Equality Network

Scottish Trans

By email from [redacted]@equality-network.org

Angela Constance MSP
Cabinet Secretary for Justice and Home Affairs
Scottish Government
St Andrew's House
Regent Road
Edinburgh
EH1 3DG
CabSecforJHA@gov.scot

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Dear Cabinet Secretary for Justice and Home Affairs,

Thank you very much for taking the time to meet with us to discuss the proposed SSI to add 'sex' as a characteristic to the Hate Crime and Public Order (Scotland) Act 2021.

The focus of our discussions was of course around our very serious concerns about the proposed interpretive provision for the HCPOA, that would define the new characteristic of 'sex' in terms of "biological sex".

Given how concerned we are about the proposals, we wanted to write to you to reflect on our discussions. We feel that these points are extremely important in considering whether to amend the definition before the SSI is laid at Parliament for approval - we strongly believe it should be amended.

No previous use of "biological sex" anywhere in legislation

As mentioned by one of your officials briefly during the meeting, there is no previous example of 'sex' being defined as "biological sex" in Scots criminal legislation, or in fact anywhere on the face of any UK legislation. We note that the House of Commons recently rejected a proposal to

define 'sex' in a similar way in the Data (Use and Access) Act 2025. It therefore seems wholly unpersuasive that the HCPOA would require that specific definition for the law to be clear and unambiguous, given that no other statutes use this definition.

Preventing an overlap between the characteristics of 'sex' and 'transgender identity'

You explained that the Scottish Government's view was that there were two clear purposes of the definition in this regard:

- To ensure that criminal justice agencies understood when to apply a 'sex' aggravator and/or when to apply a 'transgender identity' aggravator
- To ensure that there was not a complete overlap between the two characteristics (our recollection is that Scottish Government officials used the language of the approach being to ensure that the 'transgender identity' characteristic was not "totally subsumed" by the 'sex' characteristic).

On the first of these, this should be clear from the nature of an offence and can be clearly communicated to e.g. Police Officers as part of the training they receive on Hate Crime law. For example, if any woman, transgender or not, were to experience a physical assault on the street while a perpetrator made misogynistic comments – such as "I bet you want me to grab you don't you while you're out dressed like such a slut" then this would be a physical assault aggravated by sex-based prejudice. If, however, any woman, transgender or not, were to experience a physical assault on the street while a perpetrator made transphobic comments – such as "What do you think you're doing coming out of the house dressed like that you he-she freak" then this would be a physical assault aggravated by transgender identity-based prejudice.

On the second bullet point above, we remain entirely unclear about the Scottish Government's understanding of how their proposed definition prevents an overlap between the characteristics. As we discussed in the meeting, the concepts of 'sex' and 'transgender identity' are hugely interlinked and inter-related, and any definition of 'sex' that is used will overlap with the 'transgender identity' characteristic.

Using the example provided above demonstrates how a trans woman, if she was the victim in each scenario, would have distinct protections from both types of prejudice (as indeed would any woman). This is not achieved by insisting on using a definition of 'sex' that excludes trans people from being recognised in-line with their gender identity, and explicitly disapplying the Gender Recognition Act 2004, but by the distinction between a crime being committed that is motivated by prejudice towards women (or men) or that is motivated by prejudice towards trans people. Of course, sometimes a crime may be motivated by both.

This is why we suggested in our submission to the Scottish Government's consultation on the proposed SSI that an alternative definition to the one proposed, that would still maintain distinct protections in law for crimes motivated by sexism as opposed to crimes motivated by transphobia, is:

"(9) A group defined by reference to sex is a group of persons defined by reference to—

(a) their sex being female (that is, they are women or girls), or

(b) their sex being male (that is, they are men or boys),

and references to sex are to be construed accordingly."

Such a definition would maintain all of the intended policy outcomes of the Scottish Government's proposals to add 'sex' as a characteristic to the HCPOA, without relying on what is in our view an unnecessary and harmful extension of the Supreme Court's use of "biological sex" in its April ruling, which they were specifically clear applied only to the Equality Act 2010.

Necessity for a clear and unambiguous definition of 'sex'

However, if the Scottish Government does insist on defining 'sex' in a way that explicitly excludes trans people from recognition in-line with their gender identities, we do not consider that the proposed definition is at all clear or unambiguous. As we discussed during our meeting, the Supreme Court did not provide a clear definition for the term "biological sex" in For Women Scotland vs. Scottish Ministers.

However, to the extent that they did define it, they did so as the "sex of a person at birth" and assumed that there were only two options – male or female.

There is no 'legal sex' until registered, it is in the assigning. This is what makes 'sex' unambiguous in the eyes of the law, despite the fact that biology is not so. This is clearly acknowledged in the Scottish Government's own Policy Note on the draft SSI, where at paragraph 18 it says "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."

