

Scottish Government
SSI to add "sex" as a characteristic to the Hate Crime and
Public Order (Scotland) Act 2021
10 October 2025

Introduction

NASUWT welcomes the opportunity to comment on the SSI to add "sex" as a characteristic to the Hate Crime and Public Order (Scotland) Act 2021 consultation.

NASUWT is the Teachers' Union, representing teachers and school leaders in all sectors of education and across all 32 local authorities in Scotland.

Questions

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?

In 2022, NASUWT proposed the following motion to STUC Women's Conference, which was first discussed and agreed through our National Officers and Executive Committee structure:

Misogyny in Schools

Conference is deeply concerned about the level of misogyny that is faced by women, trans and non-binary staff and pupils on a regular basis.

Conference asserts that all women and girls in educational settings have an inalienable right to be afforded safety, security and respect at all times and to not be exposed to derogatory comments, actions and communications that lead to them feeling and being unsafe whilst at school.

Conference further asserts that, in too many workplaces, misogyny is institutional as evidenced in the many high-profile cases reported in the press.

Conference calls on the STUC to continue to campaign against all forms of sexual harassment and misogyny and to:

(i) support and promote the recommendations of the working group on Misogyny and Criminal Justice for the creation of new criminal law provisions in four areas;

- (ii) work with relevant bodies to produce comprehensive policies in order to protect women and girls against violence, misogyny, assault, harassment and sexism;*
- (iii) work with organisations that are campaigning against any groups that promote hatred of women and others;*
- (iv) campaign to make it compulsory for schools to explicitly teach pupils and students about misogyny and misogynistic attitudes;*
- (v) lobby for fully-funded mental health and wellbeing programmes and further investment in mental health services, with a priority on early intervention; and*
- (vi) continue to raise the profile of misogyny and sexual harassment with affiliates and urge the importance of reporting to employers any incidences experienced or witnessed.*

Looking at the recommendations¹ of the Misogyny and Criminal Justice Working Group which are referenced in the motion, they state:

¹ <https://www.gov.scot/publications/misogyny-and-criminal-justice-working-group-recommendations-scottish-government-response/>

‘The report recommends the creation of new criminal law provisions in four areas. Three of these are new offences criminalising specific forms of misogynistic conduct and the fourth is the creation of a new sentencing aggravation to address the spectrum of misogynistic conduct.

These new items of criminal law are the creation of:

a new statutory aggravation to relate to misogynistic conduct where a crime such as assault, criminal damage/vandalism or threatening or abusive behaviour is aggravated by misogyny

a new offence of stirring up hatred against women

a new offence of public sexual harassment of women, and

a new offence of issuing threats of, or invoking, rape or sexual assault or disfigurement of women and girls online and offline

The report does not recommend adding a sex characteristic to the Hate Crime and Public Order (Scotland) Act 2021’

So the proposed SSI is problematic given its insistence on defining biological sex: it goes against our agreed policy, set out in the motion above, and is also inconsistent with the NASUWT position following the Supreme Court judgement.

This proposal appears to be yet another knee-jerk approach by Government, which is attempting to use the Supreme Court ruling to provide a legal definition of ‘Sex’ in an area that is not needed. Defining ‘Sex’ for the purposes of Scottish hate crime law will not provide greater protections for women against sexism and misogyny: it also excludes and ignores the lived experiences of non-binary people, as well as entrenching the exclusion of trans people.

The Supreme Court ruling is being challenged in November, but the Scottish (and Westminster) Government’s interpretation of it (and probably that of the gender-critically loaded EHRC guidance) goes beyond what the ruling actually said. The formal guidance from Governments has not been concluded and there is a challenge in place. While the EHRC has provided its updated draft

Code of Practice to the Minister for Women at the Westminster Parliament, it will still need Parliamentary approval. NASUWT's position remains in line with the STUC and TUC.

There was no need to move from the recommendations, which were accepted at the time, of the report of the Misogyny and Criminal Justice Working Group.

There is no clear evidence from other countries that have adopted this method that it is an effective way to protect women. Many third sector organisations have raised concerns that adding 'sex' to hate crime law, as opposed to having a specific piece of legislation that intends to protect women from the many forms that misogyny takes, creates a gender-neutral approach that will allow some men to make vexatious complaints against their partners, perhaps as part of coercive behaviours and methods of coercive control within domestic abuse situations. A gender-neutral approach sees men and women covered in the same way. There is no evidence that men experience hate due to their sex/gender. A gendered approach, that is a women-centred approach, such as was proposed by the expert group on Misogyny and the legislative proposals consulted on at the time would have ensured that this would not be the case. The Misogyny Bill also would have covered many other forms of misogynistic behaviour that this SSI will not cover.

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?

We do not agree with the proposed extension to the characteristic of sex (see question 1 for further details).

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

NASUWT notes that the Scottish Government is proposing defining sex as “biological sex” with proposed wording as: “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.”

There is no requirement for the Scottish Government to use the definition from the Supreme Court ruling which dealt only with the Equality Act 2010. There are already protected characteristics in hate crime law that are defined differently from the Equality Act, protected characteristics such as sexual orientation and disability.

There is no way to define ‘sex’ that does not overlap with the definition of ‘transgender identity’. The two concepts are completely interlinked – in many ways transphobia is a manifestation of sexism – it is about the view that certain gender identities and gender expressions are unacceptable. Indeed, there is a contradiction between protecting intersex people from hate crime and defining sex in line with the Supreme Court ruling as simply biologically female or biologically male at birth: this could also put gender non-conforming people and women at risk from police or personal searches.

The Supreme Court ruling is already causing substantial harm to trans people, which will only get worse, and copying it into legislation will only justify and encourage those harms. Cis and trans woman share a common cause and experiences of misogyny and sexism. NASUWT supports the right of trans people to be recognised and seen as who they truly are.

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

See response to question 3.

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

NASUWT's view is that individuals have the right to self-identification and self-determination and the right to assert their gender identity free from fear, intimidation or penalty.

No-one should be the subject of personal attacks as a result of how they choose to assert their gender identity and neither should they be forced to adopt or comply with an externally ascribed view.

Trans and non-binary people are entitled to the same human rights as everyone else: please see further details in questions 1 and 3 above.

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?

There is also a risk that by defining sex in this way, the existing protected characteristic of 'sexual orientation', which also refers to sex in its definition, will be impacted: it will change the meaning of that characteristic in a way that does not reflect how many LGBTI people define their own sexual orientation.

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?

N/A

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

N/A

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?

N/A

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NASUWT is happy for this response to be published with our name and to be contacted again by the Scottish Government in relation to this consultation exercise. We confirm that the privacy policy has been read and consent to the data we have provided being used as set out in the policy.