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CSW Communications Procedure  
Commission on the Status of Women  
[cp-csw@unwomen.org](mailto:cp-csw@unwomen.org)

01 August 2021

**BY EMAIL ONLY**

Dear Sir/Madam,

We provide the following information by way of evidence relating to allegations of human rights violations affecting the status of women and girls in Scotland.

**1. Context**

- 1.1. The Scottish Government is the devolved government for Scotland (one of the four nations in the UK, ie. England, Wales, Scotland and Northern Ireland) and has a range of responsibilities that include: healthcare, education, rural affairs, justice, transport, sport and the arts, local government and some taxation and social security elements. Certain powers are reserved to the UK Government: defence, foreign affairs, immigration, trade policy, constitution, broadcasting, and equal opportunities.
- 1.2. In recent years the Scottish Government has taken a number of steps that are detrimental to women and girls as a group who are protected from all forms of discrimination on the basis of sex, as defined in international and European human rights law, as well as UK equality law. Some of those steps are acts of omission and negligence that has resulted in the erosion of the protections of women and girls from sex-based discrimination, whereas others are active steps towards the elimination of such protections.
- 1.3. For Women Scotland is a grassroots women's rights organisation composed of ordinary women from across Scotland: the primary motivation for forming was concern about the Scottish Government's proposal to reform the Gender Recognition Act 2004 and the potential impact on the hard won rights and protections for women and girls.

## 2. Status of women and their human rights to participate in political and public life and the enactment of positive measures in the Gender Representation on Public Boards Act

- 2.1. According to a report by Engender<sup>1</sup> 35% of public bodies are headed by a woman. However, it is impossible to know if this number is correct as public bodies, in the main, no longer collect statistics based on sex and have, along with the Scottish Government, failed to adhere to their Public Sector Equality Duty<sup>2</sup> to monitor for discrimination based on the protected characteristic of sex.
- 2.2. In 2018, the Scottish Parliament passed the Gender Representation on Public Boards (Scotland) Act<sup>3</sup> (GRPBA), aimed at improving the representation of women on the boards of Scottish public bodies. The Act was introduced to redress historic under-representation of women on these boards by setting an objective for the non-executive member component in order to achieve 50% female representation. The Act places duties on public authorities, appointing persons, and Scottish Ministers in connection to their role in achieving the gender representation objective. The Statutory Guidance was published on 29 May 2020.<sup>4</sup>
- 2.3. Originally, the Scottish Government proposed that its 50% objective would be for those who are "female or who identify as female"<sup>5</sup>, but after a public consultation this was changed to "women" when the Bill was introduced to Parliament in June 2017.<sup>6</sup> According to the Policy Memorandum, "*this step was taken to ensure that the Bill reflects the protected characteristic of sex in the Equality Act 2010*".<sup>7</sup>
- 2.4. However, during Stage 2 of the legislative process, following representations from Scottish Trans Alliance<sup>8</sup>, an amendment was laid to change the definition of "woman" to include "*a person who has the protected characteristic of gender reassignment (within the meaning of section 7 of the Equality Act 2010) if, and only if, the person is living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female*".<sup>9</sup>
- 2.5. This amendment was unanimously agreed by the Committee and incorporated into the Bill without a Parliamentary debate or vote.<sup>10</sup>
- 2.6. The Statutory Guidance, as drafted, expanded on the definition of "woman" and set out examples of what would be regarded as evidence that the person was 'living as a woman': "*This would not require the person to dress, look or behave in any*

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<sup>1</sup> [Sex & Power in Scotland 2020, Engender](#)

<sup>2</sup> [Public Sector Equality Duty](#)

<sup>3</sup> [Gender Representation on Public Boards \(Scotland\) Act 2018](#)

<sup>4</sup> [Gender Representation on Public Boards \(Scotland\) Act 2018: statutory guidance - gov.scot](#)

<sup>5</sup> Page 10, [A Scottish Government Consultation on the Draft Gender Representation on Public Boards \(Scotland\) Bill](#)

<sup>6</sup> [Gender Representation on Public Boards \(Scotland\) Bill, as introduced](#)

<sup>7</sup> Page 15, [Policy Memorandum on Gender Representation on Public Boards \(Scotland\) Bill](#)

<sup>8</sup> Paras 20 and 50, [Stage 1 report on the Gender Representation on Public Boards \(Scotland\) Bill](#)

<sup>9</sup> [List of Amendments for Stage 2, Gender Representation on Public Boards \(Scotland\) Bill](#)

<sup>10</sup> Page 6, [Equalities and Human Rights Committee](#), 21 December 2017

*particular way. However, it would be expected that there would be evidence that the person was continuously living as a woman, such as – always using female pronouns; using a female name on official documents such as a driving licence or passport, or on utility bills or bank accounts; describing themselves and being described by others in written or other communication using female language...The Act does not require an appointing person to ask a candidate to prove that they meet the definition of woman in the Act.”<sup>11</sup>*

- 2.7. The Scottish Government held a public consultation on this draft Statutory Guidance in 2019 which received over 300 responses, the majority of which focused on the terminology, more specifically the definition of “woman”, the confusion of the different protected characteristics of “sex” and “gender reassignment”, the exclusion of women who did not meet the “living as a woman” criteria, and the undermining of the purpose and value of the Act.<sup>12</sup>
- 2.8. Despite a specific question in the consultation asking respondents’ views on the terminology, the Scottish Government initially claimed the responses were outwith the scope of the consultation and then decided to disregard them on the basis that they contradicted a predetermined Government “policy”<sup>13</sup> - a policy that the Government is unable to provide a written copy of in response to a Freedom of Information request.
- 2.9. For Women Scotland (FWS) believe that this Act, which was intended to address historical under-representation of women on public boards, is fundamentally flawed and the Scottish Ministers acted unlawfully and in contravention of their duties under reserved UK equality legislation which led to the Scottish Parliament exceeding its legislative competency in redefining “woman”. This wholesale redefinition of women was done at the request of the registered lobby group, Scottish Trans Alliance (the ‘project’ of the organisation Equality Network), and without public consultation or full and proper Parliamentary debate or scrutiny.
- 2.10. Following a successful crowdfunder FWS sought a Judicial Review on this Act on the basis that:
  - The Scottish Parliament has acted outwith its legislative competence by confusing the distinct protected characteristics of "sex" and "gender reassignment". The UK Equality Act only allows for measures for those persons who share a protected characteristic, not for merging elements of different protected characteristics.
  - The redefinition of "woman" includes persons who may self-identify as women, but who the Equality Act would characterise as male. It also excludes persons who would be characterised as female, ie. those women who self-identify as men.

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<sup>11</sup> [Gender Representation on Public Boards \(Scotland\) Act 2018: consultation on implementation - gov.scot](#)

<sup>12</sup> [Gender Representation on Public Boards \(Scotland\) Act 2018 implementation: consultation analysis](#)

<sup>13</sup> Paras 15-22, [Freedom of Information release on GRPBA consultation results](#)

- The redefinition of "woman" goes against the very grain of the Equality Act 2010 and decades of anti-discrimination law.
- The GRPBA is incompatible with EU law, which only makes provision for the possibility of workplace-related "positive action" in relation to inequality between the sexes.
- Scottish Ministers failed to assess the impact of applying the new law on the need to advance equality between women and men, or consider the need to foster good relations.

2.11. Unfortunately, the Court of Session ruled with the Scottish Ministers in March 2021<sup>14</sup> and FWS are currently engaged in appealing the decision. The substantive hearing is scheduled for 03 November 2021.

