

## UN Convention on the Elimination of all forms of Discrimination Against Women: The meaning of sex and self-identification

### About us

For Women Scotland is a not-for-profit group campaigning to protect and strengthen women's rights in Scotland. We believe that "sex" is a biological term referring to the two immutable categories of male and female. This aligns with the UN definition of sex as "the physical and biological characteristics that distinguish males and females"<sup>1</sup> and is reflected in Article 1 of CEDAW which protects women against discrimination on the basis of sex.<sup>2</sup>

### CEDAW and UK law

The UK Government considers that the substantive provisions of CEDAW are legislated for in domestic law, largely by the Equality Act 2010 and the Human Rights Act 1998.<sup>3</sup> The Equality Act provides protection against discrimination, harassment and victimisation in a wide range of circumstances for nine separate protected characteristics - the relevant two here are "sex" and "gender reassignment". Sex is defined as a reference to a man or a woman,<sup>4</sup> where a man means a male of any age and a woman means a female of any age.<sup>5</sup> Gender reassignment is defined as a reference to a transsexual person who is proposing, undergoing or has undergone a reassignment process by changing physiological or other attributes of sex.<sup>6</sup> The defining feature common to those in this group is the "process" - having this protected characteristic does not change a person's sex, and "gender" or "gender identity" are not defined in any legislation.

We do not have self-identification of sex in the UK. Following a ECtHR ruling, gender recognition for some legal purposes was introduced in the UK by the Gender Recognition Act 2004 (GRA). This Act does not require an individual to undergo surgery but does require a relevant medical diagnosis to be provided. This fully complies with international obligations and the provisions were upheld in 2021 by the High Court in Northern Ireland which ruled the requirement for a diagnosis was fair and balanced as it safeguards individuals applying for a gender change and ensures rights granted to a particular group do not interfere with the rights of wider society.<sup>7</sup>

### Gender recognition reform in Scotland

Power to amend the Gender Recognition Act is devolved to Scotland and in December 2022 the Scottish Parliament passed the Gender Recognition Reform (Scotland) Bill which removed the requirement for a medical diagnosis of gender dysphoria, replacing it with a quick process of self-identification of sex.<sup>8</sup> Potentially this allowed every man in Scotland to legally declare himself to be a woman and placed no restrictions on applications from

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<sup>1</sup> [UN Women, Gender Equality Glossary](#)

<sup>2</sup> Article 1, [Convention on the Elimination of All Forms of Discrimination against Women](#)

<sup>3</sup> [Information received from the United Kingdom of Great Britain and Northern Ireland on follow-up to the concluding observations on its eighth periodic report](#)

<sup>4</sup> [The Equality Act 2010 definition of sex at section 11](#)

<sup>5</sup> [The Equality Act 2010 definition of woman at section 212](#)

<sup>6</sup> [The Equality Act 2010 definition of gender reassignment at section 7](#)

<sup>7</sup> [For Women Scotland: Medical diagnosis is best practice](#)

<sup>8</sup> [Gender Recognition Reform \(Scotland\) Bill, as passed](#)

convicted sex offenders. The UK Government responded with a Scotland Act 1998 Section 35 order which prevented the Bill gaining royal assent and thus passing into law, citing reasonable concerns that the Bill would adversely affect the operation of the UK-wide Equality Act, in particular with regards to women's rights.<sup>9</sup> A legal challenge by the Scottish Ministers followed where the Court of Session Outer House ruled in favour of the UK Government.<sup>10</sup> There was no appeal and the case is now settled.

### **Interaction between the Equality Act and the Gender Recognition Act**

There has been genuine confusion over the interaction between the Equality Act and the Gender Recognition Act. Legal academic Michael Foran has written about Section 9 of the GRA<sup>11</sup> and the uncertainty about which part applies to the Equality Act. If section 9(1) applies then a Gender Recognition Certificate (GRC) changes a person's sex for the purposes of the Equality Act, however, if section 9(3) holds then the effect of a GRC is disapplied and sex in the Equality Act retains its ordinary meaning in line with the UN definition:

*From at least 2004 onwards, our law had a technical meaning of sex in addition to the ordinary common law meaning. The difficulty which arose, given the wording of s.9(3), is how one is to determine when provisions refer to the ordinary meaning of sex and when they refer to the technical meaning crafted by the Gender Recognition Act? It would be unlikely, given the specific wording of s.9(3), if all references to sex were automatically and without question taken to mean sex as modified by a Gender Recognition Certificate. So the difficult task before any interpreter is to determine whether the meaning of sex in the Equality Act should be taken to be covered by s.9(1) or s.9(3).<sup>12</sup>*

