

UN Convention on the Elimination of all forms of Discrimination Against Women: A case study in the Scottish courts

Introduction

Often described as an international bill of rights for women, the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) protects women against discrimination, which is defined as:

*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*¹

and where sex is defined by the UN as “the physical and biological characteristics that distinguish males and females”.²

The United Kingdom ratified the treaty in 1986, agreeing to be bound by its 30 Articles. Although not a signatory of the treaty, the Scottish Government stated its intention to incorporate CEDAW into law in the 2019 Programme for Government³ and is currently consulting on a Human Rights Bill which would allow women to pursue legal action on the grounds of a breach of CEDAW rights.⁴ The UK Government however, considers that the provisions of CEDAW are already legislated for in domestic law, largely by the Equality Act 2010 and the Human Rights Act 1998, and that CEDAW can and has been invoked before the domestic courts as an interpretive source in respect of existing legislation.⁵

This report examines how the Scottish Government performed in its commitment to the incorporation of CEDAW by examining a case where it was taken to judicial review by a women’s rights organisation citing a breach of CEDAW, alongside primary claims of unlawful actions under the Equality Act 2010 and the Scotland Act 1998 regarding the terms of the Gender Representation on Public Boards (Scotland) Act 2018.

Gender Representation on Public Boards (Scotland) Act 2018

The Gender Representation on Public Boards (Scotland) Act 2018 (GRPBA)⁶ was introduced to redress the historic under-representation of women and set an objective of 50% female representation on the boards of Scottish public authorities. This action was permissible under the general positive action measures in the Equality Act⁷ as well as a specific exception for public boards in the Scotland Act.⁸

¹ Article 1, [Convention on the Elimination of All Forms of Discrimination against Women](#)

² [UN Women, Gender Equality Glossary](#)

³ Page 137, [The Government’s Programme for Scotland 2019-20](#)

⁴ [A Human Rights Bill for Scotland: Consultation](#)

⁵ [Information received from the United Kingdom of Great Britain and Northern Ireland on follow-up to the concluding observations on its eighth periodic report](#)

⁶ [Gender Representation on Public Boards \(Scotland\) Act 2018](#)

⁷ [Section 158 and 159, Equality Act 2010](#)

⁸ [L2 Equal opportunities, Scotland Act 1998](#)

In order to reflect the protected characteristic of sex in the Equality Act the GRPBA was originally introduced to Parliament with no definition of the word “woman”.⁹ However, this was amended during the committee stages after successful lobbying from Scottish Trans Alliance to include males in the 50% target if they held the protected characteristic of gender reassignment and, correspondingly, *exclude* those females who have the protected characteristic of gender reassignment.¹⁰

The legislation was therefore passed with the following definition:

*“woman” includes 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.*¹¹

This major change in the definition of women was not subject to public consultation and the equality impact assessment was based only on the first draft of the bill, the terms of which were not proceeded with.

The Scottish Government conducted a public consultation the following year on draft statutory guidance to accompany the Act, which set out what is meant by “living as a woman”. A candidate for a public board position does not have to prove they meet this definition:

*This would not require the person to dress, look or behave in any 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.*¹²

Despite the vast majority of consultation respondents highlighting concerns that the GRPBA definition was not consistent with the Equality Act and taking issue with the quite ridiculous notion of a woman defined by a name on a gas bill, the guidance was enacted in June 2020 with no amendments.¹³ A Freedom of information response later revealed that women’s concerns were dismissed as they were contradictory to the Government’s trans inclusive policy and therefore deemed “out of scope”.¹⁴

For Women Scotland lodged a petition in August 2020 for a judicial review on the GRPBA on the grounds that the Scottish Government had acted outwith its devolved competence by

⁹ Para 43, [Gender Representation on Public Boards \(Scotland\) Bill, Policy Memorandum](#)

¹⁰ [Official Report of the Scottish Parliament, Equalities and Human Rights Committee 05 October 2017](#)

¹¹ [Key definitions, Gender Representation on Public Boards \(Scotland\) Act 2018](#)

¹² Paras 2.13 to 2.15, [Gender Representation on Public Boards \(Scotland\) Act 2018: consultation on implementation](#)

¹³ [Gender Representation on Public Boards \(Scotland\) Act 2018: statutory guidance](#)

¹⁴ [Gender Representation on Public Boards \(Scotland\) consultation analysis: FOI release \(FOI/202000043385\)](#)

confusing the distinct protected characteristics of "sex" and "gender reassignment" and redefining "woman" in the Equality Act which is a legislative power reserved to Westminster. The court was also asked to consider whether any of the provisions of the GRPBA were incompatible with the international obligations of the United Kingdom as contained in CEDAW.