2.12. It is of additional concern that the Ministers' legal representatives argued, contrary to the United Nations definition of sex as biological and the clear statement that discrimination against women is on the basis of sex in Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>15</sup> that the GRPBA is compliant with CEDAW in being inclusive of men who self-identify as women (and exclusive of natal women with a trans identity). Given the Scottish Government's intention to incorporate CEDAW into Scots law, the repercussions from their flawed interpretation will be detrimental and harmful to women's rights.

2.13. Also in the course of the hearing, it was revealed that Government policy is that *"transgender women are to be treated as non-transgender women unless to do so would otherwise be prohibited by law"*.<sup>16</sup> ie. a man who self-identifies as a woman is to be deemed a woman. This contravenes the current (devolved to Scotland) Gender Recognition Act<sup>17</sup> which specifies a two year process and the requirement of a medical diagnosis of gender dysphoria prior to making an application to obtain a Gender Recognition Certificate for a person to be recognised, for most purposes in law, as the opposite sex.

2.14. It was also stated in court that the GRPBA, with its definition of women, was an implementation of that policy.

2.15. There is no public record of this policy being formulated, Freedom of Information requests can elicit no Government record of it, there has been no public consultation, no evidence gathering, no debate, no impact assessment - all of which contravene the Government's Public Sector Equality Duty and 2012 Specific Duties Regulations.<sup>18</sup>

2.16. This policy is almost certainly the one referred to in paragraph 2.8 above, which resulted in the rejection of the submissions of hundreds of women to a public

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<sup>14</sup> [Judicial Review Opinion](#)

<sup>15</sup> [Convention on the Elimination of All Forms of Discrimination against Women](#)

<sup>16</sup> [The Scotsman, 07 January 2021, Scottish Government can 'ride roughshod' over equalities law in row over definition of women in new Act'](#)

<sup>17</sup> [Gender Recognition Act 2004](#)

<sup>18</sup> [Technical Guidance on the Public Sector Equality Duty Scotland](#)

consultation, and who were thus denied any input into what was supposed to be a democratic process.

- 2.17. Public support for the legal challenge on the GRPBA is high, with almost £175,000 raised to-date to fund legal costs.<sup>19</sup> This is against the backdrop of the Equality and Human Rights Commission in Scotland<sup>20</sup> - the independent body responsible for upholding equality and human rights laws - failing to take any action to hold the Government to account, or even to participate in the legal case when petitioned. This is especially galling as it was this body who first warned the Scottish Government of the likely unlawfulness of the GRPBA.<sup>21</sup>
- 2.18. Reform of the Gender Recognition Act is currently a heated topic of public debate in Scotland and the Government's recent proposals to remove the requirement for a medical diagnosis of gender dysphoria and make legal change of sex a matter for self-identification have been delayed due to Covid-19. However, it is concerning that, in the meantime, the GRPBA has been used to bring in self-identification of sex by the back door. We believe this has encouraged similar misuses of the protected characteristic of sex in other legislation that has been laid before Parliament, for example in the collection of data on sex in the national census which will be on the basis of self-identification (see Section 4 below), and the possibility of the definition of sex changing should it be added as a characteristic to the Hate Crime and Public Order Act.<sup>22</sup>
- 2.19. The implications of the GRPBA extend beyond Scotland as, if it becomes established that devolved legislatures can amend key terms in the UK Equality Act via other pieces of legislation, then other countries within the UK may follow and the Equality Act will ultimately be undermined.

### **3. Status of women and their human rights to participate in political and public life and the enactment of positive measures in All-Women Shortlists**

- 3.1. The political participation of women in Scotland has not yet achieved full equality, and, as such, still requires positive temporary measures to ensure women's equal participation in the Scottish Parliament. In 2016 only 45 women were elected as Members of the Scottish Parliament (MSP), representing 35% of Scotland's 129 MSPs. In the 2021 election the number of women MSPs rose to 58 (45%).
- 3.2. In preparation for the May 2021 election the executive committee of the Scottish National Party (SNP) - Scotland's largest political party and the party of Government - decided to use the positive measure of all-women shortlists (AWS) for the selection

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<sup>19</sup> [Stop the Scottish Government redefining "woman" to include men - www.crowdjustice.com](https://www.crowdjustice.com)

<sup>20</sup> [Equality and Human Rights Commission](https://www.equalityhumanrights.com)

<sup>21</sup> [EHRC response to the Scottish Government Consultation of the Draft Gender Representation on Public Boards \(Scotland\) Bill](https://www.equalityhumanrights.com)

<sup>22</sup> [Letter to Delegated Powers and Law Reform Committee](https://www.equalityhumanrights.com)

of candidates in the eight constituencies where the sitting MSP was retiring or standing down from the position.<sup>23</sup>

- 3.3. AWS are legislated for by Part 7, s104 of the Equality Act 2010,<sup>24 & 25</sup> and are clearly based on the protected characteristic of sex, defined according to biology in the same Act,<sup>26 & 27</sup> and not by self-declared gender identity or by holding the separate protected characteristic of gender reassignment.
- 3.4. Despite this, in at least two of the constituency areas male candidates were accepted onto AWS on the basis of their self-identification as women. Not that it should make any difference, but both candidates are believed not to hold a Gender Recognition Certificate - one certainly confirmed this in media interviews.
- 3.5. This was a deliberate decision by the SNP to once again implement their undemocratic and unevidenced policy that men who self-identify as women are women, despite the fact this does not comply with the Gender Recognition Act or the Equality Act. (See paragraphs 2.13 - 2.16 above for how this policy was discovered).
- 3.6. Women in the constituencies who raised the breach of AWS laws were ignored and the national regulator, the Electoral Commission, said that it was not within their remit to investigate. Therefore, FWS addressed these violations in a solicitor's letter to the SNP,<sup>28</sup> requesting that immediate steps were taken to comply with the terms of the AWS in the Equality Act, in the hope that the matter would be resolved without the need to initiate legal action. The SNP failed to respond.
- 3.7. In the end, neither of the male candidates were selected from the shortlists to represent the constituencies at the Scottish election, and the two women who were selected, and fortunately not displaced, went on to become MSPs at the Scottish Parliament.
- 3.8. It remains concerning that the SNP had no checks or monitoring in place to ensure their compliance with the principle of equality between the sexes and the positive measures legislated to achieve this for women. The ease with which they replaced the legal definition of "woman" with their own definition to include males is quite frightening, along with their refusal to discuss the matter or be held accountable. Having flouted the law with no repercussions it is likely that at the next election the same situation will occur, with claims that a precedent has already been set.

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<sup>23</sup> [The National, 16 October 2019, "SNP plan to have all-female shortlists for 2021"](#)

<sup>24</sup> [Equality Act 2010, Part 7, s104](#)

<sup>25</sup> [Equality Act 2010, s104 Explanatory Notes](#)

<sup>26</sup> [Equality Act 2010, Definition of Sex](#)

<sup>27</sup> [Equality Act 2010, Definition of Woman](#)

<sup>28</sup> [Letter to SNP re AWS](#)

