

SSI to add “sex” as a characteristic to the Hate Crime and Public Order (Scotland) Act 2021: Analysis of Responses to Consultation

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Executive Summary

The Hate Crime and Public Order (Scotland) Act 2021 (“the 2021 Act”) contains a power which enables the Scottish Ministers to lay an order in Parliament which, subject to Parliamentary approval, adds the characteristic of sex to the characteristics covered by the Act.

In May 2025, the Cabinet Secretary for Justice and Home Affairs announced that the Scottish Government would lay a Scottish Statutory Instrument (SSI) to add the characteristic of sex to the Hate Crime and Public Order (Scotland) Act 2021 so that people who are victims of crime motivated by a perpetrator’s prejudice concerning their sex have the same protections as other groups protected by that Act.

The Scottish Government undertook a consultation on a draft version of the SSI between 28 August 2025 and 17 October 2025 seeking views on the approach taken in the draft SSI.

All responses where permission was granted have been published. This analysis can be read alongside the published responses.

Respondent Profile

In total there were 365 responses to the consultation paper, of which 34 were from organisations and 331 were from individuals. A list of organisations which responded to the consultation is provided as an appendix.

Methodology

Responses to the consultation were primarily submitted using the Scottish Government consultation platform Citizen Space, however, some responses were submitted by email. Where responses were submitted by email, these were entered manually onto the Citizen Space system to create a complete database of responses.

When referring to respondents who made particular comments, the following phrases are used to ensure consistency when discussing the

volume of responses that shared similar themes¹:

- "a very small number" - less than 5% of those commented
- "a small number" - less than 10% of those who commented
- "a number of" - 10-25% of those who commented
- "a significant number" - 25-45% of those who commented
- "around half" - 45-55% of those who commented
- "a majority of" - 55-75% of those who commented
- "a large majority of" - 75-90% of those who commented
- "a very large majority of" - 90% plus.

Citizen Space as a platform contains analysis tools which allow consultation hosts to determine how many respondents answered “yes” or “no” to consultation questions. For questions 1-4 (the questions on the policy content of the SSI), Citizen Space analysis was used to determine how many respondents were in support, and how many were opposed.

For all questions, there was the option to respond with “yes” and “no”, but there was also no requirement for respondents to answer any question. In instances where a respondent did not answer “yes” or “no” but *did* leave comments in the free text box following the question, the text was considered and included in this analysis. However, for reasons of consistency, where a respondent did not answer “yes” or “no”², they are not included in figures for the proportion of respondents who are or are not content with a particular aspect of the policy.

Following the closure of the consultation on Citizen Space, all 365 responses were extracted from the Citizen Space platform and exported into Excel for analysis. For each question where respondents left comments in the free text box, responses were grouped by recurring keywords and common themes.

The analysis of responses is presented in the following chapters which follow the order of the questions raised in the consultation paper.

¹ Where appropriate, when dealing with small numbers of responses by organisations raising a particular issue, exact numbers have been given (e.g. “of the three organisations who were not content with the approach to X, one said this was because”)

² There were cases where it would be reasonable to make an assumption about the respondent's position on the question from the comments they had left, but others were less clear cut.

Summary of questions

Principle of adding characteristic of sex to the 2021 Act

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.

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.

Freedom of expression provision

There was support from a very large majority of consultation respondents (94%) who answered this question for extending the provision concerning the protection of freedom of expression to the characteristic of sex if the offence of stirring up of hatred is extended to cover the characteristic of sex. This view was shared by individual respondents and those responding on behalf of organisations. It was also consistent across those who supported and who were opposed to the addition of the characteristic of sex to the 2021 Act.

Many argued that the extension of the provision is necessary to protect the right to freedom of expression. A number of respondents noted that they did not see any reason to treat the characteristic of sex differently from the other characteristics to which the 2021 Act extended the stirring up hatred offence.

Among the small number of respondents who opposed the application of the provision for protection of freedom of expression to the characteristic of sex, of those who gave reasons, a recurring theme was concern that it

may provide a loophole which could be exploited by those seeking to stir up hatred of women and girls.

Interpretive provision concerning the characteristic of sex

There was support from a large majority of consultation respondents (85%) for the approach taken in the draft SSI to interpretive provision concerning the characteristic of sex.

However, there was a significant divergence of views between individual respondents, of whom 88% were content, and organisations responding to the consultation, of whom a small majority (53%) were *not* content with the provision.

Those who were content with the interpretive provision concerning sex often highlighted what they saw as the importance of being consistent with the decision of the Supreme Court in the case of *For Women Scotland (FWS) v. The Scottish Ministers* on the meaning of 'sex' in the Equality Act. A number highlighted that separate provision already exists to address hate crimes relating to the characteristic of transgender identity.

Those who were not content with the interpretive provision concerning the characteristic of sex often expressed concern that the approach is the same as that of the Supreme Court decision with this reflecting their underlying concern with the nature of this decision. A number expressed concern that, in their view, it failed to recognise people with a transgender identity in line with their gender.

Data collection provisions

A large majority of consultation respondents (91%) who answered this question were content with the provisions concerning data collection in the draft SSI. This view was shared by both individual respondents and those responding on behalf of organisations.

Most respondents who offered views said that they thought the same approach should be adopted to the collection of data about victims and perpetrators of hate crime relating to the characteristic of sex as for the other characteristics covered by the 2021 Act. A number also noted that such data can help to better understand and respond to hate crime

motivated by hostility relating to sex and stirring up of hatred on grounds of sex.