Senior legal counsel, Aidan O'Neill KC, has argued that there is a single definition for sex throughout the Equality Act which must be read as its ordinary common law meaning relating to biological differences. To do otherwise would cause, amongst other issues, protections for "pregnant women" to become incoherent by giving those rights to men (who hold a female GRC) and removing them from women (who hold a male GRC), but who may nevertheless, still get pregnant. Since it is the most recent Act, the Equality Act must be construed first, and its terms take precedence over the older GRA where there is conflict. The inconsistencies between the two Acts are resolved by the Equality Act being covered by section 9(3) of the GRA.<sup>13</sup>

As Lord Hope noted in *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, 2013 SC (UKSC) 153:

*The best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable.*

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<sup>9</sup> [UK Government: Statement of reasons related to the use of section 35 of the Scotland Act 1998](#)

<sup>10</sup> [The Scottish Ministers v Office of the Advocate General \[2023\] CSOH 89](#)

<sup>11</sup> [Section 9, Gender Recognition Act 2004](#)

<sup>12</sup> [Michael P Foran: On Defining Sex in Law](#)

<sup>13</sup> [Note of Argument for the petitioner in For Women Scotland v Scottish Ministers](#)

*This will be achieved if the legislation is construed according to the ordinary meaning of the words used.*<sup>14</sup>

## Legal Cases

In recent years there have been three significant legal cases centred on the definitions of “sex” and “woman”, two of them brought by For Women Scotland. All these cases reached the highest civil court in Scotland, the Court of Session Inner House, and established the following points:

1. **FPFW.** There are some statutory contexts in which a rigid definition of sex based on reference to biology must be adopted and the effect of a GRC disapplied, specifically “matters affecting status, or important rights, in particular the rights of others”.<sup>15</sup>
2. **FWS1.** Incorporating transsexuals living as women into the definition of woman conflates and confuses the two separate protected characteristics of sex and gender reassignment and is outside the powers of the Scottish Ministers. Transsexuals are those with the protected characteristic of gender reassignment and include those with and without GRCs.

An exception which allows steps to be taken relating to the inclusion of women as having a protected characteristic of sex, is limited to allowing provision to be made in respect of a “female of any age”. Provisions in favour of women, in this context, by definition (in the Equality Act) exclude those who are biologically male.<sup>16</sup>

3. **FWS2.** A (male) person with a GRC in the female gender comes within the definition of “woman” for the purposes of the Equality Act. Those without a GRC remain of their birth sex.<sup>17</sup>

The rulings are somewhat contradictory but the most recent For Women Scotland judgment does not overturn the earlier one; both stand with equal weighting in law.

## FWS1 and CEDAW

We have previously written<sup>18</sup> about the initial For Women Scotland judicial review in the lower court where we challenged the following definition of “woman” in a positive action measure designed to increase women’s representation on public boards:

*“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.*

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<sup>14</sup> §14, [Imperial Tobacco Ltd v Lord Advocate \[2012\] UKSC 61, 2013 SC \(UKSC\) 153](#)

<sup>15</sup> [Fair Play For Women v Registrar General for Scotland and Scottish Ministers \[2022\] CSIH 7](#)

<sup>16</sup> §36, [For Women Scotland v The Scottish Ministers \[2022\] CSIH 4](#)

<sup>17</sup> [For Women Scotland v The Scottish Ministers \[2023\] CSIH 37](#)

<sup>18</sup> [UN Convention on the Elimination of all forms of Discrimination Against Women: A case study in the Scottish courts](#)

The petition to the court claimed this redefinition conflated and confused the distinct protected characteristics of “sex” and “gender reassignment” and was outside the Scottish Government’s legislative competence as the power to amend the Equality Act is reserved to the UK Government. The court was asked to consider CEDAW as an interpretive aid and issue a declarator on compatibility with Article 4(1) on temporary special measures aimed at accelerating de facto equality between men and women.