#### 4. Women's rights to accurate data collection on sex in the national census

- 4.1. In 2018 a draft bill on the proposed (later delayed) 2021 Scottish Census was introduced. Provision was made for additional questions on sexuality and gender identity which were universally supported. However, of concern to women's organisations was the proposal to undermine the integrity of the sex question by allowing a third "non binary" category to be introduced and guidance which would have permitted the sex question to be answered based on self-identification of gender, meaning that, in effect, there would be two questions based on self-identified gender and none on sex.
- 4.2. A question on sex has been asked in the Census - which remains the gold standard in data collection - since 1801. Recording information on sex is vital: for planning medical services and treatment, to mitigate discrimination in recruitment and promotion, measure pay gap, tackle and record male violence, selective abortion, infanticide, FGM, participate in fair and safe sporting activity, and much more.
- 4.3. The Parliamentary Committee charged with considering the draft bill on the census took evidence from a range of expert witnesses, including Professor Rosa Freedman who said: *"At international level, the law remains that sex relates to biology. Sex is about chromosomes, gonads and genitalia. Therefore, under international human rights obligations—whether it is the Convention on the Elimination of All Forms of Discrimination against Women or the European convention on human rights—the definition of sex relates to biology. To suddenly turn the definition around and have male, female and another category, or to define sex as gender, would go against the law. If we want to change the law, the way to do it is not through conflating two things in a bill; we would need to go through the processes of changing the law."*<sup>29</sup>
- 4.4. They also heard from Prof Susan McVie who said: *"From a research point of view, we know that certain conditions—medical conditions, for example—are sex related. Regardless of a person's gender identity, there are certain medical conditions that they will be more likely to face depending on whether they were born a man or a woman. We also know—this is probably more to do with my area—that certain social processes are differentiated for men and women. There are sex-related biases, discriminations and forms of inequality that do not necessarily go away if a person changes their gender identity."*

*It is important to distinguish between sex, on the one hand, and gender identity, on the other, in order for us to understand, for example, whether trans women have worse outcomes than cis women and whether trans men have worse outcomes than cis men. If we are to properly understand the relationship between sex and gender identity and how that impacts on factors such as health, the likelihood of getting a*

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<sup>29</sup> [Professor Rosa Freedman, Official Report - Parliamentary Business](#)

*job and attainment in education, we need to disentangle those things so that we can have a much clearer picture.*<sup>30</sup>

- 4.5. Professor McVie also said of the guidance notes in the 2011 consensus which had allowed for the possibility of self identification that *"I think that the General Register Office for Scotland got it wrong when it redesigned the census in 2011 and conflated sex and gender identity into one question. We are now trying to disentangle those things. Arguably, the measure of sex in the 2011 census data is not accurate."*
- 4.6. The Committee also took account of representation from professional and academic statisticians<sup>31</sup> who wrote to urge the importance of reliable data. They concluded that the sex question should remain consistent with scientific consensus and UK law as defined in the Equality Act and record biological or legal sex.<sup>32</sup> However, this was resisted by National Records Scotland (NRS) who took advice from the Government funded lobby groups pressing for the question to remain one of self-identification.
- 4.7. The NRS and the Minister, Fiona Hyslop, preferred to rely on a letter signed by academics who were not experts in working with data populations. As MBM Policy concluded, it raised questions about how *"far the Scottish Government feels obliged to research any representations put to it, and how far it weights these not by evidence of expertise, but by how far they align with what it wishes to hear"*.<sup>33</sup> As the Scottish Government has a policy which runs counter to preserving and upholding the legal definition of "woman" (see 2.13), the implications for proper scrutiny of the effect of eroding the quality of data is concerning.
- 4.8. This problematic approach to data collection, irrespective of the impact on the monitoring of women's rights or making provision for services, was highlighted in the Draft Guidance from the chief statistician<sup>34</sup> which was similarly politically informed rather than reflecting Equality Law or statistical need. Despite citing the World Health Organisation, the Royal Statistical Society, and the USA Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys who **all** state that sex refers to biological characteristics, the Draft incorrectly introduced a statement that this objective and biological classification can instead be an emotional feeling.<sup>35</sup>
- 4.9. The Draft Guidance cited Public Sector Equality Duty which requires employers to collect data on the protected characteristics of employees in order to eliminate harassment and discrimination, to advance equality, and to foster good relationships between protected groups. In UK equality law, one of those characteristics is sex.
- 4.10. Despite this, they concluded that, in the absence of medical need, data collection by Scottish Government and Public Bodies should not be asked saying "Questions

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<sup>30</sup> [Professor Susan McVie, Official Report - Parliamentary Business](#)

<sup>31</sup> [Letter from statisticians to the Committee re the census](#)

<sup>32</sup> [Stage 1 Report on the Census \(Amendment\) \(Scotland\) Bill](#)

<sup>33</sup> [MBM Policy: A tale of two letters: whose views count?](#)

<sup>34</sup> [Working Group on Data Collection on Sex and Gender - Draft Guidance](#)

<sup>35</sup> [Draft guidance on collecting sex and gender data - FWS feedback](#)



*about a person's biology should not be asked, except potentially where there is direct relevance to a person's medical treatment. Such a question is likely to breach an individual's human privacy."*

- 4.11. The Guidance drew on a statement from the Equality and Human Rights Commission (EHRC) who argued that forcing individuals with a Gender Recognition Certificate to reveal their sex might constitute a breach of their human rights.<sup>36</sup> However, this was contended in a legal opinion from Aidan O'Neill QC who said this misrepresented the law, which allowed for the collection of data on a protected characteristic in order to achieve a legitimate aim.<sup>37</sup> Women's rights group WPUK subsequently wrote to the CEO of the EHRC asking they withdraw the advice.
- 4.12. The continued determination of the Scottish Government and the NRS to collect data on gender identity (which is not a category in UK law) in preference to the legally defined sex is likely to be challenged in a similar manner to the successful case brought by Fair Play For Women against the UK's Office for National Statistics.<sup>38</sup> That they have failed to-date to align with the recognised legal position in the UK and recognise that data on biological sex is crucial for services and monitoring inequality, suggests that women's organisations may have to return to court to ensure they are counted.

## **5. The impact of Scotland's Hate Crime legislation on women's rights and freedom of expression**

- 5.1. In May 2018 Lord Bracadale published his report on Hate Crime in Scotland.<sup>39</sup> One of the areas he had been asked to address was whether the category of sex should be added in order to address the rising tide of misogynistic abuse. Bracadale said that his investigations into such abuse had made him angry and *"I worry that it puts the next generation of young women off politics. So, I feel a responsibility to challenge it, not so much on my own behalf, but on behalf of young women out there who are looking at what people say about me and thinking, I don't want to ever be in that position."*
- 5.2. The conversation about protecting women in Scottish hate crime law is not a new one. A gender aggravator was first mooted in Scotland in 2003 which led to a working group but no subsequent concrete legal protection for women.<sup>40</sup>
- 5.3. Bracadale's recommendation was that sex should be included which, he felt, would also go a way to fulfill the Scottish Government's international obligations to tackle violence against women. He considered the alternative option forwarded by Government funded feminist organisation Engender of a stand alone offence of misogynistic harassment, but concluded: *"I think the clearest and most effective way to mark out hate crime is a scheme involving baseline offences and statutory*

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<sup>36</sup> [EHRC submission to Sex and Gender Working Group](#)

<sup>37</sup> [Scottish Legal News, 08 December 2020, "EHRC sex data advice 'misrepresents the law'"](#)

<sup>38</sup> [Reuters, 17 March 2021, "UK gov't concedes defeat to Fair Play For Women in census sex row"](#)

<sup>39</sup> [Independent review of hate crime legislation in Scotland: final report - gov.scot](#)

<sup>40</sup> [For Women Scotland - History of Women and Hate Crime Law](#)

*aggravations which reflect identity hostility. That is the underlying philosophy which I have applied throughout the scheme which I am recommending. I would depart from that approach if I felt that it was necessary in order to achieve effective recognition of gender-based hate crime. However, based on the evidence and arguments which I have heard, I do not think there is any real gap in relation to patterns of conduct against women which ought to be criminal but are not. Any new standalone offence would therefore have a considerable cross-over with other existing offences, which risks causing confusion and undermining the aim of collecting reliable data."*