Judicial Review

The substantive hearing was heard in the Court of Session Outer House in January 2021 with Aidan O'Neill KC acting for the petitioners For Women Scotland, and Ruth Crawford KC representing both the respondents, the Lord Advocate and the Scottish Ministers.

(a) Petitioner's argument:

The petitioners contended that while CEDAW had not yet been expressly incorporated as part of the law of Scotland and hence not enforceable in the domestic courts, it does not make reference to it irrelevant. The provisions of CEDAW are worthy of respect by the courts and have been quoted in the Supreme Court as an interpretive aid to the European Convention on Human Rights.¹⁵ And since the Scottish Government has committed to incorporating CEDAW in Scots law there is a legitimate interest in establishing whether particular laws such as the GRPBA are compatible with CEDAW before it is incorporated. To that end a declarator by the court would be instructive, providing a formal explicit statement on compatibility, albeit not enforceable. There is precedent for this in the case of *Wightman*¹⁶ where a declarator was issued concerning the proper interpretation of a provision of EU law and a similar practical use is relevant for national measures such as the positive actions for public boards in the GRPBA.

As with the Equality Act, CEDAW recognises only two sexes, the biological sex classes of men and women, and provides protection against discrimination on that basis. The positive actions of the GRPBA fall within Article 4(1) of CEDAW in that they are temporary special measures aimed at accelerating de facto equality between men and women and shall not be considered discrimination. However, the peculiar definition of women in the GRPBA is incompatible with CEDAW and the provisions of Article 4 cannot lawfully be extended to include men in the special measures for women.

Where "gender" comes into play in CEDAW it is with reference to Article 5(a) where the measures in the GRBPA modify the patterns of decision making in recruitment and counter the historical discrimination and stereotypical assumptions of society that has led to fewer women taking up roles on public boards.

(b) Respondent's argument:

The respondents held that CEDAW is unenforceable and not a constraint on the legislative powers of the Scottish Parliament. The lawfulness of the GRPBA with reference to CEDAW

¹⁵ [R \(MA\) v Work and Pensions Secretary \[2016\] UKSC 58 \[2016\] 1 WLR 4550](#) quoted Article 1 of CEDAW at para 74 to demonstrate that to deny women protection against gender-based violence, such that they cannot live an equal life with men, is discrimination preventing the enjoyment of their fundamental Convention rights.

¹⁶ [Wightman v Secretary of State for Exiting the EU \[2018\] CSIH 62, 2019 SC 111](#) where the Inner House issued a bare declarator reflecting the ruling of the CJEU on this purely international law issue.

is entirely hypothetical and academic until such time that the treaty is incorporated into domestic law, and therefore the petition for a declarator should be refused.

Contrary to supporting a binary and biological construction of “woman” the General Recommendations of the CEDAW Committee in fact embrace transwomen and support the approach taken to the definition of women in the GRPBA. These recommendations are non-binding (and post-date the ratification of the treaty by the UK) and their legal authority as a matter of international law has been described as “slight”,¹⁷ although they do express a point of view which is entitled to respect.¹⁸

In particular, General Recommendation No. 28 specifies at paragraph 18 that:

*Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and **gender identity**. Discrimination on the basis of **sex or gender** may affect women belonging to such groups to a different degree or in different ways than men. States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and General Recommendation No. 25.¹⁹ (emphasis added)*

These measures simply include women who also happen to have another intersecting personal characteristic ie. they include transwomen. Transgender is also listed as a factor that may affect a woman’s life in General Recommendation No. 35²⁰ and the Concluding Observations by the Committee to the eighth periodic review of the United Kingdom specifically mentions transgender women.²¹

It is the policy of the Scottish Government that transgender women are to be treated as non-transgender women unless to do so would be prohibited by law. The policy reflects the recommendations of CEDAW and the GRPBA, with its definition of woman, is an implementation of that policy.