Incoherence between the existing 'variations of sex characteristics' characteristic and proposed 'sex' characteristic

As we discussed in the meeting, we think that the conflict between the 'variations in sex characteristics' (VSC) characteristic, and the proposed definition for the 'sex' characteristic, will in fact introduce ambiguity into the legislation. It is completely contradictory to have, in the same law, one characteristic that defines malice and ill-will towards people because they are "born with physical and biological sex characteristics which, taken as a whole, are neither those typically associated with males, nor those typically associated with females" and another characteristic that defines malice and ill-will towards people because of their "biological sex", where this is defined in a wholly binary way as "their biological sex being female, or their biological sex being male" and that this means their "sex at birth". Existing section 11(8) of the HCPOA contradicts proposed section 11(9) and (10).

We note that Robin Allen KC discussed related issues in his analysis of the Supreme Court ruling for a recent Discrimination Law Association Briefings paper. He highlights "This is why I think it is important to ask whether our domestic binary approach to sex continues to be appropriate or whether we need to think harder about this." within the context of a growing understanding of intersex people, and explicitly mentions Scotland's recognition of intersex people in hate crime legislation as an example of evolving legal recognition of intersex people in UK law: https://discriminationlaw.org.uk/assets/documents/DLA-Briefings-vol-85-1127-1139-July-2025-PDF-version.pdf (pages 10-12).

In short, the existence of people with VSCs, already recognised in the HCPOA, demonstrates that both "biological sex" and "sex at birth" is not

a simple characteristic that takes a value of either 'female' or 'male' for all people, but that things are more complex. This is why, as we suggested in our response to the Scottish Government consultation on the proposed SSI, we believe that at the very least the definition should be changed to explicitly acknowledge that what is being referred to is the sex that someone was assigned at birth (which is also the language that is used in the Scottish Government's policy note to accompany the proposed SSI). As we noted above - it is the assigning and registering that allows someone a 'legal sex'. This is a much more clear and unambiguous definition.

As the Scottish Government's policy note rightly sets out at paragraph 18, groups defined as those who were assigned female at birth or assigned male at birth includes everyone. This is not the case for groups defined as those whose "biological sex" is either male or female, where this is their 'sex at birth'.

Alternatives to using the language 'assigned at birth' might be to use 'registered at birth'.

Section 11(9) and (10) would then read something like:

"(9) A group defined by reference to sex is a group of persons defined by reference to–

(a) their sex registered at birth being female, or

(b) their sex registered at birth being male,

and references to sex are to be construed accordingly.

(10) In this section "sex registered at birth" means the sex specified on a person's birth certificate, discounting the effect of any gender recognition granted to them under the Gender Recognition Act 2004."

<u>The contrast between the Scottish Government's stated position on the Supreme Court ruling and their commitment to human rights, and the decision to take this approach</u>

As we raised with you at the meeting, we feel that the proposed definition runs contrary to the Scottish Government's reassurances that the government does not want to extend the effects of the Supreme Court ruling into areas of policy and law that it does not directly affect. This includes reassurances provided to us directly by the Cabinet Secretary for Social Justice, Shirley-Anne Somerville MSP, and Minister

for Equalities, Kaukab Stewart MSP, in a meeting that we attended alongside colleagues from the LGBTQIA+ equality and human rights sector the day prior to our meeting with you.

In addition, on the weekend following our meeting we noted that the First Minister published his support for the European Convention of Human Rights in the run up to the 75th anniversary of its signing.

We were pleased to see him highlight the role that the ECHR has played in protecting and progressing the human rights of LGBTI+ people, and welcomed his comments that:

> "The ECHR has been critical in securing justice for ordinary people in their everyday lives – including protecting freedom of religion in the workplace and supporting LGBT rights. With some increasingly extreme political voices advocating against these rights, I believe it is vital that those of us who believe in human rights and equality redouble our efforts to stand behind them."

We find the proposal to use the definition from April's Supreme Court judgment in this SSI to be completely out of step with the overall response and tone from the Scottish Government following the judgment, and indeed the government's wider publicly stated commitments to protecting and progressing the human rights of everyone. The Gender Recognition Act was of course a result of a European Court of Human Rights Case that found the UK was breaching trans people's Article 8 rights. It is the most significant piece of legislation in the UK dedicated solely to promoting the human rights of trans people.

Given that the Supreme Court judgment applies, quite explicitly, only to the Equality Act, and that human rights expertise indicates the SC ruling may place the UK in breach of the ECHR, we suggest that it would be most unfortunate for the Scottish Government to, at this time, write the term "biological sex" into legislation in another area of law altogether.

Furthermore, Scotland would become the only part of the UK to write "sex = biological sex" into legislation – a move that runs completely counter to Scotland's previous well-deserved reputation for being the UK leader on LGBT+ equality.

We are extremely concerned that the Scottish Government's proposed actions would be departing significantly from the government's previous words – calling into question the government's ongoing commitment to the human rights of trans people.

Yours sincerely,

[redacted]
Equality Network Chief Executive

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Manager, Equality Network