Of the small proportion of respondents who opposed this provision and set out their reasons for doing so, a common theme was concern about the reliability of government statistics and a concern that collection of data about victims could constitute an invasion of their privacy.

Impact Assessments

Human Rights

The consultation revealed mixed views on the human rights implications of adding “sex” as a characteristic under the 2021 Act. Among organisations, opinions were relatively evenly split: some saw positive impacts, particularly for women and girls, saying it would be in keeping with obligations under the European Convention on Human Rights (ECHR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Istanbul Convention, while others raised concerns about negative effects on transgender, non-binary, and intersex individuals. Issues included the reliance on birth sex in definitions and potential requirements for victims to disclose birth sex to police. A few organisations felt the measure did not go far enough to protect women and girls compared to previous commitments on misogyny legislation.

Among individual respondents, nearly half viewed the change as positive for human rights, especially for women and girls, while about a quarter saw negative impacts, mainly for transgender and non-binary people. Concerns included perceived conflict with the Gender Recognition Act, risks to freedom of expression, and fears of discriminatory enforcement. Some respondents expressed mixed views, supporting the principle but stressing the need for proportionate policing.

Financial Impacts

Responses suggested limited financial implications overall. Most organisations anticipated minimal additional costs for the justice system, though some foresaw extra expenses for third-sector support services and justice agencies due to potential increases in investigations and prosecutions. Guidance and training for justice agencies were

highlighted as essential, and possible impacts for employers were noted, with calls for clear reporting guidance.

Individual respondents largely believed costs would be negligible or irrelevant, with some warning against using financial concerns as a barrier to implementation. A small minority opposed the measure on grounds of perceived poor use of resources, without specifying cost estimates.

Protected Characteristics

The addition of sex to the 2021 Act was broadly welcomed, with strong emphasis between both individuals and organisations on its importance for protecting women and girls from sex-based hate crimes.

Respondents highlighted that this change would improve clarity in the law and strengthen enforcement, enabling better data collection and more effective responses from police and prosecutors.

Intersectionality was a recurring theme, with recognition that multiple characteristics subject to protection can compound experiences of harm. Overall, the proposal was seen as a positive step toward ensuring equal treatment of all characteristics given protection under hate crime legislation.

Children's Rights

All respondents generally agreed that the draft SSI would have a positive impact on children and young people, particularly girls. The regulations were viewed as supporting key principles of the UN Convention on the Rights of the Child, notably protection from discrimination and violence. Many felt that these changes would enhance safeguarding and wellbeing for young people, ensuring they are better protected from abuse and prejudice.

Socio-economic, Island communities and data impacts

The draft SSI was widely perceived as beneficial for addressing socio-economic inequality, especially for women from lower-income backgrounds who are more vulnerable to gender-based violence and often face barriers to accessing justice. Respondents also noted the

importance of robust data protection measures, with confidence that alignment with UK GDPR and anonymised, gender-disaggregated data would maintain privacy standards. For island communities, the main theme was the need for targeted outreach and support to overcome challenges such as stigma and limited anonymity, which can hinder reporting in remote areas.

Introduction

The Hate Crime and Public Order (Scotland) Act 2021 (“the 2021 Act”) contained a provision at section 12 which enables the Scottish Ministers to lay regulations in Parliament to add the characteristic of sex to the Act, subject to the agreement of Parliament.

In May 2025, the Cabinet Secretary for Justice and Home Affairs announced that the Scottish Ministers intended to use the power at section 12 of the 2021 Act to lay regulations to add the characteristic of sex to the Act.

That order is subject to a form of “super-affirmative” procedure whereby, before laying such an order in Parliament, the Scottish Ministers must first lay before Parliament a proposed draft of the instrument and have regard to any representations about the proposed draft that are made to them within the period of 40 days beginning with the day on which the draft is laid and make any changes to the draft instrument that they consider appropriate.

The power to add the characteristic of sex to the 2021 Act enables it to be added to either or both of the provisions at section 1, concerning the aggravation of offences by prejudice, and at section 4, concerning offences of stirring up of hatred. It also enables consequential amendments to be made to the provisions at section 9 of the Act, concerning protection of freedom of expression, at section 11, to add interpretive provision concerning the characteristic of sex, and at sections 14 and 15, concerning the publication of reports on hate crime convictions and hate crime recorded by the police.

In order to facilitate the process by which people could make representations to the Scottish Ministers about the draft order, the Scottish Government undertook a public consultation on the draft Order between 28 August 2025 and 17 October 2025 using the Citizen Space platform.

Addition of characteristic of sex to offence of stirring up hatred and aggravation of offences by prejudice

Consultees were asked if they support the extension of both the stirring up of hatred offence and the aggravation of offences by prejudice to cover the characteristic of sex. There were four options available to respondents:

- Support extension to both aggravation of offences by prejudice and stirring up of hatred offence;
- Do not support extension to either aggravation of offences by prejudice or stirring up of hatred offence;
- Support extension only to aggravation of offences by prejudice.
- Support extension only to stirring up of hatred offence.

There were 361 responses to this question, of which 32 were from organisations and 329 were from individual respondents.

There was a significant divergence between the responses from individuals to this question and the responses from organisations.