The court favoured the Scottish Ministers’ argument which relied, not on the terms of the ratified treaty, but rather on the CEDAW Committee’s non-binding observations and recommendations which introduce “gender identity”. This seems the wrong way round and it is troublesome that the Committee’s reports have strayed from the core underlying principles of the convention articles. As others have warned, the growth of the concept of gender identity and how it is structurally displacing sex in policy and language has resulted in aspects of the Committee’s observations and recommendations showing a misunderstanding of discrimination based on sex, and actually violate the very obligations to achieve equality between men and women.<sup>19</sup>

A subsequent Concluding Observation for Portugal in 2022 identified the problem: “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.”<sup>20</sup>

Fortunately, the lower court decision was overturned in its entirety by the Court of Session Inner House (see FWS1 at number 2 in the above list) which we consider brought the law back in line with the terms of CEDAW. The redefinition of “woman” was ruled unlawful and the court ordered it struck from the legislation.

### **FWS2 and CEDAW**

Following our successful judicial review the Scottish Government amended the statutory guidance for the positive action measure, adding a definition of “woman” that included males who had obtained a GRC. As the Government was limited to using the Equality Act definitions, which make no mention of the Gender Recognition Act, we returned to court to seek clarification. Despite the binding FWS1 decision stating that **by definition** biological males are excluded from provision made for women, the court took a different interpretation and ruled that some biological males, the subset of those with the protected characteristic of gender reassignment and who hold a GRC, are included in the Equality Act definition of woman.

It is our understanding that now that the law cannot distinguish between the biological characteristics that define the two sexes and does not recognise women as a distinct sex class, it no longer aligns with CEDAW. There is simply no way to achieve equality between men and women when the legal categories now contain a mixture of both males and females.

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<sup>19</sup> [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](#)

<sup>20</sup> §18 and 19, [CEDAW Concluding observations on the tenth periodic report of Portugal](#)

## The Scottish Government response

The Scottish Government's announcement to the court of the previously unknown official policy that "transwomen are women" by self-identification confirmed what has long been suspected and, despite the appeal court in both judicial reviews ruling categorically that this does not stand as a matter of law, it is still plainly evident in many Government policy areas. Some examples include:

- Guidance for schools that advises children (who cannot obtain a GRC and thus remain of their birth sex in the Equality Act) can access the opposite sex toilets, changing rooms, overnight accommodation and sporting activities on the basis of how they self-identify their sex.<sup>21</sup>
- Funding allocations to the women's sector are conditional on organisations operating a transwomen inclusive policy on the basis of self-identification.<sup>22</sup> This has led to a male without a GRC managing a rape crisis centre<sup>23</sup> and, as described in an ongoing employment tribunal, staff unable to disclose the sex of counsellors to rape victims seeking female-only support.<sup>24</sup> Jobs are regularly advertised contrary to the court rulings, inviting applications from those who "identify as women" for positions restricted by an Equality Act exception to be women-only.<sup>25</sup>
- After a public outcry when a double rapist who identified as a woman was sent to a female prison<sup>26</sup> the Scottish Prison Service transgender policy was amended to keep transwomen prisoners with a history of violence against women in the male estate.<sup>27</sup> A full review has since concluded and the updated policy<sup>28</sup> does not comply with international obligations to house male and female prisoners separately; nor does it comply with the single-sex residential accommodation provisions of the Equality Act since prisoners can still be housed on the basis of self-identification of sex. The Prison Service takes no account of GRCs, believes there is an "acceptable risk" to women prisoners, and existing transwomen prisoners, including one who murdered a cellmate in a male prison, still remain in women's prisons.
- Data collection guidance that advises data should be collected on the basis of gender identity and not sex, unless necessary in a medical context.<sup>29</sup> This is detrimental to women as the Public Sector Equality Duty can no longer assess provision for women as a protected sex class and must always consider the needs of men.

All of these policies should have been reviewed and updated in light of the court rulings but this has not happened, instead the Scottish Government continues to encourage self-identification and prioritise "gender identity" over sex. All are in breach of women and girls' protections in CEDAW and do not comply with the rulings made in either of the FWS

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<sup>21</sup> [Supporting transgender young people in schools: guidance for Scottish schools](#)

<sup>22</sup> [For Women Scotland: Equally Safe funding conditions](#)

<sup>23</sup> [The Times, "Mridul Wadhwa, rape crisis boss, under fire over challenge to 'bigot' victims"](#)

<sup>24</sup> [Holyrood, "How a service set up for traumatised women forgot its core function"](#)