- 5.4. Despite Bracadale's carefully considered analysis of Engender's arguments and his rigorous examination of the evidence presented, the Justice Minister, Humza Yousaf, decided to accept the rejected arguments forwarded by the funded sector and did not include a sex aggravator in the Draft Bill. Instead, he announced that a Working Group would be established tasked with examining the case for a stand alone offence and attempting to identify the gaps in the law which had eluded Bracadale.
- 5.5. In the early stages of consultation on the Bill, Mr Yousaf claimed that he was dedicated to meeting with stakeholders. In practice, however, he relied on a narrow circle of government funded or appointed groups. Questions by MSP Elaine Smith on the breadth of Scottish Government's consultation process highlighted that, in contrast to previous administrations, they did not regularly call upon diverse groups.<sup>41</sup> When Mr Yousaf did engage with groups beyond the funded management organisations and sought input from, as he phrased it, groups working at the "coalface" of women's rights, he ignored their recommendations<sup>42</sup> (and misrepresented their opinion).
- 5.6. When FWS undertook to investigate what engagement the funded groups had conducted with wider grassroots organisations, it emerged that they had not. Engender said they were "*not funded for a huge amount of engagement and are not presenting our work as advocating on behalf of the members or as representative of women*".<sup>43</sup> They claimed this was the remit of the Scottish Women's Convention, however, there is no evidence they attempted to consult either and they did not input into the process.<sup>44</sup> We believe that the decision to exclude women in the Bill, in defiance of Bracadale's consideration of UK and International law, came down to the opinion of a handful of policy analysts who are ultimately paid by the Scottish Government.
- 5.7. The veteran Labour MSP Johann Lamont, supported by her party colleagues Elaine Smith, Jenny Marra and Pauline McNeill, and SNP's Joan McAlpine,<sup>45</sup> fought hard to have sex included in the Bill and highlighted the delays and the unwillingness to tackle sexism in Scotland. Lamont also argued that any subsequent legislation should recognise the centrality of sex in analysis of discrimination. For this, she was

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<sup>41</sup> [Parliamentary question asked by Elaine Smith](#)

<sup>42</sup> [MBM Policy, December 2020, "Legislating for hatred against women: the view from the coalface"](#)

<sup>43</sup> [Transcript of Engender's AGM, 14 November 2020](#)

<sup>44</sup> [For Women Scotland - Hate Crime Bill: Stage 3 Briefing](#)

<sup>45</sup> [MBM Policy - Statement on the Stage 3 Debate on the Hate Crime Bill](#)

branded a “bigot” by fellow MSPs<sup>46</sup> including Scottish Green co-convener Patrick Harvie who is rumoured to be considered for a Ministerial position by Nicola Sturgeon.

- 5.8. The Scottish Government have, instead, commissioned a Working Group on Misogyny. This carries no guarantees of action or funding and is chaired by Baroness Kennedy who was also appointed, personally, by Nicola Sturgeon as a member of the First Minister’s National Advisory Council on Women and Girls (NACWG)<sup>47</sup> - an undemocratic group who recommended a standalone misogynistic harassment offence in January 2019.<sup>48</sup> The First Minister has, as previously promised,<sup>49</sup> accepted all the recommendations of this group to date. Having committed to implementing this recommendation<sup>50</sup> it is not surprising that the Scottish Government failed to include sex as a characteristic in the Hate Crime Bill, contrary to the conclusion reached by Bracadale. It also explains why NACWG had no need to take part in the Justice Committee’s Call for Views.
- 5.9. We maintain that any stand alone offence which only considered misogynistic harassment would be open to challenge on the grounds of sex discrimination under the Equality Act. Therefore, we believe that the most effective solution would be to follow the example of the gender neutral Domestic Violence Act and ensure that statutory guidance and training for the courts and police reflect the reality that women would be the group disproportionately affected.
- 5.10. Part 2 of the Bill concerning “stirring up” hatred has been hugely controversial and resulted in the alliance of very disparate groups and individuals concerned about the impact on free speech.<sup>51</sup>
- 5.11. One of the major areas of concern has been the impact on women who try to discuss controversial changes and amendments to the Gender Recognition Act and who are frequently targeted by activists who brand them “hateful” for discussing women as a sex class. In our submission to the Committee we gave examples of the many activists who wanted to report feminists under the new law and who considered that lobbying for women’s rights was, in itself, problematic.<sup>52</sup>
- 5.12. During the Committee hearing on Part 2 of the Bill, Lucy Hunter Blackburn of Murray Blackburn MacKenzie drew attention to the atmosphere in which women’s rights advocates were working: *“We have provided the committee with more examples in our written submission. I stress that they are not hypothetical examples—we are not picking them out of thin air. We mention the veteran feminist Lidia Falcón, the president of the Feminist Party of Spain, who spent her 85th birthday in the office of*

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<sup>46</sup> [Holyrood, 15 April 2021, "Johann Lamont: The Scottish Parliament has not improved the lives of Scotland's women"](#)

<sup>47</sup> [National Advisory Council on Women and Girls questions: FOI release - gov.scot](#)

<sup>48</sup> [First Minister’s NACWG First Report and Recommendations](#)

<sup>49</sup> [Scottish Government’s Response to the National Advisory Council on Women and Girls](#)

<sup>50</sup> [Misogyny and Criminal Justice in Scotland Working Group: FOI release - gov.scot](#)

<sup>51</sup> [Supporters of the Free to Disagree Campaign](#)

<sup>52</sup> [Hate Crime and Public Order \(Scotland\) Bill Call for Views Submission by For Women Scotland, 19 July 2020](#)

*the prosecutor against hate crimes of Madrid because she had been reported for comments that she had made about the reform of gender recognition law in Spain. Last week, she was cleared—all the charges were dropped—because her comments were found to be legitimate political speech, but not until after an investigation had taken place.*

*As for the atmosphere in which such events take place, members might or might not be aware that, this week, an effigy of Carmen Calvo, the Deputy Prime Minister of Spain, was found hanging in Santiago de Compostela. I am sorry for showing you the image—it is not a good image, but I think that people need to see it to understand it. It is shocking stuff, but it illustrates the atmosphere in which we are working, which is why getting the law clear is important.*<sup>53</sup>

- 5.13. The issue of the suppression of free speech was picked up by various disparate witnesses, including John McLellan of the Scottish Newspaper Society who pointed out that ultimately court judgements of innocence did not weigh as heavily in the balance as the disruption and expense of an investigation and a charge, along with the confiscation of equipment.<sup>54</sup>
- 5.14. In evidence to the Committee, the Police Federation had also voiced concerns that the Bill might “devastate” their relationship with the public.<sup>55</sup>
- 5.15. In April 2021, our worst fears were realised when feminist activist, accountant, and mother of disabled children, Marion Millar was charged for “Hate Crime”.<sup>56</sup> This criminal activity apparently involved a series of tweets, including a picture of ribbons in the Suffragette colours tied to the fence near a BBC studio where a prominent trans activist actor recorded a BBC soap. There was no reason to suspect she had even tied the ribbon.
- 5.16. Millar has not been charged under the new legislation, so we have good reason to believe that the situation for women’s rights activists will become much worse. A report in the Spectator by Debbie Hayton, a transwoman and activist who supports women’s sex-based rights, covered the event for Millar in Glasgow and the legislative backdrop.<sup>57</sup>
- 5.17. Increasingly, in the wake of the passage of the Hate Crime Bill, stories like this are appearing in the Scottish press as Police are tasked with the investigation of stickers supporting women’s rights.<sup>58</sup> While these may appear trivial and ridiculous, the police believe they must investigate. An undermining of faith in the Police coupled

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<sup>53</sup> [Lucy Hunter Blackburn, Official Report - Parliamentary Business](#)

<sup>54</sup> [John McLellan, Official Report - Parliamentary Business](#)

<sup>55</sup> [Scottish Police Federation, 28 July 2020, "New Hate Crime Bill Could Devastate Police Relationship with the Scottish Public"](#)

<sup>56</sup> [The Times, 04 June 2021, "Activist Marion Millar charged with sending homophobic and transphobic tweets"](#)

<sup>57</sup> [The Spectator, 21 July 2021, "Marion Millar and Scotland's growing hostility to women"](#)

<sup>58</sup> [The Scotsman, 23 May 2021, "Kirkcaldy: Police face social media backlash after deleting tweet investigating stickers which read 'Women won't wheesh!'"](#)

with more reports against, and prosecution of, Scottish feminists are certain to be the upshot. The police remain concerned that they are being used in a political campaign<sup>59</sup> against women.