Of the individual respondents, 294 respondents (89%) supported the extension of both the stirring up of hatred offence and the provision concerning aggravation of offences by prejudice to cover the characteristic of sex. 25 respondents (8%) did not support the extension of either the aggravation or the stirring up of hatred offence to the characteristic of sex. 10 respondents (3%) supported the characteristic of sex being added to the aggravation of offences by prejudice, but not to the stirring up of hatred offence. There were no respondents who supported the characteristic of sex being added to the stirring up of hatred offence but not to the aggravation of offences by prejudice.

Responses from organisations were much more evenly split as to whether they supported the addition of the characteristic of sex to the 2021 Act. 15 respondents (47%) supported this approach, while 16 respondents (50%) were opposed³. One organisation supported the

³ These numbers only include those organisations which directly answered the question. Two organisations used the comments section to provide views, but did not answer the question. Their comments appear to suggest that they are sceptical of extending the 2021 Act to cover the characteristic of sex.

extension of the aggravation of offences by prejudice to the characteristic of sex, but not to the stirring up of hatred offence.

No respondents supported it extending to the stirring up of hatred offence but not the statutory aggravation.

Organisation respondents

32 organisation respondents provided comments in response to this question⁴.

A significant majority of organisation respondents who did not support the addition of the characteristic of sex to the 2021 Act either said that they thought that there should be a specific Bill on misogyny instead, or drew attention to the fact that the Working Group on Misogyny and the Criminal Law, which reported to Scottish Ministers in 2022, recommended that there should be specific legislation on misogyny and that the characteristic of sex should not be added to the 2021 Act. It should be noted that a number of respondents who supported the addition of the characteristic of sex to the 2021 Act said that they did so in light of the Scottish Government's decision not to introduce legislation for a Misogyny Bill in this Parliament, and that a stand-alone Bill was their preferred option.

A significant majority of organisation respondents who did not support the extension of the addition of the characteristic of sex to the 2021 Act also stated that they did not support this because it is gender-neutral. A number of those respondents stated that they thought this could encourage malicious or frivolous complaints from men against women or that they thought that a gender-neutral approach was contrary to the Convention on the Elimination of all forms of Discrimination Against Women and/or the Istanbul Convention on Violence Against Women.

Around half of organisation respondents who did not support the extension of the addition of the characteristic of sex to the 2021 Act said that one of their reasons for this was that they thought crimes motivated by misogyny and prejudice against women did not fit well into the hate crime legislative framework. A number noted that in their view, misogynistic crime was often not motivated by hatred, but by contempt or a belief that women and girls did not matter.

⁴ This includes two organisations which did not provide an answer to the question.

Around half of organisation respondents who supported the addition of the characteristic of sex to the 2021 Act said that they thought that “sex” should be treated in the same way as other characteristics covered by the Act⁵. A number of respondents said that they thought it was needed to deal with either a rise in, or the prevalence of, misogynistically motivated criminal behaviour or crimes against women and girls. A small number of respondents who supported the approach raised other issues: that a gender-neutral approach was appropriate and in keeping with the hate crime legislative framework, that it should have been included at the outset when the Bill was introduced in Parliament, and that the existence of a statutory aggravation would help to change public attitudes and/or the approach of the police towards crimes motivated by hatred of women and girls.

A number of organisations commented specifically on the stirring up of hatred offence. The one organisation which supported the addition of the characteristic to the statutory aggravation but not to the stirring up of hatred offence said that they took this view because they thought that the stirring up of hatred offence could be likely to encourage spurious reporting of non-criminal behaviour to the police, which would impact on those accused, even though they thought it would not ultimately result in prosecution or conviction. A small number of organisations said that they did not support the inclusion of a stirring up of hatred offence in the 2021 Act but that if there is such an offence, it should extend to the characteristic of sex to ensure a consistent approach across the different characteristics covered by the Act.

A number of comments were made by respondents which did not directly relate to whether they supported the policy. A small number highlighted what they saw as the need for non-legislative action to address misogyny, including public awareness campaigns and funding for organisations providing support for victims and one organisation which said that while they supported the addition of the characteristic of sex to the 2021 Act, they disagreed with the use of secondary legislation to make such a change as they thought such a significant change should be subject to the level of scrutiny that is applied to primary legislation.

⁵ Many referred to ‘protected characteristics’ which may be a reference to the characteristics protected by the Equality Act 2010, though it should be noted that not all of these are specifically covered by the 2021 Act.

Individual respondents

124 of the 329 individual respondents who responded to this question used the comments box to provide reasons for their views.

A significant number of those who commented expressed the view that they supported the extension of the 2021 Act to cover the characteristic of sex because they thought that the characteristic of sex should be treated in the same way as to the other characteristics covered by the Act. Many of these respondents said that they considered that the main reason for doing so was to ensure that protection is in place for women and girls who are victims of crime because they are women and girls.

Several other issues were raised by small numbers of individual respondents. The most common came from a number of individuals who supported adding sex as a characteristic because they believed women and girls targeted for being female represent either the largest group of hate crime victims, or at least a substantial proportion. There were also a small number of respondents who specifically stated that they thought that the characteristic of sex should have been included in the legislation from the outset.

A small number of respondents stated that they did not support hate crime law, or specifically that they did not support the concept of an offence of stirring up of hatred, but that if these offences are to be in place, they should apply to the characteristic of the sex in the same way that they apply to the other characteristics covered by the 2021 Act.

As noted above, the number of individual respondents who did not support the extension of the characteristic of sex to the 2021 Act was small, though they were more likely to state the reasons for their view. The most common reasons given for this were around that around a third said that they thought that the 2021 Act should be repealed in its entirety, and a similar number who said that they thought that the hate crime legislative framework was not suitable for dealing with crimes motivated by prejudice relating to the victim's sex. Some of these respondents said that they thought specific legislation on misogyny was required to address the issue.