<sup>25</sup> [Advert for a Women's Support Domestic Abuse Practitioner at Dundee Women's Aid](#)

<sup>26</sup> [The Times, "Gender-switch rapist gaming the system, says Joanna Cherry MP"](#)

<sup>27</sup> [Scottish Government: Transgender prisoner management: urgent case review correspondence](#)

<sup>28</sup> [SPS Policy for the Management of Transgender People in Custody \(2023\)](#)

<sup>29</sup> [Scottish Government: Sex, gender identity, trans status - data collection and publication: guidance](#)

judicial reviews. After the defeat of the Gender Recognition Reform Bill, which had self-identification at its core, it was quite extraordinary for a Government Minister to confidently declare to Parliament that “The bill’s reforms remain the Government’s policy.”<sup>30</sup>

This is especially worrying in light of the Scottish Government’s plans to introduce a Human Rights Bill later this year to incorporate CEDAW into Scots law.<sup>31</sup> It seems unlikely that the Scottish Government has accepted that the first instance court’s ruling on CEDAW compatibility was overturned by the appeal court and self-identification of sex is not in line with CEDAW. Our response to the Human Rights public consultation sought absolute clarity on this point before a Bill is drafted which embeds a misunderstanding of CEDAW and incorporates a male inclusive definition of woman.<sup>32</sup> Given that the proposals will increase the legal status of CEDAW Committee recommendations and observations this is not an unwarranted concern and may well lead to another constitutional and legal battle with the UK Government.

### **UK Government acknowledges adverse effects of the GRA on the Equality Act**

The first instance court ruling in FWS2 was issued nine days before the Gender Recognition Reform Bill was passed by the Scottish Parliament.<sup>33</sup> No Parliamentary time was given to consider its implications or impact on the proposed legislation. The UK Government however, based their reasoning for the Section 35 order on this ruling and highlighted the following eight adverse effects of the GRA on the Equality Act and the risks posed to women’s rights and safeguarding, all of which would be made worse by the predicted significant increase in number of GRC holders and lack of checks and balances under a self-identification law.<sup>34</sup>

1. **Clubs and associations.** Women’s associations, including associations of lesbians and for sport, cannot exclude men who identify as women from membership if those men have a GRC. (Schedule 16 para 1 EA 2010)
2. **The public-sector equality duty (PSED).** The legal definition of man and woman makes a difference to the groups whose needs and disadvantages a public body is required to consider and advance. It becomes impossible to eliminate discrimination, harassment and victimisation of women, and separately to advance equality of opportunity for women vis-à-vis men when both groups are mixed sex. (Section 149 EA 2010)
3. **Equal pay.** Women’s right to equal pay with men. A single employee with a GRC in a workplace could lead to an equal-pay issue being falsely identified, or to a failure to identify such an issue. (Section 64 EA 2010)
4. **Single-sex and separate-sex services.** Service-providers are finding it difficult to provide accommodation and services expressly intended for women only, for example in hospitals, rape crisis centres, domestic abuse shelters, and prison - even

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<sup>30</sup> Col 39, [Meeting of the Parliament: Section 35 Order Judicial Review](#)

<sup>31</sup> [Scottish Government: A Human Rights Bill for Scotland: Consultation](#)

<sup>32</sup> [For Women Scotland: consultation response on the Human Rights Bill](#)

<sup>33</sup> [For Women Scotland v The Scottish Ministers \[2022\] CSOH 90](#)

<sup>34</sup> [UK Government: Statement of reasons related to the use of section 35 of the Scotland Act 1998](#)



when there are exceptions to allow transsexual people to be excluded. This leads to chilling effects which disincentivise providers from offering single-sex services and leading to women self-excluding because they may encounter males (and be called transphobic if they object). (Schedule 3, paragraphs 26-27 EA 2010)

5. **Sports.** The legal effect of a GRC makes it more complex to exclude male people from female sports for fairness and safety reasons. (Section 195 EA 2010)
6. **Occupational requirements.** Women's ability to access a job or role which has been reserved for women as an occupational requirement. There are legal and service user risks should a person with a GRC apply. (Schedule 9, paragraph 1 EA 2010)
7. **Schools and colleges.** Single-sex schools would have problems maintaining clear admission rules if under-18s were able to get GRCs. (Paragraphs 1 to 4 in Part 1 of Schedule 11 and paragraphs 1 to 3 in Part 1 of Schedule 12 EA 2010)
8. **Sex discrimination.** A GRC changes the comparators in a sex-discrimination claim, even though in practice there is no material difference between transsexual people with and without certificates. Indirect discrimination of women as a group compared to men may no longer be apparent when the group contains women without a GRC and men with a GRC (Direct discrimination: Section 13(1) EA 2010, indirect discrimination: Section 19(1) EA 2010)

The Court of Session confirmed that all of these concerns were reasonable.

