

Response to UN Periodic Review of Human Rights 2022

This response has been written by For Women Scotland, a grassroots group of women from across Scotland working to protect and strengthen women's and children's rights, to protect "sex" rather than "gender" in law and policy, and to promote evidence-based discussion.

Abbreviations:

CEDAW UN Convention on the Elimination of All Forms of Discrimination Against Women

CPT European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

EA Equality Act 2010

GRA Gender Recognition Act 2004

HCA Hate Crime and Public Order (Scotland) Act (2021)

MG Misogynistic Harassment Working Group

SG Scottish Government

SPS Scottish Prison Service

WG Working Group on Misogyny and Criminal Justice

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Section 1: Women and Hate Crime

a. Definition of Women – Equality Act 2010 and CEDAW

The Scottish Government (SG) makes reference to the provision of the Equality Act (2010) (EA2010) and CEDAW as legislation to protect individuals against discrimination and hate crime.

The EA2010 defines “woman” on the basis of the protected characteristic of sex. CEDAW¹ likewise defines discrimination against women 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.”

The definition of women on the basis of sex has not been amended by either legislation to change its definition to include a person who has the protected characteristic of “gender reassignment” under the EA2010.

b. Statements from the Scottish Government

We note the Scottish Government (SG) has highlighted the actions it is taking to combat discrimination and inequality, in particular to combating Hate Crime.

In response to recommendation 134.105 the SG states that it is resolved to ensure that Scotland is a place where any form of hate crime or prejudice will not be tolerated, and that the Hate Crime and Public Order (Scotland) Act (2021) (HCA) provides for consolidating, modernising and extending hate crime legislation, ensuring that it is fit for 21st century Scotland and affords sufficient protection for those that need it. We note that the HCA deliberately excludes the protection of hate against sex, and the Scottish Government announced a commitment to developing, in principle, a standalone offence on misogyny and the establishment of a Misogynistic Harassment Working Group (MG) to take this work forward.

In response to recommendation 134.82 the SG also acknowledges that “minority ethnic women experience multiple discrimination and inequality” and states that in order to address this effectively they “have committed to improve our approach to data, and to ensure that we involve people, including minority ethnic women and girls in developing and shaping our policies.”

c. Women and Hate Crime legislation in Scotland

We unfortunately disagree with the SG and note that, unfortunately, none of these actions tackle hate crime against women and girls in Scotland. On the contrary, we note that the actions taken by the SG have the potential of increasing the occurrences of hate crime and discrimination against women and particularly worryingly against minority ethnic women, and increase the risk of criminalising women who challenge such discrimination.

The HCA specifically excludes the protection of women from hate on the basis of sex. This exclusion was intentional, as evidenced by the debate prior to the approval of the HCA. The Scottish Government commissioned an independent Working Group on Misogyny and Criminal Justice (WG) to decide whether the inclusion of sex as a protected characteristic would be an effective way of

¹ CEDAW is not currently integrated into Scottish Law, however the SG states in its response to recommendation 134.96, that it is committed to “implementation of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and has committed to incorporate CEDAW into Scots Law”.

protecting women, or if it would be preferable to create a separate, stand-alone offence based on misogyny. The WG's independent report² was published on 8 Mar 2022 and clearly suggests extending the protection of hate crime against women under a future Misogyny Act to include men who self-identify as women.

The Gender Recognition Act (GRA) Reform proposal from the SG, as published, would allow males that have "lived as a woman" a short period of 3 (three) months to obtain a Gender Recognition Certificate. No definition of what to "live as a woman" is provided and the proposals do not require applicants to provide any medical diagnosis of dysphoria or evidence of undergoing, having undergone or planning to undergo a process (or part of a process) for the purpose of becoming female. Under these proposals a male who "lives as a woman" will be able to legally change the sex recorded on their birth certificate, and in doing so expect to have the right to access women-only spaces like hospital wards, refuges or changing rooms, and provide care for women in hospitals and care homes. Because of the legislation included in the HCA and the proposals of the WG, any women challenging the presence of men who self-identify as women, in these environments could be subject to criminal charges under both the existing HCA and future Misogyny legislation in line with the WG's report.