Other reasons given by small numbers of individual respondents for not extending the 2021 Act to cover the characteristic of sex were that they didn't believe it would be implemented in a gender-neutral manner or that they thought that the fact that the provision applied to the

characteristic of sex in a gender-neutral manner would encourage false or frivolous allegations.

A number of respondents used the comments section to address issues which relate to other questions in the consultation. For example, a small number of respondents said that it was important that the characteristic of sex be defined by reference to biological sex, birth sex or 'sex rather than gender' and a very small number of respondents said that it should be defined by reference gender rather than sex or that they did not support the provisions because they do not protect victims of transmisogyny

Half of the 10 individual respondents who stated that they supported extending the aggravation to cover the characteristic of sex but not the stirring up of hatred offence provided comments on their reasons.

These related to what they saw as its negative impact on the right to freedom of expression. Of these, two respondents said that they thought the offence risked criminalising what would otherwise be lawful speech and infringing on the right to debate. Three respondents stated that, while they did not think that the offence itself criminalised behaviour that ought to be lawful, there was a risk that vexatious or frivolous complaints could result in individuals wrongly being drawn into the criminal justice process, even if their behaviour would be unlikely to result in a criminal conviction.

Approach to addition of characteristic of sex to offence of stirring up hatred and aggravation of offences by prejudice

Application of freedom of expression provision

The consultation asked consultees if they were content for the provision concerning protection of freedom of expression at section 9 of the 2021 Act to be extended to cover the characteristic of sex.

There were 345 responses to this question, of which 323 were from individual respondents and 22 were from organisations.

The great majority of both individual respondents and organisation respondents supported the extension of the freedom of expression provision to the characteristic of sex.

Of the individuals who responded to this question, 303 (94%) supported the extension of the freedom of expression provision to the characteristic of sex while 20 (6%) did not. Of the organisations who responded to this question, 20 (91%) supported it, while 2 (9%) did not.

Support came from both a majority of those who favoured extending the 2021 Act to cover the characteristic of sex (292 out of 304) and those who were opposed to doing so (18 out of 28). All those respondents (11) who were of the view that the characteristic of sex should apply to the statutory aggravation but not to the stirring up of hatred offence were of the view that if the characteristic of sex were to be added to the stirring up of hatred offence, the freedom of expression protection provision should apply.

Organisation respondents

19 of the organisations who responded to this question used the comments box to provide reasons for their views. Of those who supported the extension of the freedom of expression provision to the characteristic of sex, a significant number specifically stated that they did so to ensure consistency with the other characteristics covered by the 2021 Act. A number of other issues were raised by small numbers of respondents. These included the importance of ensuring that the stirring up of hatred offence does not impinge on free discussion and debate of

controversial issues, the need for training of those working in the justice system to ensure that they had a consistent approach to what kinds of behaviour or communication are protected by the defence and the importance of the defence in protection of the right to religious freedom, particularly as regards the views of religions on the roles of women and men.

The two organisations which opposed the extension of the freedom of expression provision to the characteristic of sex made comments which actually related to their position on other matters. One stated that they did not support the addition of the characteristic of sex to the 2021 Act, while the other expressed concern that the stirring up of hatred offence sets too high a bar to allow for the prosecution of many forms of misogynistic behaviour which has the effect of encouraging hatred of women and girls.

Individual respondents

67 of the 303 individual respondents who responded to this question used the comments box to provide reasons for their views.

Among those respondents who supported the extension of the freedom of expression provision to the characteristic of sex, the most common reason which was given by around half of respondents, was that it was important to ensure that free expression is protected. This was emphasised particularly by those respondents who opposed extending the characteristic of sex to cover the offence of stirring up of hatred. A small number of respondents raised concerns about specific matters which they were concerned could be made more difficult to debate by the stirring up of hatred offence if it did not include provision protecting freedom of expression. These included the ability to discuss policy concerning single-sex spaces and biological sex differences.

Around half of the 20 individual respondents who opposed the addition of extension of the provision to protection freedom of expression to cover the characteristic of sex used the comments box to set out their reasons. As the total number of individual respondents who were opposed to its extension was small, the number of respondents who held this view for any particular reason was very small.

Issues that were highlighted by more than one respondent included that the protection of freedom of expression provision is not strong enough to actually protect freedom of expression, that it lacks clarity regarding

exactly what it protects (it was suggested that examples would help) or conversely, that it goes too far and could risk enabling those who are genuinely seeking to stir up hatred to escape prosecution.

Interpretive provision relating to characteristic of sex

The consultation asked consultees if they were content with the interpretive provision contained in the draft SSI relating to the characteristic of sex.

There were 356 responses to this question of which 326 were from individual respondents and 30 were from organisations. Of these, 304 (85%) stated they were content with the provision and 52 (15%) stated that they were not.

There was a significant divergence between the responses of organisations and individuals to this question. The great majority (88%) of individual respondents who answered this question were content with the provision contained in the draft SSI.

Of the organisations which responded to this question, there was a relatively even split between those organisations which were content with the provision (53%) and those which were not (47%).

Organisation respondents

29 of the 30 organisations who responded to this question provided comments setting out the reasons for the position they had taken.