## **6. Status of women in prison and their human rights not to be subjected to sexual harassment, intimidation, degrading and inhuman treatment, and not to be treated unfairly on the basis of their sex**

- 6.1. In 2014 the Scottish Prison Service (SPS) published its Gender Identity and Gender Reassignment Policy, in which the key policy principle is that: *"The person in custody's gender identity and corresponding name and pronouns must be respected. The accommodation provided must be the one that best suits the person in custody's needs and should reflect the gender in which the person in custody is currently living...Restrictions to association with other people in custody should be avoided wherever possible."*<sup>60</sup>
- 6.2. In a manner similar to the contested definitions in the Gender Representation on Public Boards Act (discussed above in Section 2) the policy describes "living in a new gender" as using *"their new name, title and pronoun in all their everyday social interactions with strangers, service providers, friends and family"*, as well as having changed the name and gender on documents (except birth certificates). A Gender Recognition Certificate is not required, nor is any surgery or other physical changes.
- 6.3. This policy was developed in partnership with the pressure group Scottish Trans Alliance which is heavily funded by the Scottish Government, and has long lobbied for the principle of self-identification of sex to be the bedrock of policy making in Scottish organisations and Scots law - a position which fails to take into account the importance of biological sex. Their influence went far beyond that of an organisation simply consulted by the SPS: the Manager of Scottish Trans Alliance, James Morton, was cited as the author in the metadata of the policy document.<sup>61</sup>
- 6.4. Morton further wrote: *"We strategized that by working intensively with the Scottish Prison Service to support them to include trans women as women on a self-declaration basis within very challenging circumstances, we would be able to ensure that all other public services should be able to do likewise."*<sup>62</sup>
- 6.5. This "intense" working relationship has resulted in a policy that overrides the single-sex exceptions in the UK's Equality Act which provide for separate male and female prison estates, and gives weight to the contested concept of "gender identity", a concept that has no recognition in either Scottish or UK law.

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<sup>59</sup> [The Scotsman, 30 July 2021, "Why there are concerns that Police Scotland is being increasingly politicised"](#)

<sup>60</sup> Page 6, [SPS Gender Identity and Gender Reassignment Policy 2014](#)

<sup>61</sup> [Scottish Women, 12 September 2018, "Scottish Prison Service Policy written by trans lobby group"](#)

<sup>62</sup> Morton quote from "A Scottish History of Trans Equality Activism" in "Trans Britain: Our Journey from the Shadows" by Christine Burns, 2018

- 6.6. The policy establishes a mixed-sex prison estate by enabling male prisoners who self-identify as women to be accommodated in the female estate - on a case-by-case basis, and subject to risk assessments. Female prisoners who self-identify as men may be similarly accommodated in the male estate, although the policy does at least recognise the high level of concern about sexual assault risk in a male establishment in this scenario.
- 6.7. The mandatory Equality Impact Assessment (EQIA) of this policy was not published by the SPS and it took a Freedom of Information request for it to be made public. The EQIA<sup>63</sup> identified only three protected characteristics that could be affected by the introduction of this policy: age, sexual orientation and gender identity (this is the SPS's replacement term for the protected characteristic of gender reassignment). The box for "gender" (used instead of the protected characteristic sex) was left blank, implying the policy had no conceivable impact on female prisoners. No women's groups, or any female prisoners, were consulted in the formation of the policy and no evidence was considered relating to the vulnerability of female prisoners. This is despite a major publication, only two years previous, that detailed the much higher rates of mental health problems suffered by women prisoners, compared to the general population, and that women offenders were "*often victims of severe and repeated physical and sexual abuse*".<sup>64</sup> Research in the Glasgow and Greater Clyde Health Board area found over 80% of women in prison had a past experience of gender based violence.<sup>65</sup>
- 6.8. There is little publicly available information on how many transgender prisoners are in custody in Scottish prisons - the information is not routinely collected by the prison service, nor how many have transferred, or have been denied a transfer, into the female estate under the SPS policy. It is thought there were 22 males who self-identified as women across the Scottish prison estate in 2019, all of whom were in the women's estate or looking to transfer into it. This represents 6% of Scotland's 380 female inmate population.<sup>66</sup>
- 6.9. Public concern has been rising for some time and numerous media reports warn of significant issues for women prisoners. Paris Green was convicted in 2013 for torture and murder and was initially sent to HMP Cornton Vale, a women's prison in Stirling. However, within five weeks Green was pursuing female prisoners sexually and so was moved to the women's wing of HMP Edinburgh while awaiting gender reassignment surgery. Despite further warnings, Green continued to sexually pursue female prisoners and so was eventually moved to the men's section of the jail in early 2017. Green's current whereabouts is unknown.<sup>67</sup>
- 6.10. Alan Baker/Stewart was convicted in 2013 of murder and was reported by the press in 2018 as being held in the women's wing of HMP Greenock. A source was quoted

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<sup>63</sup> [SPS Equality Impact Assessment](#)

<sup>64</sup> [Commission on Women Offenders: Final Report 2012](#)

<sup>65</sup> Page 6, [Sexual Health Needs of Women within the Criminal Justice System in Greater Glasgow and Clyde, 2017](#)

<sup>66</sup> [The Times, 19 January 2019, "Scots trans law is threat to women, says ex-head of prison"](#)

<sup>67</sup> <https://transcrimeuk.com/2017/10/30/paris-green/>

as saying Baker *“is not segregated from female prisoners in the showers and female prisoners are uncomfortable with the policy. The women inmates have had to accept that Stewart is being allowed to live as a woman, despite not having had surgery.”* Further media reports claim Baker formed a relationship with a fellow (male) transgender inmate and female prisoners were subject to witnessing the couple openly having sex.<sup>68</sup>