¹⁷ Para 35, [R \(A\) v Secretary of State for Health \(Alliance for Choice and others intervening\) \[2017\] UKSC 41, \[2017\] 1 WLR 2492](#)

¹⁸ Para 23, [R \(QSA\) v Secretary of State for the Home Department \[2020\] EWCA Civ 130, \[2020\] 1 WLR 2062](#)

¹⁹ Para 18, [CEDAW General Recommendation No. 28, 2010](#)

²⁰ Para 12, [CEDAW General Recommendation No. 35, 2017](#)

²¹ Para 16(c), [CEDAW Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland](#)

The CEDAW Committee also welcomed the GRPBA as a positive instrument for women's equality in its Concluding Observations.²²

(c) Petitioner's reply

In a brief right of reply the petitioner queried the announcement of the previously unheard of Scottish Government "policy" that transwomen are women and that such a policy change should be evidenced by data collection and a public consultation contributing to its formulation. The fact that none exists is contrary to the Equality and Human Rights Commission's guidance on the Public Sector Equality Duty. In reply the respondent stated that "policy" was perhaps the incorrect word and downgraded it to a "viewpoint".

The General Recommendation No. 28 is quite clear in paragraph 5 that although CEDAW only refers to sex-based discrimination it should also cover gender based discrimination against women. The term sex refers to biological differences, the term gender refers to socially constructed identities, attributes and roles for women and men and society's social cultural influence on biological differences, resulting in hierarchical relationships and distribution of power and rights, favouring men and disadvantaging women.²³ It encapsulates what is sometimes said to be the difference between sex and gender. Sex is what one is born with, but it should not be, as it were, one's destiny, as it is sometimes thought to be in patriarchal societies where roles are enforced on women because of their sex. The challenges to what society expects or enforces, whether expressly or implicitly, is what challenging gender is about from the biological basis of being a woman in the first place.

Paragraph 18 does not, as the respondent's claim, support the Scottish Government's "policy" that transwomen are women. When it refers to gender identity it is the gender identity or trans status held by those who were born women, not a reference to those born men and who have adopted whatever requirements there are for the Scottish Government to regard them as "living as women".

Discussion

186 of the 193 member states of the UN have ratified CEDAW, a document which has no mention at all of trans or gender identity; it only crops up in the CEDAW Committee's subsequent country reports or recommendations. Many member states do not have the same concept, or indeed any concept at all, of gender or gender identity to that which exists in the UK, and different languages simply have no equivalent to the pronouns used in the English language. Furthermore, even within the UK it is not at all clear that there is a common understanding of "trans woman". An independent poll showed that fewer than two thirds of those asked understood that the term referred to someone who was registered male at birth. Approximately 20% thought it referred to someone born female and a further 20% were unsure.²⁴ To blindly assume that a woman with a gender identity or a trans woman means the same globally as the Scottish Government's backroom policy is a naive and self-serving reach.

²² Para 4(g), [CEDAW Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland](#)

²³ Para 5, [CEDAW General Recommendation No. 28, 2010](#)

²⁴ [Clarity matters: how placating lobbyists obscures public understanding of sex and gender](#)

Whilst UN member states agreed to be bound by the Articles contained within the CEDAW treaty, neither the subsequent CEDAW Committee General Recommendations or the Concluding Observations following periodic reviews on the progress of each country are legally binding. An analysis into the growth of the concept of gender identity and how it is structurally displacing sex in policy and language warns that aspects of the Committee's observations and recommendations constitute a misunderstanding of discrimination based on sex and actually violate the very obligations to realise substantive equality between men and women.²⁵ The varying success of the encroachment of gender identity ideas and the changeable nature of CEDAW Committee membership has also led to widely different reviews over time, shown by the Committee's Concluding Observations upon review of the following countries:

UK, 2019 "...discrimination faced by "Black, Asian and Minority Ethnic" women, older women, women with disabilities, asylum-seeking and refugee women, lesbian, bisexual and **transgender women** and intersex persons."²⁶

Portugal, 2022: "It notes with concern, however, the gradual dilution of the concept of "sex" and its replacement by the concept of "gender" across policies and legislation...recommends avoiding the broad use of the concept of "gender" when addressing the rights of women."²⁷

Despite this recognition of the fundamental problem a report the following year still failed to clarify the use of transgender language.

