



17 February 2023

## **Half-day general discussion on the equal and inclusive representation of women in decision-making systems**

### **Committee on the Elimination of Discrimination against Women**

For Women Scotland (FWS) is a grassroots women's rights organisation composed of ordinary women from across Scotland. Our primary motivation for forming was concern about the Scottish Government's proposal to reform the Gender Recognition Act 2004 and its potential impact on the hard-won rights and protections for women and girls.

Our submission addresses the most recent developments in Scotland on the conflict between sex and gender or gender identity, with the legally protected characteristic of sex being conflated and increasingly replaced by them. Such conflation undermines the legal framework upon which women and girls in Scotland are protected from discrimination. Women's concerns about the impact that erasing sex from laws and policies has on women has been ignored and dismissed by the Scottish Government. Through this, women have been excluded from representation in decision-making systems – by omission or active prevention – and in a way that men have not. Our exclusion has resulted in a lack of consideration for the needs of women and girls, increasing discrimination and harm.

Women's equal and inclusive representation in decision-making systems should be viewed in the context of their ability to freely participate in public life, to exercise their freedoms of thought, conscience or religion, expression and assembly. In recent years, all of these rights have been violated in Scotland. Women have been prevented from peacefully assembling to discuss their rights as a sex under UK law, expelled from political parties for talking about their knowledge of science and reproductive biology, banned from social media for discussing the needs of female survivors of male violence, shamed, threatened, attacked and fired for saying that women are discriminated against on the basis of their sex and consequently that sex matters in law and policy.

### **A note on terminology**

We use the terms sex and gender as defined in in General Recommendation No 28 (1.5) of 2010,<sup>1</sup> with the terms men and women given their ordinary meaning of referring to males

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<sup>1</sup> <https://www.refworld.org/docid/4d467ea72.html>

and females respectively. Unless it is in a quote, we do not use the terms “trans women” or “transgender women” to refer to male members of the trans community, because: 1. Many women think that any term containing the word “women” refers to female persons. 2. Others believe that this term refers only to post-operative homosexual transsexuals, while most “trans women” are fully intact, heterosexual males. For clarity about sex, we use the term “men who identify as women” to refer to all male members of the trans community, regardless of whether they transitioned.

## **1. Context**

The Scottish Government is the devolved government for Scotland, one of the four nations of the United Kingdom. It has a range of responsibilities that include healthcare, education, rural affairs, justice, transport, sport and the arts, local government, and some finance. Other powers are reserved to the UK Government: defence, foreign affairs, immigration, trade policy, pensions, constitution, broadcasting, and equal opportunities. Since 2007, the Scottish National Party has been the governing party.

### 1.1 Political participation of women in Scotland

Although women make up 52% of the country’s population, female Members of the Scottish Parliament (MSPs) gained on average only 37.5% of seats between 1999 and 2017. However, during the 2021 Scottish Parliament election, a record number of female MSPs won seats: a total of 58 (or 45%).<sup>2</sup> Women make up 30% of the Members of Parliament sitting in the UK Parliament for Scotland. Local government elections in 2022 resulted in 29% female councillors, up from 24% in 2018.<sup>3</sup> Less than one in four council leaders in Scotland are women.

### 1.2 Scottish Government policy on treatment of men who identify as women

It is Scottish Government policy *“that transgender women are to be treated as non-transgender women unless to do so would be prohibited by law”*.<sup>4</sup> As there is no law in Scotland or the wider UK, which prohibits treating men and women the same, this is not only a rejection of the specific protections afforded to women and girls on the basis of their sex in international and UK equality law, it also signals to public bodies and NGOs that the Scottish Government may disapprove of organisations in Scotland lawfully applying the sex-based exceptions allowing female-only spaces, services, sports and so on. When challenged on this in court, counsel for the Scottish Government defended the policy and

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<sup>2</sup> <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-57047370>

<sup>3</sup> <https://lgiu.org/local-government-facts-and-figures-scotland/>

<sup>4</sup> <https://forwomen.scot/wp-content/uploads/2021/03/2021CSOH031.pdf>, page 22

stated that the Scottish Government believes that it fully reflects the recommendations of CEDAW.<sup>5</sup>

## **2. Hostile Environment for women's political participation**

In the last decade, the equal and inclusive representation of women in decision-making systems in Scotland has been increasingly impaired by violations of their Article 7 and 8 rights in conjunction with Article 2, 5 and 14 under CEDAW as well as their Article 18, 19 and 21 rights under the International Covenant on Civil and Political Rights.