The Equality and Human Rights Commission, in a letter from Kishwer Falkner to the Minister for Women and Equalities in April 2023<sup>35</sup> added four further issues:

9. **Pregnancy and maternity.** Protections for pregnant women and new mothers fail to cover females who become pregnant after obtaining a GRC.
10. **Sexual orientation and freedom of association.** If a man who is attracted to women obtains a female GRC then his sexual orientation changes from heterosexual to homosexual. This undermines discrimination protections for this protected characteristic and a lesbian association or club with 25 members or more must admit such males. (Section 12 and Schedule 16 para 1 EA 2010)
11. **Positive action measures.** Measures aimed at increasing female participation in the workplace (including women-only shortlists for Parliamentary seats) or in the provision of services must include males with a GRC and exclude females with a GRC. (Sections 104, 158 and 159 EA 2010)
12. **Data collection.** When data are broken down by legal and not biological sex, the result may seriously distort or impoverish our understanding of social and medical phenomena.

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<sup>35</sup> [EHRC letter to the Minister for Women and Equalities on the definition of sex in the Equality Act](#)

Other points that were raised at the FWS2 judicial review include:

13. **Harassment.** If single-sex toilets and changing rooms include members of the opposite sex who hold a GRC this may make it impossible to claim harassment on the basis of sex for an intimidating, hostile, degrading, humiliating or offensive environment for women. Offences such as voyeurism and indecent exposure become extremely difficult to prosecute. (Section 26 EA 2010)
14. **Charities.** Charities set up to alleviate disadvantages and provide benefits only to women may now risk legal proceedings if they do not include men with a GRC and exclude women with a GRC. Women may feel unable to continue accessing such charities and funding may be impacted. (Section 193 EA 2010)
15. **Health and safety.** Actions taken by employers or service providers in order to prevent health and safety risks specifically affecting women, for example maximum safe lifting weights, are undermined with risks no longer specific to a person's actual sex. (Schedule 22 paragraph 2 and Schedule 16 para 1 EA 2010)
16. **Residential accommodation.** Dormitories and other shared sleeping accommodation provided for women for reasons of privacy, should be used only by persons of the same sex. The privacy condition is undermined when person's of the opposite sex but who hold a GRC are admitted. (Schedule 23 paragraph 3 EA 2010)
17. **Armed forces.** Proportional measures to ensure combat effectiveness may be impacted if sex is no longer a reference to a person's biology. (Schedule 9 paragraph 4 EA 2010)

The definitions of "sex" and "woman" do not just affect the Equality Act. If the court's ruling in FWS2 that section 9(1) of the GRA applies in all statutory contexts, unless expressly disapplied or deemed incompatible, then a number of other laws will fail to provide for women who have obtained a GRC and inappropriately include those males with a GRC, both as service providers and service users. This includes the Abortion Act 1967, the Surrogacy Arrangements Act 1985, the Human Fertilisation and Embryology Act 1990, the Victims and Witnesses (Scotland) Act 2014 (as amended by the Forensic Medical Services (Victims of Sexual Offences)(Scotland) Act 2021), the Gender Representation on Public Boards (Scotland) Act, and the National Health Service (Free Prescriptions) Scotland Regulations 2011. In order for the original intention of the legislature in passing these laws to be met, it is clear that a biological definition of sex is essential.

In short, all the rights and protections that women enjoyed and thought they were entitled to under the Equality Act and other statutory provisions are undermined, or simply not available, when sex is not a biological referent and instead incorporates section 9(1) of the GRA to include those with GRCs. If GRCs were available on a basis of self-identification, with no restrictions or medical gatekeeping, it would only serve to completely eradicate women's existing rights.



## **The Equality Act no longer aligns with CEDAW**

Professor Rosa Freedman, when giving evidence to the Scottish Parliament, stated that:

*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>36</sup>*

International law has not changed; the interpretation of sex in the Equality Act has.