This is particularly concerning for those women from minority ethnic and religious groups that have the right because of their traditions, cultures and beliefs to access women only spaces on the basis of biological sex. Women could now find themselves not only discriminated against but also criminalised for, for example:

- objecting to being cared for by men who self-identify as women in care homes, refuges etc
- objecting to being treated in hospitals by men who self-identify as women, when attending e.g. cervical screening and other gynaecological treatments
- objecting to sharing changing rooms with men who self-identify as women in sports facilities
- objecting to referring to men who rape them as women, in a Court of Law or during police investigations, when those men self-identify as women³, etc

In summary, the combination of these legislations as currently passed and/or proposed:

- creates a legal vacuum for the protection of women (as defined under both the EA2010 and CEDAW) against hate crime
- provides a double legal protection for hate crimes against men who self-identify as women under both the HCA and a future potential Misogyny legislation, and
- criminalises under hate crime legislation those women that object to the presence of men who self-identify as women in same sex women spaces and/or object to being naked and vulnerable in the presence of men in care, medical and social environments.

The SG acknowledges its commitment to protect women from minority ethnic groups (response to 134.82), to combat religious hatred, in particular Islamophobia and Antisemitism (response to 134.87), and to continue to support the important interfaith engagement work taking place across Scotland (response to 134.112).

² <https://www.gov.scot/publications/misogyny-human-rights-issue/>

³ Under Scottish Law only a biological male can commit rape. Section 1 of Part 1 of the Sexual Offences (Scotland) Act 2009 defines rape as follows: (1) If a person ("A"), with A's penis—a) without another person ("B") consenting, and (b) without any reasonable belief that B consents, penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B then A commits an offence, to be known as the offence of rape"

It is difficult to understand how the SG envisages upholding these commitments while enacting legislation that criminalises those women who, based on their traditions, cultures, religions, or beliefs, demand access to segregated same-sex spaces.

Section 2: Women and Criminal Justice

a. Recommendations to the UK and Scottish Governments regarding compliance with Human Rights Law in the Justice System

Recommendations were made towards guaranteeing compliance with Human Rights law within the police, prison and justice system (134.134), prison reform (134.159) and on inmate safety (134.160).

b. Statement from the Scottish Government (SG)

In response to 134.134, the SG refer to human rights training delivered to Police Scotland and the Scottish Prison Service (SPS), including on the excessive use of force, and Equality and Diversity training in prisons. The SG also state that data is collected to monitor compliance with Human Rights.

In response to 134.159, the SG refer to plans to improve the female prison estate. “The new female custodial estate will consist of a smaller national prison for around 80 women, to be built at Cornton Vale, and up to five new community-based custodial units that will provide high quality, gender-specific custodial places for women.”

In response to 134.160, the SG stated that the National Health Service and Scottish Prison Service (SPS) provide mental health care tailored to meet the recognised needs of prisoners.

c. Lack of sex-specific provisions and strategy in access to justice in Scotland: impacts on women and girls

Women and girls are disadvantaged by a range of criminal justice policies. The SG has failed to take into account the specific needs of women and girls on the basis of the protected characteristic of sex under the EA2010, which as a recent Inner Court ruling confirmed, refers to biological sex.⁴

This failure stems from the SG policy position that gender identity, which relates to how people self-identify and express themselves socially, should take precedence in policymaking over the protected characteristic of sex.⁵ Gender is not however defined in UK law. Murray et al. (2019) note “The prioritisation of self-declared gender identity within policy-making represents a departure from the key principles which have underpinned advances in women's rights, and carries significant implications for how female inequality is addressed”.⁶

In response to 134.134, Police Scotland, the SPS and the Judicial Institute for Scotland are advised by single interest advocacy groups promoting the belief that gender identity supersedes the protected characteristic of sex. A report published in 2021 found that policies advocated by Stonewall, the UK's leading LGBT charity, included an erroneous understanding of the law in this area, which undermined the rights of others.⁷