### 2.1 Girls and Young Women

Gender identity is now taught in Scottish schools as an innate quality of all human beings. As the concept of gender identity is rooted entirely in stereotypes of and prejudices about women and men and girls and boys, this is leading to a reinforcement of these stereotypes and prejudices in violation of Article 5 CEDAW. Girls who set boundaries around their own bodies against all males for reasons of privacy, dignity, safety or to manifest their beliefs are framed in state-funded guidance to schools<sup>6</sup> as problematic and in need of re-education. Parents who speak in defence of such girls are dismissed or face outright hostility.

The chilling effect this has on the ability and desire of all girls to participate in the public and political sphere must not be underestimated.

In addition to the issues above, increasingly student officer roles for women are taken up by men who identify as women or are abolished entirely with women being included as a sexual identity category within the LGBTQ+ umbrella.

### 2.2 The public debate around the Gender Recognition Reform Bill

Women's rights campaigners held public meetings so that women across Scotland could gather to discuss the impact this Bill would have on women. They had to hire security guards, paid for by ticket sales, because they faced aggressive and sometimes violent counter protests dominated by male trans rights activists. Organisers and meeting venues received bomb, rape and death threats as well as calls for boycotts.

In 2020, the Glasgow Women's Library cancelled our booking for a women's rights meeting because we oppose the Bill, a clear case of discrimination against women under UK equality law. Similar cases of other women sharing our views being discriminated against are known.

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<sup>5</sup> See footnote 4

<sup>6</sup> For an analysis of such guidance see:

<https://wgscotland.org.uk/wp-content/uploads/2019/01/Childrens-Rights-Impact-Assessment-by-Women-and-Girls-in-Scotland.pdf>

In violation of CEDAW Article 2 (d) and (e), the Scottish Government has undertaken no efforts, not even through a public statement, to oppose or prevent such discrimination.

In violation of Article 7 CEDAW (esp. 7 (b) and (c)), the Scottish Government did not call upon supporters of the Gender Recognition Reform Bill to cease terrorising women opposing it. It did not ensure that women in elected positions could express their opposition without being threatened and harassed or called on political parties to cease disciplining or expelling female members for doing so. As Joanna Cherry, an elected politician, explained:

*Had I known the level of abuse and threats I would receive from within my own party, and the repeated briefing against me and attempts to smear me from within my own party, without the sort of support I would've expected from the leadership, then I would not have stood to be a candidate.<sup>7</sup>*

Such hostility has a chilling effect on the ability and willingness of women to stand for election at all levels of government, to participate in this debate and to speak on other pressing women's rights issues, such as prostitution and surrogacy, where the same hostile activists oppose women's rights campaigners.

### 2.3 Examples of female politicians and campaigners as victims of targeted harassment

During the Census Bill debate in 2018, **Joan McAlpine**, an SNP MSP, stated that the conflation of sex and gender is detrimental to women and girls and explained that Census data collection on the basis of sex is of vital importance because this state document is used to plan national, regional, and local services for the future. She was subjected to sustained, intense harassment online<sup>8</sup> and offline, with much of the harassment coming from male members of her own party.<sup>9,10</sup>

**Joanna Cherry**, a Member of Parliament (MP) for the SNP, was punished by her party for defending women's sex-based rights, losing a leading party role as an MP. Much of the harassment has come from male members of her own party, with one SNP member convicted of threatening her<sup>11</sup> and another awaiting trial. The Scottish Government did not call on party members to cease harassing her for expressing an opposing view.<sup>12</sup>

In 2019, feminist academics organised a women's rights event and the sex and gender debate at Edinburgh University. After giving a speech about the pervasiveness of male violence against women and girls, **Julie Bindel**, a life-long women's rights campaigner, was

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<sup>7</sup> <https://www.holyrood.com/news/view-joanna-cherry-says-snp-party-member-threatened-to-rape-her>

<sup>8</sup> <https://twitter.com/TAFKAMacM/status/1192455551223058433>

<sup>9</sup> <https://www.scotsman.com/news/politics/joan-mcalpine-defies-bullies-sex-and-gender-dispute-1420329>

<sup>10</sup> <https://womansplaceuk.org/2020/02/05/courage-catching-joan-mcalpine/>

<sup>11</sup> <https://twitter.com/joannaccherry/status/1421077575489753092>

<sup>12</sup> <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-56004722>

attacked by a male trans rights activist who opposes her views.<sup>13</sup> This protester was later charged with assault by Police Scotland.