Many of these comments directly referenced the decision of the Supreme Court in the case of *For Women Scotland v. The Scottish Ministers* on the meaning of the term “sex” in the Equality Act 2010. A number of those organisations which were content with the interpretive provision specifically welcomed the fact that the definition was consistent with the definition of ‘sex’ in the Equality Act 2010. A number referred to the fact that there is separate provision in the 2021 Act in relation to transgender identity and thought it was important that the characteristics of ‘sex’ and ‘transgender identity’ were defined in such a way as to ensure that they were treated as distinct. A small number of

respondents who supported the approach to the definition specifically noted that it is the perception of the perpetrator and not the identity or characteristics of the victim which determine whether an offence is aggravated.

Around half of those organisations which were not content with the interpretive provision stated that the Supreme Court's ruling was limited to the meaning of "sex" in the Equality Act 2010 and that there is no requirement for any SSI adding the characteristic of sex to the 2021 Act to adopt the definition for other purposes. Some of those who raised this issue expressed concern that the decision to do so could be seen as setting a precedent as to the meaning of the term in all contexts, while a small number used their consultation response to argue against the Supreme Court's decision in that case on its own terms.

A number of respondents argued that the interpretive provision sought to make an artificial distinction between the concepts of gender or gender identity and sex when, in the view of these consultees, they are intrinsically linked. These consultees argued that it was not possible to distinguish between hatred or prejudice based on a person's sex or their gender. Two organisations specifically raised concerns about the use of the term 'biological sex' in the provision, which they regarded as not being a term with a clear scientific meaning and one which they said was used mainly by people opposed to transgender rights.

A small number of respondents had concerns that the interpretive provision conflicted with, or risked interfering with, other provisions in the 2021 Act. They argued that because the interpretive provision is premised on the idea that everyone is of one of two sexes, it conflicts with the characteristic of 'variations in sex characteristics'. They also argued that there is a risk that the interpretive provision could be used to define the meaning of 'sex' in the context of the definition of the characteristic of 'sexual orientation'. They note that the term is not defined in that context and that the courts may therefore read the meaning of 'sex' provided for in the interpretive provision into that definition, meaning that sexual orientation would be read as applying exclusively to attraction to people based on their birth sex, irrespective of how the victim of an offence may define their sexuality.

Two organisations who were generally supportive of the approach taken to the draft interpretive provision were critical of the language used in the explanatory note to the draft SSI, which referred to "sex assigned at

birth”. They suggest that it is a person’s sex at birth, and not the sex which they are assigned at birth, which should be referred to, as they consider it is a person’s sex at birth, rather than the sex assigned to them at birth which may motivate perpetrators of hate crime.

One organisation highlighted what they saw as the importance of clear guidance being produced on how the characteristic of sex interacts with other characteristics covered by the 2021 Act.

Individual respondents

115 of the 326 individual respondents who responded to this question used the comments box to provide reasons for their views. Of those who were content with the provision and provided comments, a majority specifically welcomed that ‘sex’ was defined as referring to biological sex.

Of those who said they were content with the interpretive provision relating to the characteristic of sex, a small number stated that they thought that the explanatory note should refer to a person’s “sex at birth” rather than their “sex assigned at birth”.

Those respondents who were not content with the interpretive provision and provided comments set out a range of reasons for their views. A number considered that the term “biological sex” was either ill-defined and failed to appropriately address how the provision applies to people with variations in sex characteristics, or else stated that they disagreed with the adoption of the definition of sex in the Equality Act 2010, which some respondents stated was ‘divisive’.

A number of respondents said that they thought ‘sex’ should be defined by reference to gender identity rather than ‘biological sex’ or ‘sex at birth’. A small number said that this would be more inclusive because a trans person can experience hatred based on prejudice against their gender as well as their transgender identity and this would not be covered by either the transgender identity aggravation or the aggravation relating to the characteristic of sex.

A small number of individual respondents who said that they were not content with the provision raised a number of other concerns. A very small number stated that they were opposed to the 2021 Act as a whole, which they thought should be repealed, and a very small number of respondents also stated that they thought that the provision framed

women as victims and men as perpetrators. A very small number of respondents also used the comments section to express their view that there is no such thing as 'gender' as distinct from 'sex'.

Data collection provisions

The consultation asked consultees if they were content with the provisions concerning data collection in relation to the characteristic of sex.

There were 342 responses to this question of which 325 were from individual respondents and 17 were from organisations.

The great majority of both the organisations and individuals who responded to this question were content with the provisions concerning data collection. Of the 17 organisations which responded to this question, 15 (88%) were content with the provision and 2 (12% were not).

Of the 325 individuals who responded to this question, 295 (91%) were content with the provision and 30 (9%) were not.

Organisation respondents

15 of the 17 organisations which responded to this question provided comments setting out the reasons for the position they had taken.

Of those organisations that commented, a significant number specifically said that they supported the approach because it ensured that the recording of information about perpetrators and victims in cases involving the characteristic of sex is consistent with the other characteristics covered by the 2021 Act. A significant number highlighted what they saw as the importance of data collection to assist in evaluating the effectiveness of the 2021 Act and the scale and nature of hate crime.

A significant number of respondents referred to the question of what is meant by a victim or perpetrator's "sex" in the context of data recording. A small number of respondents specifically stated that it should be biological sex rather than gender, while one respondent said that both should be recorded.

A small number of respondents who were not content with the provisions on data collection, were concerned that it would or may require victims who are transgender or non-binary to provide information to the police about their biological sex. One of these organisations noted that this would be impractical given that it would be based on self-declaration, while the other noted that it was insensitive and would be an unjustified interference with their privacy.