⁴ <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csih4.pdf>

⁵ For example the SG Equality Evidence Strategy 2017-2021 reframes the protected characteristic of sex in terms of gender equality: <https://www.gov.scot/publications/scotlands-equality-evidence-strategy-2017-2021/pages/7/>

⁶ <https://www.eupublishing.com/doi/full/10.3366/scot.2019.0284>

⁷ <https://sex-matters.org/wp-content/uploads/2021/06/Reindorf-Report-Sex-Matters-.docx.pdf>

Police Scotland policy⁸ allows for a male accused of rape or attempted rape to self-identify as a woman for data recording purposes (this applies to all recorded offences). Given that the vast majority of sexual offences are committed by males, a very small number of misclassified cases has the potential to skew the data.⁹ Evidence submitted to the Scottish Parliament shows that such policies have the potential to deter rape victims, who already face barriers to obtain justice, from seeking prosecution of the perpetrators.¹⁰

Scotland's Equal Treatment Bench Book for the judiciary states "language used to or about LGBT people should reflect how they themselves wish to be addressed or referred to", including pronouns.¹¹ The impact on female victims, who may be required to refer to a male aggressor in female terms, is not considered. We note that similar guidance is published in England and Wales,¹² where a judge denied compensation to a female victim of male assault, in part due to her failure to refer to the perpetrator as *she*.¹³

In 2014 the Scottish Prison Services (SPS) published its Gender Identity and Gender Reassignment Policy,¹⁴ which allows for prisoners to be housed and searched on the basis of self-defined gender identity. The policy was initially drafted by the Director of a transgender rights advocacy group.¹⁵ Subsequent decision-making focused exclusively on the interests of transgender prisoners. The Equality Impact Assessment, intended to consider how a policy might affect the nine protected characteristics in the EA2010, failed to recognise that the policy would affect female prisoners and prison officers.¹⁶ Subsequent research has shown how the policy has adversely affected female prisoners, whose concerns include the placement of biological males with full male genitalia in the female estate, housing biological males with female victims of child abuse, and female vulnerability.¹⁷ We also note that the policy does not meet rule 18.8(b) of the European Prison Rules¹⁸ and Rule 11(a) of the United Nations Standard Minimum Rules for the Treatment of Prisoners¹⁹, which state that male prisoners should be accommodated separately from female prisoners.

⁸ <https://murrayblackburnmackenzie.org/2022/01/08/police-scotland-policy-on-recording-rape-how-did-it-evolve-and-where-does-responsibility-lie/>

⁹ https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-citizen-participation-and-public-petitions-committee/correspondence/2021/pe1876_h-professor-alice-sullivan-submission-of-27-august-2021

¹⁰ https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-citizen-participation-and-public-petitions-committee/correspondence/2021/pe1876_q--lesley-warrender-submission-of-27-october-2021

¹¹ <https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/equal-treatment-bench-book.pdf>

¹² <https://www.thetimes.co.uk/article/call-defendants-by-gender-they-want-judges-told-cfxmf0wzb>

¹³ <https://www.standard.co.uk/news/crime/transgender-activist-tara-wolf-fined-ps150-for-assaulting-exclusionary-radical-feminist-in-hyde-park-a3813856.html>

¹⁴ <https://www.sps.gov.uk/Corporate/Publications/Publication-2561.aspx>

¹⁵ Cowan, S, Giles, HJ, Hewer, R, Kaufmann, B, Kenny, M, Morris, S & Nicoll Baines, K 2020, 'Sex and gender equality law and policy: A response to Murray, Hunter Blackburn and MacKenzie', Scottish Affairs. Early version, also known as pre-print, last accessed on University of Edinburgh site.