Following this attack **Jenny Marra**, a Scottish Labour Party MSP, lodged a motion calling all elected representatives to support that the Parliament “*strongly believes that there is no place for violence or threats of violence towards women engaging in public life in Scotland.*”<sup>14</sup> The motion was supported by just over half of all MSPs, but not by the Scottish Government. Jenny Marra was also abused for her views.

In 2020, writer **JK Rowling** published an essay on why women need to be able to talk about the reality of male violence and the importance of single-sex services for traumatised female survivors. She called for women to be allowed to join the debate without fear of violence, but in response has received so many threats to paper her entire house with it.<sup>15</sup>

On 27 October 2022, **Ash Regan**, Minister for Community Safety in the Scottish Government, resigned her post, because she opposed the Gender Recognition Reform Bill, believing this would be detrimental to women’s rights. It is indefensible that the Minister whose responsibilities includes violence against women could not stay in post and vote against a Bill that would have a negative effect on women. She was abused and harassed.

These are just a few examples of the hostile environment faced by women for peacefully expressing their view that sex matters for women’s rights and women’s lives. This has a chilling effect on other women, many of whom have been scared off participating.

### **3. Exclusion of women from formulating policies**

#### **3.1 Scottish Prison Service policy on male prisoners who identify as women**

In 2014, the Scottish Prison Service (SPS) adopted a policy on the placement of male prisoners who identify as women,<sup>16</sup> allowing them to move to the female prison estate, regardless of the nature of their crime or whether they had transitioned or legally changed their sex.

This policy was written by a trans rights organisation. No women or prisoner welfare organisations were consulted before its adoption. In the legally mandated Equality Impact Assessment, where the impact of this policy on female prisoners should have been considered, there is a blank space. The SPS says its policy is safe because it uses a “robust risk assessment”. A freedom of information request made this available to the public: it is

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<sup>13</sup> <https://www.scotsman.com/news/scottish-news/feminist-speaker-julie-bindel-attacked-transgender-person-edinburgh-university-after-talk-545841>

<sup>14</sup> <https://www.parliament.scot/chamber-and-committees/votes-and-motions/votes-and-motions-search/S5M-17604>

<sup>15</sup> <https://www.telegraph.co.uk/news/2021/11/22/jk-rowling-says-will-not-intimidated-trans-activists-targeted/>

<sup>16</sup> For a case study of this policy see <https://eupublishing.com/doi/full/10.3366/scot.2019.0284>

wholly inadequate. It considers only the risk female prisoners pose to the male. It does not consider the risk the male poses to the psychological and physical safety of female prisoners.<sup>17</sup>

Rhona Hotchkiss, previously the governor of the only women's prison in Scotland, disclosed the devastating impact this policy had on female prisoners, detailing several incidents of male prisoners in the female estate behaving aggressively or in a predatory manner. In 2019, the SPS promised a review that would consider the needs of female prisoners. FWS participated in this review in April 2022, but the review did not deliver on that promise.

On 25 January 2023, the policy came under public scrutiny when newly convicted double rapist Adam Graham (aka Isla Bryson) was moved to the women's prison.<sup>18</sup> The resulting public outcry forced the SPS to send him to the male prison estate, especially since those who know him have claimed he identified as a woman only to take advantage of this policy. The policy is now on hold.

### 3.2 Data collection on the basis of sex

The Scottish Government opposes collecting data on the basis of sex. Following protests about this during the Census Bill debate in 2018 from statisticians, data users, researchers, scientists, and women's rights campaigners highlighting the vital importance of sex-aggregated data for women, the Scottish Government formed a *working group on sex and gender in data* to consider the issue in detail.

The working group acknowledged that submissions had highlighted how important accurate data was in working to eliminate all forms of discrimination of women and cited criticism made by the CEDAW Committee in the 2019 Concluding Observations report on the UK about its "*lack of systematic collection of data, disaggregated by sex.*"<sup>19</sup>

However, the group dismissed all of these concerns as well as the CEDAW recommendations and advised public bodies in Scotland that data should not be collected on the basis of sex unless this was in a medical context.