- 6.11. In June 2019 a whistleblower said the *“trans prisoners in Scotland’s female jails had been responsible for a “quite horrific” number of incidents towards women inmates, including threats of rape”*.<sup>69</sup> The retired governor of a Scottish women’s prison, Rhona Hotchkiss, continues to warn of the dangers to women inmates<sup>70</sup> stating, *“My experience is that it is always an issue to have transwomen in with female prisoners. I think you have to think beyond the obvious things like physical or sexual threat, which are sometimes an issue, to the very fact of the presence of a male bodied person in amongst vulnerable women causes them distress and consternation”*.<sup>71</sup>
- 6.12. In 2015, the British Association of Gender Identity Specialists (BAGIS) submitted evidence to the Transgender Equality Inquiry undertaken by the UK Parliament’s Women and Equalities Committee explaining why it was naive to suggest that *“nobody would seek to pretend transsexual status in prison if this were not actually the case. There are, to those of us who actually interview the prisoners, in fact very many reasons why people might pretend this. These vary from the opportunity to have trips out of prison through to a desire for a transfer to the female estate (to the same prison as a co-defendant) through to the idea that a parole board will perceive somebody who is female as being less dangerous through to a [false] belief that hormone treatment will actually render one less dangerous through to wanting a special or protected status within the prison system and even (in one very well evidenced case that a highly concerned Prison Governor brought particularly to my attention) a plethora of prison intelligence information suggesting that the driving force was a desire to make subsequent sexual offending very much easier, females being generally perceived as low risk in this regard.”*<sup>72</sup>
- 6.13. Research conducted on publicly available data by the women’s rights group Fair Play For women, and later confirmed by the UK’s Ministry of Justice, showed that 48% of male prisoners who self-identified as women were jailed for sex offences - compared to less than 20% in the general male estate. It seems clear one of two scenarios is in place here: either transgender people commit sexual offences at a higher rate than other men, or male sex offenders take advantage of the self-identity aspects of the prison’s trans policy, for the reasons outlined by BAGIS above. Whatever the correct scenario, the outcome for female prisoners who have no choice but to share accommodation with these male prisoners is very bleak.<sup>73</sup>

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<sup>68</sup> <https://transcrimeuk.com/2017/10/30/alan-baker-2alex-stewart/>

<sup>69</sup> [The Times, 30 June 2019, “Feminists celebrate U-turn on self-identification in Scotland as women’s prisons review trans policy”](#)

<sup>70</sup> [The Times, 19 January 2020, “Scots trans law is threat to women, says ex-head of prison”](#)

<sup>71</sup> [For Women Scotland, Video of Public Meeting 31 January 2020 - Rhona Hotchkiss](#)

<sup>72</sup> [Written evidence submitted by BAGIS to the Transgender Equality Inquiry](#)

<sup>73</sup> [Fair Play for Women, 09 November 2017, “Half of all transgender prisoners are sex offenders or dangerous category A inmates”](#)

- 6.14. The SPS policy also states that prisoner searches are to be undertaken on the same basis of prisoner self-identification: *“People in custody should be rubdown and body searched in accordance with the social gender in which they are living, rather than according to their physical body...Any staff concerns about performing searches on transgender people in custody should be initially addressed through the provision of additional staff training and information about gender reassignment and equality requirements.”*<sup>74</sup>
- 6.15. Andrew Burns/Tiffany Scott was convicted in 2017 of five charges of assault and remains one of the few prisoners in Scotland subject to an Order for Lifelong Restriction, under which prisoners are only released once no longer considered an “unmanageable risk to public safety”. One appearance at court had to be abandoned after Scott was deemed too dangerous to be tried in public, yet female officers were required to give the prisoner, who was not undergoing any medical treatment to transition gender, intimate body searches. Contrary to the requirements of the SPS policy the female officers defied orders to conduct the search. It is not known whether the officers faced disciplinary penalties for their stance but it is thought they had the support of their trade union.<sup>75</sup>
- 6.16. In December 2018 it was reported that the SPS planned to review its policy for transgender prisoners, with a consultation to start early in 2019. A spokesperson acknowledged the previous failure to consider women in the policy stating: *“One of the groups we will be particularly keen to consult is the female prison population, who have not been specifically consulted about this before. There is an obvious interest and locus for those individuals.”*<sup>76</sup>
- 6.17. Unfortunately, that consultation never materialised and some 2.5 years later, despite the Justice Secretary stating the consultation was expected to begin in October 2020,<sup>77</sup> we are still waiting for its commencement. It is intolerable that the changes made by SPS’s transgender policy have been touted as progressive but have so badly, and starkly, failed women prisoners and staff, and yet the authorities continue in their avoidance to take steps to address the situation.
- 6.18. A thorough analysis of the SPS transgender policy is given in MBM Policy’s paper which concludes: *“The analysis shows that the unregulated roll-out of gender self-identification in Scotland has taken place with weak or non-existent scrutiny and a lack of due process, and that this relates to a process of policy capture, whereby decision-making on sex and gender identity issues has been directed towards the interests of a specific interest group, without due regard for other affected groups or the wider population. The paper raises questions about the adequacy of institutional safeguards against well-organised and highly purposeful lobbying, particularly where any groups detrimentally affected do not have effective representation.”*<sup>78</sup>

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<sup>74</sup> Page 26, [SPS Gender Identity and Gender Reassignment Policy 2014](#)

<sup>75</sup> <https://transcrimeuk.com/2017/10/31/andrew-burns-tiffany-scott/>

<sup>76</sup> [The Ferret, 18 December 2018, “Scots prisons to consult on changes to transgender policy”](#)

<sup>77</sup> [Parliamentary Question asked by Liam Kerr, 20 August 2020](#)

<sup>78</sup> [MBM Policy - Losing sight of women’s rights: the unregulated introduction of gender self-identification as a case study of policy capture in Scotland](#)



- 6.19. In England, which operates a stricter transgender prison policy whereby male prisoners are only automatically housed in the female estate if they have a Gender Recognition Certificate, a female prisoner recently sought a judicial review to challenge the policy. The High Court decided that the policy was “capable of being operated lawfully” under the Equality Act but did confirm a conflict between women’s rights and the rights sought by transgender prisoners. The court ruled on “lawfulness, not the desirability” of the policies.<sup>79</sup>
- 6.20. It remains to be seen whether the petitioner will lodge an appeal to this ruling but we note the fact that the single-sex exceptions in the Equality Act are opt-in protections, and any organisation is free not to make use of them. This may have been a contributing factor to the prison policy being deemed capable of being operated lawfully, in which case our laws are woefully weak in providing the necessary protection of women and girls. Time will tell how the even more liberal policy in Scotland, which relies on self-identification by prisoners, will fare in any similar court action.
- 6.21. Specifically we believe the SPS transgender policy is in breach of 18.8(b) of the European Prison Rules<sup>80</sup> and Rule 11(a) of the United Nations Standard Minimum Rules for the Treatment of Prisoners,<sup>81</sup> both of which are very clear that male prisoners should be accommodated separately from female prisoners.

## **7. Women’s Rights and positive measure in the area of preventing and combatting violence against women: Genuine Occupational Requirement and women-only services**

- 7.1. According to the European Union’s Directive 2004/113/EC,<sup>82</sup> transposed in the United Kingdom in December 2007, differences in treatment between women and men are permissible when they are justified by a legitimate aim. The directive states that “A *legitimate aim* may, for example, be the protection of victims of sex-related violence (in cases such as the establishment of single-sex shelters), reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person’s home), the promotion of gender equality or of the interests of men or women (for example single-sex voluntary bodies), the freedom of association (in cases of membership of single-sex private clubs), and the organisation of sporting activities (for example single-sex sports events).” In accordance with the Directive, the UK’s Equality Act permits the difference in treatment, and the exclusion of male sex, in the context of services and establishments providing assistance to female victims of violence.
- 7.2. Despite these permissible and justifiable exemptions, understood in the European law as vital for eliminating violence against women and for achieving equality

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<sup>79</sup> [Fair Play For Women, 06 July 2021, “Transgender prison policy: judicial review ruling”](#)

<sup>80</sup> [European Prison Rules 2006](#)

<sup>81</sup> [The United Nations Standard Minimum Rules for the Treatment of Prisoners](#)

<sup>82</sup> [Directive 2004/113/EC on Implementing the principle of equal treatment between men and women in the access to and supply of goods and services](#)

between women and men, the overwhelming majority of domestic violence shelters and rape crisis centres in Scotland do not enforce them. Most of these shelters and rape crisis centres are funded by the Scottish Government, however, the Government has no policy or monitoring mechanism to ensure that single-sex services are available for female victims of violence, including the victims of domestic violence, sexual violence, rape and trafficking for sexual exploitation. On the contrary, in the governmental guidelines on funding for shelters the following requirement was stated:

