Rights of the Child?

Yes.

We believe that this draft SSI will fail to provide effective protection for children and young people from gender-based violence. Violence against women and girls and violence against children are inherently interlinked forms of gender-based violence. For instance, in cases of domestic violence, misogynistic violence directed towards women and girls directly impacts children in the household. Article 19 of the UNCRC makes it clear that children and young people have the fundamental human right to be protected from violence. As stated in our response to question one, this legislative measure will not effectively protect women and girls from misogynistic violence. Consequently, it will also fail to protect children affected by such violence, thus failing to address children's right to safety. Additionally, our concerns about the gap in legal protection for intersex people extend to intersex children who may experience violence.

8. Do you have any views on the potential financial or other impacts of the draft SSI on businesses, government and the third sector?

No.

9. Do you have any views on the potential impacts of the draft SSI on socio-economic inequality, communities on the Scottish islands, privacy and data protection, or the environment?

No.

For further information

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About us

The Young Women's Movement is Scotland's national organisation for young women's feminist leadership and collective action against gender inequality. We value the power, and recognise the necessity, of working both intersectionally and intergenerationally to achieve change. Young women, girls and non-binary people who recognise themselves within this movement are at the heart of everything we do by participating, co-designing and leading our research and programmes.