Germany, 2023: "...survivors of gender-based violence against women sometimes do not receive support that is adapted to their specific needs, in particular women and girls with disabilities, **trans women** and women and girls that do not speak German."²⁸

Finally, while the CEDAW Committee did welcome the GRPBA as a positive measure for women's equality, we note that neither the UK's report to the Committee,²⁹ the Scottish Government's statement,³⁰ or the shadow report by Engender³¹ mentions that the Act redefined the meaning of women. All these reports were written prior to the legal action raised by For Women Scotland and when the details became more publicly recognised. It is very likely that the Committee took the GRPBA at face value from the information provided and were simply unaware of the controversial change in terminology within the Act which resulted in the inclusion of men. As pointed out elsewhere, it is not the only example of "the Committee's lack of familiarity with what is going on in each nation preventing it from crafting precise concluding observations."³²

²⁵ [The Erasure of Sex: The Global Capture of Sex: The Global Capture of Policies on Sex by Gender Identity Activists and the Effects on the Rights of Women and Girls](#)

²⁶ Para 16(c), [CEDAW Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland](#)

²⁷ Paras 18 and 19, [CEDAW Concluding observations on the tenth periodic report of Portugal](#)

²⁸ Paras 31(c) and 32(c), [CEDAW Concluding observations on the 9th periodic review of Germany](#)

²⁹ Para 79, [Eighth periodic report submitted by the United Kingdom](#)

³⁰ [Convention on the elimination of all forms of discrimination against women: position statement by the Scottish Government](#)

³¹ [CEDAW shadow report by Engender](#)

³² Para 35(f), [CEDAW Concluding observations on the UK as annotated by Engender](#)

Judgment

The petitioner's arguments were not accepted by the court and a ruling was handed down in March 2021 in favour of the Scottish Ministers that the GRPBA was lawful and within the legal competence of the Scottish Parliament. The judge said that "There appears to me to be no inconsistency between the types of discrimination addressed by CEDAW and the provisions of the 2018 Act".³³

However, the case was taken to appeal in the Court of Session Inner House where the petitioners, For Women Scotland, won in February 2022. The previous ruling was overturned in its entirety. The court said that "By incorporating those transsexuals living as women into the definition of woman the 2018 Act conflates and confuses two separate and distinct protected characteristics." The redefinition of "woman" was ruled unlawful and the court ordered that it be struck from the GRPBA.³⁴

Conclusion

It is surprising that a Government publicly committed to incorporating CEDAW into law and keen to allow women to challenge breaches in the courts was so resistant to actually doing so when the opportunity arose. The Scottish Government actively contested the possibility of the court's scrutiny and were cavalier about CEDAW being of no relevance to the legislation they enact. A declarator of compatibility should have been reassuring to a Government confident in its adherence to international treaties and it reflects poorly that this was not welcomed, particularly when it amounted to a simple statement with no enforcement powers. It gives very little reassurance that CEDAW considerations will be at the forefront when drafting new legislation, nor of any support for the right to challenge decisions.

The judicial review process has, however, proved very instructive. The announcement to the court of the previously unknown "transwomen are women" official policy confirmed what has long been suspected and, despite the appeal court ruling categorically that this does not stand as a matter of law, it is still plainly evident in other Government policy areas.

Plans to incorporate CEDAW into Scots law are underway as part of the Human Rights Bill and it remains to be seen whether the Scottish Government has accepted that the first instance court's ruling about CEDAW compatibility was overturned or if they plan to introduce the same male inclusive interpretation into the law of Scotland. It is of great concern that this will be the case, particularly when the Scottish Government proposes to incorporate not just the Articles of CEDAW, but also increase the legal status of the General Recommendations and Concluding Observations, a move which will likely put any new legislation in direct conflict with the UK wide Equality Act.



*For Women Scotland
27 September 2023*

³³ [For Women Scotland v Lord Advocate and Scottish Ministers \[2021\] CSOH 31](#)

³⁴ [For Women Scotland v Lord Advocate and Scottish Ministers \[2022\] CSIH 4](#)