Individual respondents

86 of the 325 individuals who responded to this question provided comments on the reasons that they were or were not content with the data protection provisions. Of those who did comment, 65 were content with the provisions and 21 were not content (as such, the 9% of individual respondents who were not content with the provision were much more likely to have made comments giving reasons for their position than the 91% who were content).

Of the 65 individual respondents who were content with the provision who commented, around half stated that in their view it was important that information about perpetrators' and victims' sex recorded their 'biological sex'. A number used their comments to emphasise what they saw as the importance of accurately recording information about perpetrators and victims to understand who is being targeted and by whom. A small number of respondents stated that they thought that where the sex and gender of a victim differed, both should be recorded. A small number of respondents referred to what they saw as the importance of implementing the recommendations of the Sullivan Review on recording of sex and gender.

Of the 21 individuals who were not content with the provision who commented, around a quarter made comments that suggested that they distrusted or questioned the reliability or usefulness of government-published statistics generally or regarded the collection of such information about victims as being intrusive. A small number of respondents were concerned that recording of information about victims must be done in a way that is inclusive of transgender and non-binary identity and one suggested that requiring a victim to disclose their birth sex amounted to a breach of the General Data Protection Regulation.

Three respondents used the comments section to express their opposition to hate crime law more generally.

Impact Assessments

Human Rights

The consultation asked respondents if they have any views on potential impacts of the proposals in this consultation on human rights. 150 respondents provided comments in response to this question. Of those, 26 were organisations and 124 were individual respondents.

Organisation respondents

To a significant extent, organisations' responses to the question concerning the potential impact of the SSI on human rights reflected their views on the principle of adding the characteristic of sex to the 2021 Act and the approach the draft SSI took to the inclusion of interpretive provision concerning the meaning of the characteristic of sex. Of the organisations that made substantive comments, around the same number considered that the SSI would have a positive impact on human rights as considered it would have a negative impact. One respondent highlighted a number of ways in which they thought the SSI could have both positive and negative impacts on human rights.

Around half of organisation respondents who stated that they considered that the SSI would have a positive impact specifically said that it would have a positive impact on the human rights of women and girls. Some of these highlighted either specific articles of the European Convention on Human Rights (ECHR) that would be positively impacted upon, or stated that they considered that the SSI is consistent with or supports the Istanbul Convention on Violence Against Women and Girls or the Convention Against all forms of Discrimination Against Women (CEDAW).

Among those who had concerns about the human rights impacts of the draft SSI, a significant number specifically highlighted what they considered to be negative impacts on the human rights of people who are transgender, who have variations in sex characteristics or who identify as non-binary. These concerns broadly reflect the issues these respondents raised in response to earlier questions in the consultation. Some expressed concern that the human rights of transgender people could be undermined by the fact that the approach to the definition of the characteristic of sex in the SSI relates to a person's birth-sex irrespective of how they themselves would self-identify. Other respondents raised

practical concerns that the data provisions could require a hate crime victim who is transgender, non-binary or has variations in sex characteristics to declare their birth sex to the police.

There were also some respondents who stated that they considered that the approach of adding the characteristic of sex to the 2021 Act doesn't sufficiently protect the human rights of women and girls. These respondents explicitly contrasted the policy with the Scottish Government's earlier commitment to legislate to implement the recommendations of the Working Group on Misogyny and the Criminal Law chaired by Baroness Helena Kennedy, which they considered would better address criminal misogynistic behaviour experienced by women and girls. A small number of respondents said that the gender-neutral approach of having the provisions apply to both women and girls and men and boys was in their opinion contrary to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the Istanbul Convention on Violence against Women.

Individual respondents

124 individual respondents provided comments on the human rights implications of the draft SSI. Of these, around half of respondents expressed the view that the policy provided for in the draft SSI would have a positive impact on human rights. Just under a quarter of respondents expressed the view that it would have a negative impact on the human rights of particular groups of people. A small number highlighted both positive and negative impacts that the draft SSI could have on people's human rights while just under a quarter of respondents offered views that could not easily be categorised. Some of these were comments to the effect that the respondent did not think that they were in a position to offer an informed view on the question while others were either offering views on how other characteristics covered by the 2021 Act impacted on human rights, or offering commentary on individual cases (some of which were civil cases that are not connected to the 2021 Act).

Of those respondents who expressed the view that the SSI would have a positive impact on human rights, the majority specifically expressed the view that it would improve the human rights of women and girls. A number of respondents expressed the view that the characteristic of sex should have been included in the 2021 Act when it was passed by Parliament and welcomed that it is now being included. A small number

of respondents specifically welcomed the fact that it would apply equally to women and girls and men and boys.

Of those respondents who expressed concern about the impact of the draft SSI on human rights, around half expressed concern about the impact that the draft SSI would have on the human rights of people who are transgender, non-binary, or have variations in sex characteristics. These concerns were similar to those expressed in response to questions 1, 3 and 4 above. Some expressed concern that what they saw as endorsement of the concept of “biological sex” undermined the rights of transgender people. Others expressed the view that the draft SSI conflicts with what they argue are the requirements of the Gender Recognition Act 2004 which they say requires the criminal law to treat transgender people in accordance with their lived sex, or were concerned that transgender victims of hate crime could be required to disclose their birth sex to the police as a result of the data recording requirement.