*“To be eligible for funding, applicants are required to demonstrate the following in their application...Ensure that your service is inclusive to lesbian, bisexual, trans and intersex (LBTI) women. An LBTI Inclusion Plan should be submitted along with your application.”<sup>83</sup>*

- 7.3. A typical *Equality and Diversity Monitoring Form*<sup>84</sup> appended to a job application at the Government funded Rape Crisis network explicitly excludes the protected characteristic of sex, replacing it with a non-protected “gender identity”, when it asks the applicants the following question:

*“How would you describe your gender identity?*

- *Man (including female-to-male trans man)*
- *Woman (including male-to-female trans woman)*
- *In another way (for example, non-binary)”*

This contradicts UK Equality law,<sup>85</sup> as does the Scottish Government's own policy on violence against women which entirely omits mention of the protected characteristic of sex: *“The definition [of violence against women] includes women and girls across all protected characteristics defined by equality legislation - age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief and sexual orientation.”<sup>86</sup>*

- 7.4. Under the Equality Act, the Genuine Occupational Requirement in Schedule 9 Part 1 allows employers to restrict certain roles to applicants who have a particular protected characteristic where, having regard to the nature of the work, there is an occupational requirement and it is a proportionate means of achieving a legitimate goal.<sup>87</sup> This means that some jobs can be restricted to female only candidates as defined under the Act.

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<sup>83</sup> [For Women Scotland - Funding Conditions of organisations working in VAWG sector](#)

<sup>84</sup> [Job Advert for CEO, Edinburgh Rape Crisis Centre, March 2021](#)

<sup>85</sup> In the UK Equality Law protected characteristic is gender reassignment and it is a separate ground for discrimination from that of sex. The Equality Act also allows the exclusion of persons with a protected characteristic of gender reassignment, on the basis of sex, particularly in the context of service provision to female victims of violence: [Schedule 3, Part 7, 26-28](#) and [Schedule 9, Part 1, 1](#) in the UK Equality Act

<sup>86</sup> The Equally Safe Strategy omits the UK Equality Act's protected characteristic of sex. At the same time it rightfully quotes the protected characteristic of gender reassignment, however it omits the principle of exception on the basis of sex, and, replaces this characteristic in the overall policy [Equally Safe: Scotland's strategy to eradicate violence against women](#), page 13

<sup>87</sup> [Equality Act 2010, Genuine Occupational Requirement, Schedule 9, Part 1](#)

- 7.5. EHRC guidance states that: *“In UK law, ‘sex’ is understood as binary, with a person’s legal sex being determined by what is recorded on their birth certificate. A trans person can change their legal sex by obtaining a GRC. A trans person who does not have a GRC retains the sex recorded on their birth certificate for legal purposes.”*<sup>88</sup>
- 7.6. This means that if employers have reason to restrict a role to a member of one sex they are allowed to legally discriminate. However, if they knowingly allow some members of the opposite sex to apply, they risk falling foul of the law by indirectly discriminating against other members of that sex. The Scottish Violence Against Women sector routinely cite Schedule 9 in order to reserve jobs for women. However, they have, in practice, allowed males who do not fall into the legal category and who self-identify as women to apply.
- 7.7. This means that, currently, at least one major Scottish rape crisis centre (Edinburgh Rape Crisis Centre) is led by a male who identifies as transgender and is without a Gender Recognition Certificate. This position was advertised as open to women only under Schedule 9 of the UK Equality Act and the principle of sex-based exceptions therein.<sup>89</sup> However, the person who obtained this role readily admits to not having obtained the legal certificate of gender reassignment.<sup>90</sup>
- 7.8. Having been so open about their trans status there is no reason to assume the employer was unaware of this. Indeed in evidence to a Parliamentary Committee in 2015, this individual argued that the *“General Occupation Provision in recruitment is discriminatory to transsexual people especially trans women. I genuinely believe that there is no space for it in the gender based violence sector and that it has no place in violence against women work. I was unaware of its existence until a few weeks ago. I have worked in the violence against women sector since 2005 and have never known for it to be used.”*<sup>91</sup> This, however, is untrue as all jobs advertised under Schedule 9 are invoking this exception. That it has long been misapplied is problematic for women who believe they are accessing a single-sex space as is the stated belief that women who have suffered male violence might not require female only services.
- 7.9. For Women Scotland had inquired with the regulator EHRC whether recruiting a male in the organisation providing services to the most vulnerable women in Scotland was lawful, however, we did not receive a satisfactory response.<sup>92</sup> Similarly, at the time of submission of this letter another position at the same Rape Crisis Centre is being advertised, again citing Schedule 9 but undermining this by including people who are not regarded as women in the UK Equality Act and thus opening up the potential risk of discriminating on basis of sex.<sup>93</sup>

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<sup>88</sup> [EHRC, 30 July 2018, “Our statement on sex and gender reassignment: legal protections and language”](#)

<sup>89</sup> [Job Advert for CEO, Edinburgh Rape Crisis Centre, March 2021](#)

<sup>90</sup> [Copy of a now deleted podcast with Pink News](#)

<sup>91</sup> [Written evidence submitted by Mridul Wadhwa to the Transgender Equality Enquiry, 2015](#)

<sup>92</sup> [Response from EHRC, 28 July 2021](#)

<sup>93</sup> [Job advert for COO, Edinburgh Rape Crisis Centre, July 2021](#)

7.10. Additionally, the Scottish government's Strategy to Eradicate Violence against Women and Girls<sup>94</sup> is not in line with the major international legal instruments such as CEDAW, the European Directives and the UK Equality Act, as it entirely eliminates the legal provisions protecting women from sex-based discrimination by replacing the protected characteristic of sex with gender and/or gender identity. Despite the fact that the strategy states that its definitions are based on those elaborated in the United Nations Declaration on the Elimination of Violence Against Women (1993), where gender-based is understood as a function in the sex-based hierarchical system of power to maintain men's dominance over women, the strategy ignores the internationally accepted definition when it states that:

*"Along with their **gender**, women and girls have other protected characteristics that increases their level of risk of experiencing violence and abuse".<sup>95</sup>*

*"There were 1,901 rapes or attempted rapes recorded by the police in Scotland during 2014-15. Where the victim's **gender** is known, 95% (1,278 out of 1,349) rapes or attempted rapes recorded by the police in 2014-15 had a female victim".<sup>96</sup>*

7.11. Considering the statistics that the vast majority of individuals of male sex who self-identify as women, transgender or non-binary, do not undergo any medical treatment and and retain the anatomy of their birth,<sup>97</sup> in practical terms, it means that any female victim seeking access to a shelter or rape crisis centre in Scotland, is at risk of secondary victimisation and re-traumatisation by being confined in a space supposed to provide safety to her, with persons representing the group to which their perpetrators belong, i.e. males.

