

## Response ID ANON-7D26-4YC4-7

Submitted to The operation of the Public Sector Equality Duty in Scotland  
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### About you

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### How your response will be published

I would like my response to be published in its entirety

### What is your name?

Name:  
Susan Smith

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### Are you responding as an individual or on behalf of an organisation?

Organisation

### Organisation details

#### Name of organisation

Name of organisation:  
For Women Scotland

#### Information about your organisation

Please add information about your organisation in the box below:

For Women Scotland is a not-for-profit group campaigning to protect and strengthen women and children's rights in Scotland. We believe that "sex" is a biological term referring to the two immutable categories of male and female. In 2024, we took the Scottish Government to the Supreme Court to establish that sex should have an ordinary meaning in law.

We have previously won at Judicial Review in the Inner House of the Court of Session in Scotland and established that Sex and Gender Reassignment are two distinct characteristics under the Equality Act and that the Scottish Ministers acted outwith legislative competence in redefining the protected characteristic of "woman".

### Questions (page 1 of 2)

1 To what extent do you think that listed public authorities understand the terms and the aims of the PSED in Scotland?

Please provide your response in the box provided.:

The PSED places an onus on Public Bodies to understand the protected characteristics in the Equality Act 2010 and promote equality.

In recent years, faulty guidance from the government and the influence of lobbyists with a partial reading of law has led to misapplication, especially regarding the protected characteristic of sex which is often conflated with Gender Reassignment.

In ruling on our first Judicial Review (FWS1) in 2022, the Inner House established that "Provisions in favour of women, in this context, by definition exclude those who are biologically male." [1] We consider the ruling in FWS1 to correctly represent the law as it currently stands. This judgment was never appealed and duly became final law in Scotland, as well as a 'persuasive' ruling in the rest of the UK. In ruling on our second Judicial Review, the Inner House stated "Individuals without a gender recognition certificate (GRC) retain the sex in which they were born and have no right to access services provided for members of the opposite sex." [2] Although the ruling as regards to individuals with a GRC is under appeal, this part of the ruling has not been appealed and is also final law in Scotland. It has thus been established that self-identification of sex is not lawful in Scotland.

We believe that public bodies and the government have habitually misread the provisions of the Equality Act which allows for separate services for each

sex if a joint service would be less effective and the provision is a proportionate means of achieving a legitimate aim. Section 28 of the Act states such provision does not constitute gender reassignment discrimination.

Nevertheless, public bodies continue to operate de-facto self-id. This has been exemplified in the recent Tribunal brought by Sandie Peggie against NHS Fife. The EHRC has intervened and asked to see the Equality Impact Assessments (EQIA) which led to NHS Fife's failure to fulfill an obligation to provide single-sex facilities. It has now emerged that NHS Fife did not have any policies in place for single-sex provision.[3]

Our experience is that many organisations have failed to consider women or the protected characteristic of sex when conducting (or failing to conduct) EQIAs. Back in 2013, when the Scottish Prison Service (SPS) developed its Transgender Policy, the impact on women was overlooked. Indeed, the only input to developing the policy came from a narrow range of stakeholders and metadata later revealed that the author of the policy was James Morton of Scottish Trans Alliance.[4] Revised SPS guidance continues to operate on the basis of self-id. Policy collective Murray Blackburn Mackenzie has highlighted some concerning lacunae with the development of this policy which, again, failed to consider the full impact on incarcerated women.[5]

Faulty guidance has also caused problems in schools. In 2019, a Freedom of Information response revealed that ministers considered that the transgender guidance for schools which carried the Scottish Government's imprint was "not legal" as it risked excluding girls from female-only spaces [6]. Nevertheless, the revised guidance continued to incorporate most of the original text and to operate on a principle of self-id. A legal opinion by Aidan O'Neill KC concluded there is an enforceable requirement for local authorities to provide separate toilets for boys and girls under their legal obligation to prohibit harassment related to the pupils' sex and which can be perceived by pupils as having the effect either of violating their dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment (Equality Act, schedule 3, s26 and s85(3)) [7].