### 3.3 Rural women and migrant women

Rural women face considerable barriers to participation, because they are dispersed over a wide and often less accessible area. If they seek participation in the political sphere, they have to travel long distances and incur travel, accommodation and childcare costs. Rural

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<sup>17</sup> <https://murrayblackburnmackenzie.org/2023/02/06/guest-blog-does-the-scottish-prison-service-risk-assessment-for-placing-transgender-prisoners-protect-women/>

<sup>18</sup> [https://en.wikipedia.org/wiki/Isla\\_Bryson\\_case](https://en.wikipedia.org/wiki/Isla_Bryson_case)

<sup>19</sup> [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FGBR%2FCO%2F8&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FGBR%2FCO%2F8&Lang=en)

women are disproportionately also poorer, which makes this harder. This could be redressed by the Scottish Government organising public engagement events in rural areas, but it has shown no interest to do so, instead limiting them mostly to Edinburgh, the capital and seat of government, and Glasgow, Scotland's biggest city.

Amongst cultural barriers to participation, *migrant women* also face a language barrier. There is a persistent perception that everyone speaks and writes perfect English, making the inclusion of migrant women in decision-making systems much more difficult. For example, *First Minister's National Advisory Council on Women and Girls*, seemingly an opportunity for ordinary women and girls to be involved in policy making, produces much material in an undecipherable jargon, requiring a perfect command of English, a university education and knowledge of specific terminology.

A further barrier to the participation of migrant women is the loss of single-sex spaces like toilets, changing rooms and single-sex sports groups, clubs or associations. When these spaces become mixed-sex through the inclusion of men who identify as women, migrant women who cannot use such spaces are excluded from the public sphere. When migrant women raise their concerns about their exclusion, they face hostility and intolerance.

### 3.4 Capture of NGOs

The Scottish Government relies heavily on the support it receives for its proposals from the state-funded women's sector, frequently citing their acceptance of the inclusion of men who identify as women in female-only spaces and services. Most recently it did so to defend housing a double rapist with vulnerable female prisoners. Since 2012, the Scottish Government has required all women's sector organisations applying for state-funding to include men who identify as women in their service or be excluded from funding.

*Scottish Women's Aid* and *Rape Crisis Scotland* are umbrella organisations uniting women's refuges and rape crisis centres respectively. They are vocal about their support for the Scottish Government's policy but have never discussed its impact with frontline workers, individual refuges and centres or the women they serve. The policy has led to female survivors being excluded and harmed. Women who raise concerns are dismissed or ignored. As their funding depends on the Scottish Government however, it is difficult to know whether they would be free to do otherwise.

### 3.5 Men taking women's places in positive action measures

The Equality Act 2010 is UK-wide equality legislation designed to prevent unlawful discrimination on the basis of nine protected characteristics: *age, disability, gender reassignment, marriage and civil partnerships, pregnancy and maternity, race, religion or*

*belief, sex, sexuality.* On the basis of sex, this allows for girls' schools, women-only scholarships, programs for future politicians, prizes and awards etc.

The Genuine Occupational Requirement (GOR) is a positive action measure, allowing those providing female-only spaces and services to hire only female employees. In 2021, Edinburgh Rape Crisis Centre (ERCC) advertised the post of its manager using the GOR but employed a man who identifies as a woman. ERCC did so even though this candidate, who had previously managed Forth Valley Rape Crisis Centre, had admitted in an interview that his presence made it impossible for some female survivors to use the centre.

### 3.6 Hate Crime and Public Order (Scotland) Act 2021

In 2021, the Scottish Government enacted a new hate crime law protecting cross-dressing men but not women, even though evidence was presented showing the disproportionate amount of hatred women are subjected to on the basis of their sex. This evidence was dismissed by the government.

It also dismissed the recommendation of the expert tasked with reporting on Hate Crime in Scotland.<sup>20</sup> Lord Bracadale had been asked whether the category of sex should be added to address the rising tide of misogynistic abuse. He said:

*"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."*

He recommended that sex should be included as this would also contribute to meeting the Scottish Government's international obligations to tackle violence against women. The Scottish Government refused.

The second part of the new Hate Crime Bill introduces new "stirring up" offences, enabling the penalising of opinions, which will have a chilling effect on freedom of expression, belief, and assembly. This resulted in an unprecedented alliance of very disparate groups and individuals concerned about the impact on free speech.<sup>21</sup>

One of the major areas of concern has been the impact on women seeking to discuss women's sex-based rights, who are frequently targeted by activists who brand them "hateful". In our submissions to the Scottish Government, FWS provided examples of the many activists who wanted to report feminists under the new law and who considered that

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<sup>20</sup> <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>

<sup>21</sup> <https://freetodisagree.scot/about/#supporters>



lobbying for women’s rights was, in itself, problematic.<sup>22</sup> The Scottish Government ignored these concerns.