This means that the UK is in breach of CEDAW for two reasons. First, the judgment in FWS1 has been pushed aside in preference for that of FWS2, partly because it was the most current ruling when the UK Government laid the Section 35 order, and also because it has long been the interpretation favoured by the equalities regulator, the Equality and Human Rights Commission. However, it means that the Equality Act no longer reflects the ordinary meaning of the word sex and the whole intention and purpose of legislating for women's rights has been undermined.

Secondly, the Scottish Government's continuing policy of self-identification of sex goes far beyond even the current interpretation of sex in the Equality Act and endorses the co-called "Stonewall Law".<sup>37</sup> The Scottish Government and the civil service subscribe to the Stonewall equality index and have climbed the rankings with actions such as eliminating the word "mother" from their maternity policy.<sup>38</sup> Third-sector trans organisations such as Scottish Trans and LGBT Youth Scotland are registered lobbying groups almost entirely funded by the Government and their misrepresentation of the law and influence over policies in public bodies such as schools, prisons and the NHS has led to widespread adoption of policies promoting the contested concept of "gender identity" and self-identification.

These factors mean that women have been left without clear legal protection against discrimination, in contravention of the UK's obligations to the international convention.

### **Next steps**

Like many organisations facing a push to override the material reality of sex with self-identification, it is clear the CEDAW Committee is grappling with the issues. General recommendations have introduced new language and terminology which is not reflected in the convention nor understood by many member states. Inconsistencies have crept into concluding observations on periodic reviews where some States, including the UK, are advised to take measures for "trans women" yet others are advised to avoid the concept of "gender" when addressing the rights of women.

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<sup>36</sup> Col 5, [Scottish Parliament: Meeting of the Culture, Tourism, Europe and External Affairs Committee](#)

<sup>37</sup> [The Times](#), "The Times view on NHS Stonewall guidance: Dirty Word"

<sup>38</sup> [The Telegraph](#), "Scotland's civil service deletes 'mother' from maternity policy after Stonewall pressure"

Rather than allowing the gradual dilution in the meaning of sex the Committee should pay heed to Professor Freedman's comments above: if the convention is to be changed to encompass a person's right to self-identify their sex, then it must go through the proper processes as stipulated by Article 40 of the Vienna Convention of the Law of Treaties 1969 and agreement formally negotiated with the existing signatories.

In the absence of this we would hope the Committee will remain true to the core principles to realise equality for women and protect against discrimination on the basis of sex. The first step in doing so is to defend the UN definition of sex and protect the word "woman" as a sex.

The current UK Government position on the Equality Act was expressed in December 2023 by the Minister for Women and Equalities, who said:

*The law is no longer clear. In fact, I would go so far as to say that the law is now a mess because of changing times. We need to provide clarity. We cannot assume that the wording as was intended in 2004 and 2010 still works in 2023, and we are carrying out work to fix that.*<sup>39</sup>

One of the ways the definition of sex could be clarified and brought back in line with CEDAW is via section 23 of the GRA which provides a mechanism to modify the operation of any enactment for people who have obtained a GRC.<sup>40</sup> This can be done with a statutory instrument and it may be that the simplest solution is to put it beyond doubt that the Equality Act applies section 9(3) of the GRA and section 9(1) is thereby disapplied. In that way obtaining a GRC would not have any impact on rights based on sex in the Equality Act.

This would not remove protection from transsexual people as they are covered by the protected characteristic of gender reassignment, whether they have a GRC or not. It would however fix the seventeen adverse effects and maintain a coherent, stable and workable definition of sex in the Equality Act.

Another route to the same outcome is by seeking permission to appeal the decision of the Court of Session Inner House in FWS2 to the UK Supreme Court. After seeking legal advice we are satisfied there are strong grounds to do so, and our application for permission will be heard by the Inner House on 16 February 2024.

If we are able to proceed with legal action it is important that the terms of CEDAW are also, in the words of Lord Hope, "coherent, stable and workable" to enable use as an interpretive aid to uphold women's rights. It certainly should not be the case that women claiming CEDAW rights have CEDAW weaponised against them.



For Women Scotland  
16 January 2024

<sup>39</sup> [Kemi Badenoch giving evidence to the Women and Equalities Committee, House of Commons](#)

<sup>40</sup> [Section 23, Gender Recognition Act 2004](#)