A number of individual respondents who thought that the draft SSI had a negative impact on human rights were of this view because of their opposition to the 2021 Act legislative framework. Some stated that they thought that the question of whether a crime was motivated by hatred based on a particular characteristic was not something the law should be concerned with, while others stated that they thought the 2021 Act should be repealed.

A small number of those who thought that the draft SSI would have a negative impact on human rights referred specifically to what they saw as its impact on freedom of expression. These concerns appear to relate principally to the stirring up of hatred offence and concerns that it could make it a criminal offence to express certain points of view.

Other points raised by very small numbers of respondents who thought that the draft SSI would have a negative impact on human rights included that they thought its effect would be ineffective in dealing with abuse of women and girls or that it would be enforced in a way that is discriminatory against men and boys.

Of the relatively small number of individual respondents who expressed mixed views on the impact of the draft SSI on human rights, the most common theme was that the respondent supported in principle the extension of the 2021 Act to cover the characteristic of sex, but thought that in order to avoid unintended consequences it was important that

there was a proportionate and non-discriminatory approach to policing of the law.

Impacts on Protected Characteristics

The consultation asked respondents if they have any views on potential impacts of the proposals in this consultation on the protected characteristics contained within the Equality Act 2010 (“the 2010 Act”). 139 respondents provided comments in response to this question. Of those, 21 were organisations and 118 were individual respondents.

Organisation respondents

Around half of organisations who commented on this question noted their support of the addition of sex to the 2021 Act and highlighted the importance of intersectionality in considering the impact the addition would have. Some noted that although separate in law, some protected characteristics of the 2010 Act can compound a person’s experience of violence or harassment, and that there can be a cumulative impact of such crimes on people’s intersecting identities. Some commented that of the protected characteristics in the 2010 Act, the most direct and positive impact of the regulations will be on women and girls, who face disproportionate hostility and abuse due to their sex.

Around a quarter of organisations who commented on this question thought that there would be negative impacts. These were concerns that the legislation wouldn’t go far enough to protect women and girls from gender-based violence, that it would negatively impact those who do not identify with their sex at birth, and that there may potentially be unintended negative consequences for the way in which characteristics such as sexual orientation are interpreted.

A small number of organisation respondents argued that they could foresee both positive and negative implications for protected characteristics. For example, one argued that while on one hand the definition of sex proposed in the draft SSI would not prevent trans people from having protection from crimes motivated by sex-based prejudice that aligns with their gender identity (as this would be determined by the motivation and perception of the offender), there is still a risk that using such a definition could undermine the lived experience of someone who is trans.

Individual respondents

Of the 118 individuals who provided comments in response to this question, around half referenced that they supported the draft regulations and that they would have positive impacts on existing protected characteristics. A number of respondents expressed that biological sex should be explicitly protected under hate crime laws, with a strong theme of the need to protect women and girls from sex-based hate crimes, violence, and harassment. Others refer to the Supreme Court ruling, arguing that adding sex to the 2021 Act aligns the hate crime legislation with existing legal frameworks. Some respondents emphasised that all protected characteristics should be treated equally, with none overriding another. Further, a number of respondents said that better data and clarity from including sex in the 2021 Act will help police and prosecutors identify and respond to hate crimes more effectively, which they expect to lead to improved policies and practices in tackling prejudice-based offending.

A number of respondents used this text box to state their opposition to hate crime legislation in general, or their opposition to the proposal to add sex to the 2021 Act, rather than providing comments specifically on the proposed impacts on protected characteristics. Some expressed that the addition of sex to the 2021 Act was inadequate to protect women and girls from harm, while others suggested the draft regulations prioritised women and girls.

A small number of respondents specifically referenced a need for intersectionality in considering protections under the 2021 Act generally. Some referenced the fact that a person could be targeted due to their sex, sexuality and age, and that women constitute a greater proportion of older age groups, meaning they are more likely to experience overlapping needs in relation to both sex and age, and therefore would benefit from the protections offered by the addition of sex to the 2021 Act.

A small number of respondents expressed concerns over what they regarded as the exclusion of trans people in the regulations. A dominant theme was that, in the view of those respondents, defining sex as "biological" excludes transgender individuals, particularly trans women, from legal protection. Those who held this view argued that this approach invalidates trans identities and undermines rights previously protected under the Equality Act 2010 and Gender Recognition Act

(GRA). Some of those who left comments to this effect expressed concern that this could result in an increase in discrimination, harassment, and violence against trans and gender non-conforming people.

Impacts on Children and Young People

The consultation asked respondents if they 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 (UNCRC). 94 respondents provided comments in response to this question. Of those, 14 were organisations and 80 were individual respondents.

Organisation respondents

Half of the organisations who offered commentary on this question mentioned that the regulations would have a positive impact on the rights and wellbeing of children and young people, with a significant number noting in particular the benefits the regulations would have for girls and young women. These respondents specifically highlighted Articles 2 and 19 of the UNCRC, noting that the regulations will positively impact girls being protected from violence and abuse and protected from discrimination.

A small number of respondents were generally supportive of the regulations and noted they would have a positive impact on children and young people, but had some reservations about the impact on, for instance, young trans people, or young people's right to freedom of expression.

A small number of respondents didn't think that the regulations themselves would negatively impact children and young people, but did have concerns with the draft SSI itself. For example, concerns were raised that the draft SSI doesn't go far enough to protect girls from misogyny, and that standalone legislation on misogyny would be preferable to adding sex to the 2021 Act.