### 3.7 Gender Recognition Reform Bill

Female survivors of male violence asked to give evidence about self-exclusion to the Committee responsible for the Bill. It refused to hear them, then wrote in its final report that there was no evidence self-exclusion was happening in Scotland, ruling all concerns about the impact on women as out of scope of the Bill and ignoring all evidence provided in written submissions, tens of thousands of which were from women.

In response, HEAL Survivors Group sent a 60-page report<sup>23</sup> providing evidence of self-exclusion in Scotland. Reem Alsalem, *Special Rapporteur on violence against women and girls, its causes and consequences*, referenced this report in her letter<sup>24</sup> to the UK Government, criticising the Scottish Government’s refusal to listen to women’s concerns about the Bill and the Committee’s refusal to take evidence from female survivors of male violence. The Scottish Government dismissed her concerns as groundless, but the Committee held an emergency evidence session with Reem Alsalem on 19 December 2022. When MSPs and women’s rights campaigners, asked for the final vote on the Bill to be postponed so that her evidence about the impact of the Bill on women could be properly considered, the Scottish Government refused.

The UK Government stopped the Bill on 17 January 2023, because it would adversely affect the operation of UK-wide equality law and harm women. The Scottish Government denied any knowledge of such an effect. This further demonstrated that the Scottish Government ignored women’s voices opposing its Bill because these issues had been raised since 2019 by women’s rights campaigners,<sup>25</sup> in correspondence with the government, countless submissions to the three public consultations and in face-to-face meetings.

## **4. Legal challenges**

### 4.1 Gender Representation on Public Boards Act 2018 (GRPBA)

The GRPBA is a positive action measure designed to redress the historic underrepresentation of women on public boards. It mandates that 50% of all seats must go to women. However, the Scottish Government defined “women” on the basis of self-identification alone, in violation of Article 1 CEDAW (and in conflict with Recommendation No 28 (1.5) of 2010) and explained in the accompanying Statutory

<sup>22</sup> <https://forwomen.scot/wp-content/uploads/2021/02/For-Women-Scotland-Hate-Crime-Bill-FoE-Amdts-21Feb2021.pdf>

<sup>23</sup> <https://www.parliament.scot/-/media/files/committees/equalities-human-rights-and-civil-justice-committee/correspondence/2022/gender-recognition-reform-heal-survivors-group-letter.pdf>

<sup>24</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27681>

<sup>25</sup> <https://murrayblackburnmackenzie.org/2020/03/16/our-response-to-the-scottish-gra-reform-consultation/>

Guidance that a woman is a person “*always using female pronouns; using a female name on official documents.*”

A public consultation on the Statutory Guidance resulted in hundreds of women raising concerns about this redefinition of women, of the wider impact of this on women, the conflation of sex and gender, the exclusion of women who identify as men or non-binary and the subsequent undermining of the purpose of the law. The Scottish Government ruled these concerns out of scope of the consultation and dismissed them on grounds of contradicting government policy.

FWS challenged the Scottish Government over this legal redefinition of women in a Judicial Review. While we lost at first instance in March 2021, we won our appeal in February 2022.<sup>26</sup> The judgement confirmed that positive action measures designed to redress the discrimination experienced by women on the basis of their sex must be based on sex.

The Scottish Government issued new guidance, which still allows men who identify as women to take women’s seats (those who have legally changed sex). We lodged a second judicial review against this new guidance but lost at first instance in December 2022. This latest ruling<sup>27</sup> does not recognise women as a distinct sex class and so jeopardises the protections women are entitled to under the Equality Act. We are considering an appeal.

***Recommendation: The Scottish Government shall immediately undertake all steps necessary to revise all laws, policies and regulations to ensure they protect women on the basis of sex. It shall support the right of women to campaign for their sex-based rights and include women in all decision-making systems.***

## **Conclusion**

The equal and inclusive representation of women in decision-making systems in Scotland has been systematically undermined through the Scottish Government’s determination to conflate or replace sex with gender in laws and policies. There is no evidence that the Scottish Government considered the direct and indirect consequences of such laws and policies for women and did not monitor their impact, even though CEDAW places a legal obligation on the Scottish Government to do so and UK equality law mandates this. Excluding women from decision-making systems has led to increased discrimination and harm. We ask the CEDAW Committee to affirm that as women are discriminated against on the basis of their sex, women need to be protected on the basis of sex and that the conflation of sex and gender in laws and policies is harmful to women and must be stopped.

We thank the Committee for the opportunity to submit our observations on this issue.

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<sup>26</sup> <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csih4.pdf>

<sup>27</sup> <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csoh90.pdf>