¹⁶ <https://www.research.ed.ac.uk/files/109539755/MurrayBlackburnSA2019LosingSightOfWomenRights.pdf>

¹⁷ <https://academic.oup.com/bjc/advance-article/doi/10.1093/bjc/azab091/6370239>

¹⁸ <https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae>

¹⁹ https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf

In response to 134.159, on the prison estate, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has raised significant concerns about overcrowding in Scottish prisons. According to the World Prison Brief (2021), Scotland has the highest imprisonment rate in Western Europe, at 138 per 100,000 population. A 2021 report by HM Inspectorate for Prisons in Scotland stated that work on the development of a new female custodial estate was ongoing.²⁰

In response to 134-160 on reducing self-harm in prison, in 2019 the CPT raised serious concerns about the wellbeing of women with mental ill health in HMP YOI Cornton Vale, particularly those held in isolation.²¹ A detailed review by the Mental Welfare Commission for Scotland in 2021 echoed these concerns and highlighted additional issues, including access to mental health support in prison.²² The placement of male prisoners in the female prison estate, as noted above, carries further mental health risks for female prisoners, who are often victims of male violence and coercion.²³

It is our view that the SG has failed to implement the measures promised in the last UN Periodic Report, and systematically fails to uphold the protected characteristic of sex according to the EA2010. Replacing “sex” with “gender identity” in training and policy-making directly impacts women’s and girls’ access to justice and to single-sex spaces and services.

Addendum: On Language

As noted above, the SG’s use of language in relation to the protected characteristic of sex, the legally undefined concept of *gender identity*, and the protected characteristic of *gender reassignment*, is frequently ambiguous and operates to the detriment of women’s and girls’ rights. We are concerned furthermore at the SG’s frequent use of neutral language such as *people* when sex-specific language would give a more accurate picture.

Examples:

SG’s response to 134.164 mentions supplying access to menstrual products “for all of Scotland’s 400,000 school pupils and students” without specifying whether this means 400,000 female students or that access is being provided for 400,000 students, only half of whom will actually need menstrual products.

SG’s response to 134.187 does not acknowledge the role of sex in domestic violence, despite evidence that most domestic violence is perpetrated by men against women.²⁴

SG’s response to 134.200 on child exploitation and abuse does not mention girls’ particular vulnerability to such exploitation, and that to 134.214 on integration policies for migrants and refugees does not mention the specific needs of migrant women. Straightforward language is necessary for refugee and migrant women to be included, for example in healthcare.

²⁰ https://www.prisoninspectorscotland.gov.uk/sites/default/files/publication_files/HM%20Chief%20Inspectors%20Annual%20Report%202021-22%20r.pdf

²¹ <https://rm.coe.int/1680982a3e>

²² https://www.mwscot.org.uk/sites/default/files/202107/ConcernsAboutTheCareOfWomenWithMentalIllHealthInPrisonInScotland_July2021.pdf

²³ <http://www.prisonreformtrust.org.uk/presspolicy/news/vw/1/itemID/494>

²⁴ <https://www.gov.scot/publications/domestic-abuse-recorded-police-scotland-2020-21/pages/2/>

Recommendations

Bearing all the above in mind, we make the following recommendations:

- 1) That Scottish legislation is at all times aligned with CEDAW and the EA2010, to ensure that women and girls have proper access to justice, and are protected from hate crime against them, on the basis of the protected characteristic of sex.
- 2) That the SG either incorporates sex as a protected characteristic in the HCA, or defines “woman” solely on the basis of sex for the purpose of any future Misogyny legislation.
- 3) That the SG protects the rights of women in general, and in particular women from minority ethnic groups and vulnerable women, to access same sex spaces for medical and social care, medical treatment, prisons, and social spaces; and that SG grants women the specific right to legally object to the presence of biological males in those environments without any fear of criminalisation under the HCA or any future legislation.
- 4) That the SG ensures training provided to the police, prison staff and judges is aligned with the EA2010.
- 5) That the SG records crimes on the basis of sex in order to inform responses to sex-specific crimes.
- 6) That the unique needs of the female prison population to be safe from male violence is recognised by the SG. We recommend that the prison estate accommodates inmates by sex, not gender identity, and provides accommodation for transgender inmates within single-sex prison facilities or in separate sites.
- 7) That the SG ensures absolute clarity of language in relation to sex, gender identity, and gender reassignment, and does not use the neutral “people” in contexts where a sex-specific term would be clearer and more appropriate.