Police Scotland (PS) also introduced policies based on self-id: indeed, the Transitioning at Work Policy stated PS will 'go beyond the requirements of the Equality Act' [8]. It says: "All members of staff are entitled to use toilet and changing facilities appropriate to the sex in which they are currently living, regardless of whether they undergo gender reassignment, such as hormonal or surgical treatment or having socially transitioned by changing name, appearance, title, clothing etc." This, of course, is clearly in breach of the The Workplace (Health, Safety and Welfare) Regulations 1992 [9] as well as the Equality Act.

There is also an ongoing issue with data collection and recording. Guidance from the Scottish Government on data collection has downplayed the necessity of collecting data on sex (which is a protected characteristic under the Equality Act) in preference to data on Gender Identity (which is not a protected characteristic) [10]. Data on sex is, of course, vital to ensuring that bodies are meeting their PSED requirements. Even more shockingly, it has emerged that Police Scotland were failing to collect accurate data on serious offenders in allowing them to self declare their sex which was then used in official statistics [11].

[1]

<https://www.scotcourts.gov.uk/media/0a1plqgo/court-of-session-judgement-reclaiming-motion-by-for-women-scotland-limited-against-the-lord-advocate-and-oth>

[2]

<https://www.scotcourts.gov.uk/media/0a1plqgo/court-of-session-judgement-reclaiming-motion-by-for-women-scotland-limited-against-the-lord-advocate-and-oth>

[3] <https://archive.ph/Xq7AZ>

[4] <https://www.pure.ed.ac.uk/ws/portalfiles/portal/109539755/MurrayBlackburnSA2019LosingSightOfWomenRights.pdf>

[5] <https://murrayblackburnmackenzie.org/2024/01/10/was-the-scottish-prison-service-transgender-prisoner-policy-a-done-deal/>

[6] <https://www.gov.scot/publications/foi-201900003278/>

[7] <https://forwomen.scot/12/06/2022/schools-must-provide-single-sex-toilets/>

[8] <https://www.scotland.police.uk/spa-media/ltzd2cgy/transitioning-at-work-redacted.pdf>

[9] <https://www.legislation.gov.uk/ukxi/1992/3004/regulation/24>

[10] <https://www.gov.scot/publications/data-collection-publication-guidance-sex-gender-identity-trans-status/pages/5/>

[11] <https://murrayblackburnmackenzie.org/2025/01/16/police-scotland-review-of-sex-and-gender-whats-the-story/>

2 Is the PSED in Scotland delivering on its aims to improve outcomes for people with protected characteristics?

Please provide your response in the box provided.:

As set out above, the PSED can only operate if public bodies are aware of - and held to - upholding the rights of all those with a Protected Characteristic. This must accord with law and not a partial or political reading thereof.

3 Do you think the Scottish Government's proposed reforms will assist listed authorities in embedding an equalities focus and in turn improve outcomes for people with protected characteristics?

Please provide your response in the box provided.:

We see nothing in these reforms to tackle systemic failures in the operation of PSED in public bodies.

Questions (page 2 of 2)

4 What are your views on the Scottish Government's revised approach to assisting listed public authorities to embed inclusive communication?

Please provide your response in the box provided.:

With such a litany of failure, we have very little confidence that an exercise in tinkering with language will have any profound impact on the operation of the PSED in Scotland. What is needed is a proper, thorough, understanding of the law as it is and a root and branch clear out of public sector policies and

practices which fall short. Our experience of 'inclusive language', as far as how such phraseology has been employed in the past with regard to the definition of 'woman', leads us to believe it is more likely to water down than protect a protected characteristic.

5 How effective do you think the Equality and Human Rights Commission is at regulating public authorities' performance against the PSED?

Please provide your response in the box provided.:

Thankfully, the EHRC has been more proactive of late and we see that they are starting to bring a focus to bear on the proper operation of the Equality Act in Scotland than the government has hitherto managed.