7.12. Guidance for women's shelters written by LGBT Youth Scotland was, for a considerable period, posted on Rape Crisis Scotland's website until, after representation for concerned survivors, it was removed. The guidance erroneously claimed that it was not legal to restrict a service to one sex: *"People who provide separate and single-sex services, such as refuges, can only provide a different service or refuse a service to transsexual women service user under exceptional circumstances and these circumstances depend on the facts of the case - this means that 'blanket' bans or policies barring people from accessing services are not acceptable."*<sup>98</sup> This is a straight misrepresentation of the Equality Act, where provision is made for single-sex services with the following example given in the Explanatory Notes: *"A group counselling session is provided for female victims of sexual assault. The organisers do not allow transsexual people to attend as they*

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<sup>94</sup> [Equally Safe: Scotland's strategy to eradicate violence against women](#)

<sup>95</sup> Ibid. p. 19

<sup>96</sup> Ibid. p.13

<sup>97</sup> [Fair Play For Women, 22 July 2018 "The vast majority of male-born transwomen still have a penis"](#)

<sup>98</sup> [Stronger Together: Guidance for women's services on the inclusion of transgender women](#)

*judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. This would be lawful.*<sup>99</sup>

- 7.13. Murray Blackburn MacKenzie undertook a more detailed examination of the legal misrepresentations in the guidance,<sup>100</sup> along with the troubling suggestion that if women objected to the presence of obviously male people in a shelter for vulnerable women, this was no reason to move the trans identified male and they “*would work to educate other service users – much in the same way that we would if we received comments regarding other service user’s ethnicity, religious affiliation or sexual orientation.*”
- 7.14. Similarly, the Supporting Transgender Young People Guidance for Schools in Scotland,<sup>101</sup> which was undertaken by LGBT Youth carried the logo of the Scottish Government until the women’s rights organisation Women and Girls in Scotland published their Children’s Rights Impact Assessment<sup>102</sup> (something the Government and LGBTY has failed to do). They found that the guidance breached the human rights of girls multiple times. On the 7th March 2019, Ministers had a meeting during which the decision was made to produce updated guidance. “*The basis of this decision was Ministers’ view that guidance that risked potentially excluding other girls from female-only spaces was not legal.*”<sup>103</sup> The Minister, Shirley Anne Sommerville, announced in June 2019 that the guidance would be replaced. However, to date, this has not been done and illegal, discriminatory guidance is still being used in schools. Moreover, despite the failure of LGBT Youth to produce legal material, the Government continues to seek their involvement in producing new material and to rely on their advice.<sup>104</sup>
- 7.15. Cumulatively, these omissions of sex-based discrimination and the replacement of category of sex with gender and/or gender identity in the legal and semi-legal instruments produced by the Scottish Government make it impossible for the Government to effectively implement and/or monitor its own policies aimed at ending men’s violence against women and, as such, they present a pattern in the Scottish Government’s actions to abdicate its responsibility to protect women from sex based discrimination.

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<sup>99</sup> [Equality Act, Explanatory Notes, Part 7, Para 26](#)

<sup>100</sup> [MBM Policy, 22 February 2019, “The case for due diligence: assessing and owning policy and practice”](#)

<sup>101</sup> [LGBT Youth Scotland, Supporting Transgender Young People Guidance for Schools in Scotland](#)

<sup>102</sup> [Women and Girls in Scotland - Children’s Rights Impact Assessment](#)

<sup>103</sup> [Updated guidance to support transgender pupils in schools information: FOI release - gov.scot](#)

<sup>104</sup> [For Women Scotland, 03 December 2019, “LGBT Youth Scotland – Freedom of Information Request”](#)

## Conclusion

The evidence in this submission illustrates that in Scotland there exists a serious and immediate risk to the overall framework protecting women from discrimination based on sex as well as to the individual human rights and freedoms of women. In particular the human rights of women to safety, dignity, privacy, the freedom of speech, expression and belief, the protection of maternity, the right to education and sports, the right to political and public participation, are all at grave risk from changes wrought by the current legal developments in which the Scottish Government ignores the international obligations and commitments on sex-based discrimination. It does so by replacing or conflating the protected characteristic of sex with non-protected notions of gender and/or gender identity. These redefinitions and the impact on the human rights of women have not been scrutinised from the perspective of “gender impact assessment” i.e. whether it impacts the rights and freedoms of women and girls, as required by European and international frameworks.

The elimination of sex from the legal instruments and replacing it with gender and gender identity also diminishes the Scottish Government’s capacity, as indeed its will, to introduce, implement and monitor *any* positive temporary measures, in *any* sphere of women’s human rights, be it economic, social, political or cultural, as - as far as the principle of equality between women and men is concerned - all such measures in international law are based on sex, which is an objective and immutable biological characteristic<sup>105</sup> and not self-perceived and subjective gender identity. As such, the steps taken by the Scottish Government described above make achieving *de facto* equality for women and girls in Scotland impossible. Indeed, women and girls in Scotland are facing a grave risk of having their human rights rolled back to the pre-CEDAW era.

This happens in the context where protection of women and girls from sex-based discrimination in Scotland is already not as strong as it is required by such instruments as CEDAW. Despite the fact that the United Kingdom ratified CEDAW in 1986, the Convention has not been properly incorporated in UK or Scots law,<sup>106</sup> and women in Scotland and the UK in general currently cannot take a case to court on the grounds that it violates their rights under CEDAW. This means that, should the legal framework protecting the human rights of women, women’s equality and non-discrimination on the basis of sex, be further weakened as the aforementioned examples demonstrate, then women and girls in Scotland will not be in the position to claim their rights by relying directly onto the major international bill of women’s rights that is CEDAW.

For Women Scotland considers that the Government of Scotland has permitted - and in many cases encouraged - the steady erosion of women’s rights as defined in UK and international law. In a paper published by Edinburgh University Press, *Losing Sight of Women’s Rights*,<sup>107</sup> policy analysts, Kath Murray and Lucy Hunter Blackburn considered “*how gender self-identification, without any requirement that a person has gone through any form of legal process, had already become a feature of Scottish policy-making and practice*

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<sup>105</sup> “The term “sex” refers to biological differences between men and women.” (CEDAW Committee’s General Recommendation 28 on the core obligations of States parties under article 2 of CEDAW)

<sup>106</sup> [CEDAW Committee UK Concluding Observations 2019](#)

<sup>107</sup> [MBM Policy - Losing sight of women’s rights: the unregulated introduction of gender self-identification as a case study of policy capture in Scotland](#)

*long before public consultation began on reforming the GRA*” Using case studies of the Census and the actions of the Scottish Prison Service, they examined how women’s legal rights and protections had been undermined and addressed the process of policy capture by which lobby groups funded by the Scottish Government had imposed their faulty reading of the law.

All this is exacerbated by the small and interconnected nature of the Scottish political and lobbyist class. The Scottish Government is very reliant on external groups who, in turn, receive nearly all their funding from the Scottish Government. Freedom of Information requests have shown how senior Civil Servants are often driven by a desire to improve their status with groups such as Stonewall which leads them to take direction on the law and women’s rights from groups who have no expertise in either field<sup>108</sup> and a vested interest in reforming the latter. By following such advice, the Scottish Government risks acting contrary to UK and international law.<sup>109</sup> The issue, however, for women’s rights activists in Scotland is that, with such a level of capture in the major institutions, our recourse is mainly via expensive legal cases. We have also found that once bad law or policy is introduced under the radar, it is very hard to roll back.

The First Minister’s National Advisory Council for Women and Girls has recommended that Scotland push for equality law to be devolved from the UK Government.<sup>110</sup> FWS fear that if this should come to pass without a proper, robust commitment to a legislative framework to protect women as a sex class, women in Scotland will see their rights and status set back by decades.

Yours faithfully,

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Directors, For Women Scotland

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<sup>108</sup> [Submission to Stonewall Workplace Equality Index: FOI release - gov.scot](#)

<sup>109</sup> [Legal Feminist, 01 February 2021, “SUBMISSION AND COMPLIANCE: risks for Stonewall Champions”](#)

<sup>110</sup> [Holyrood, 26 January 2021, “Devolve equalities law, women’s advisory council says”](#)