Individual respondents

Of the 80 individuals who offered comments on this section, a majority said that they thought the draft SSI would result in positive outcomes for

children and young people. Of these, around half noted the regulations would have a positive impact on all children and young people, and a significant number noted there would be a positive impact specifically on girls.

A small number of individual respondents said they believed the regulations would have a negative impact on children and young people. The key concern raised by these respondents included opposition to the interpretative provision used in the draft SSI and therefore a worry that young people who are trans would be disadvantaged due to the way the SSI is drafted.

A number of respondents used the comments box to raise matters that did not appear to directly relate to the content or policy of the SSI itself. The majority of these were comments concerning teaching children about matters relating to gender identity.

Financial Impacts

The consultation asked respondents for any views that they had about the financial implications of the draft SSI. 11 organisations and 57 individuals provided comments in response to this question.

For the most part, comments were quite high-level and general, offering only views on whether they thought there would be a financial impact, and if so, whom it would have a financial impact on, rather than seeking to provide views or information on what exactly any costs may be.

Organisation respondents

Of the 11 organisations which responded to this question, 7 made substantive comments. Two of these organisations simply stated that they expected the draft SSI would, if implemented, impose only minimal additional costs on the justice system. Two respondents stated that they expected that it would impose additional costs both on the third sector in providing support to additional victims who may come forward, and to justice agencies if this results in additional investigations, prosecutions and convictions.

Two respondents highlighted what they saw as the importance of appropriate guidance and training being produced for justice agencies tasked with investigating and prosecuting the offence and cases to which

the aggravation applies. Two respondents noted that the addition of sex as a characteristic could have impacts for employers as such offences may occur in an employment context. One of these respondents suggested it would be helpful for there to be guidance to employers focusing on when they would be expected to report such matters to the police.

Individual respondents

A number of the comments made by individual respondents who were in favour of adding the characteristic of sex to the 2021 Act in response to the question about the financial impacts of the SSI expressed the view that the respondent did not think that there would be any financial implications. A smaller number of such respondents stated that the costs were, in their view, “irrelevant”, and expressed concern that costs may be used as a justification for not doing so.

The number of comments made by individual respondents who opposed the characteristic of sex being added to the 2021 Act was small. A number of these said that they did not think it was a good use of money, without specifying exactly what they thought that the costs would be.

Impacts on socio-economic inequality, island communities, privacy and data protection and the environment

The consultation asked respondents if they had 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. 47 respondents provided comments in response to this question. Of those, 7 were organisations and 40 were individual respondents.

Organisation respondents

Of the 7 organisations who provided comments on this question, 4 highlighted the potential risk of under-reporting in islands or remote areas due to stigma, limited anonymity, and service gaps, suggesting targeted outreach, training, and capacity-building for local authorities, schools and advocacy partners to combat this.

4 organisations noted the data protection aspect of the proposed policy, stating that the current requirements are robust if aligned with UK GDPR with gender-disaggregated and anonymised data where needed.

The theme of gender-based hate crime compounding existing socio-economic inequalities was mentioned by 3 organisations, who stated that women in poverty, insecure housing and/or caring roles may face barriers to reporting and redress.

No organisations highlighted any likely impact on the environment, but two organisations specifically mentioned that they perceived there would be little to no impact on the environment.

Individual respondents

Of the 40 individuals who left commentary on this question, A significant number stated that there would be positive impacts on socio-economic inequality, communities on the Scottish islands, privacy and data protection, or the environment. Of this group, a significant number said that they thought there would specifically be benefits for women from lower socio-economic groups, citing that this group of women are either more likely to be the victim of gender-based crime, or would otherwise find it more difficult to access justice for gender-based crime if the characteristic of sex was not added to the 2021 Act. A significant number of this group said that the draft SSI would have generally positive outcomes for those suffering poverty and inequality, and a small number said that they thought the draft SSI would result in better data captured on the extent of gender-based violence.

A number of respondents highlighted potential negative impacts, such as the potential over-criminalisation of “working class” men in particular and worsening socio-economic inequality of marginalised women and trans people. A number of other respondents noted that they didn’t perceive there to be any positive or negative impacts on socio-economic inequality, communities on the Scottish islands, privacy and data protection, or the environment.

The remainder of the comments were on topics that did not directly relate to the question about socio-economic inequality, communities on the Scottish islands, privacy and data protection, or the environment. These mainly reiterated points they had made in response to questions asked previously in the survey.

Appendix: Respondent Organisations

Amnesty International UK
Angus Women's Aid
Biology in Medicine
Engender
The Equality and Human Rights Commission
Equality Network/Scottish Trans (joint response)
The Equally Safe Edinburgh Committee
Evangelical Alliance Scotland
Feminist Legal Research and Action Network, University of Liverpool
For Women Scotland
The Free Church of Scotland
Girlguiding Scotland
Glasgow Violence Against Women Partnership
Grampian Regional Equality Council
The Institute of Chartered Accountants Scotland
JustRight Scotland
Law Society of Scotland
LEAP Sports
Lesbian Persistence
Lex Scotland CIC
LGBT Health and Wellbeing
Moray Violence against Women and Girls Partnership
Murray Blackburn Mackenzie
NASUWT
Rape Crisis Scotland
The Scottish Association of Social Work
Scottish Lesbians
The Scottish Women's Convention
Scottish Youth Parliament
TransActual
Women's Rights Network Scotland
Work Inclusivity Research Centre, Birmingham Business School
The Young Women's Movement
Zero Tolerance



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