

**Mandate of the Special Rapporteur on violence against women and girls, its causes and consequences**

Ref.: OL GBR 14/2022  
(Please use this reference in your reply)

29 November 2022

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on violence against women and girls, its causes, and consequences; pursuant to Human Rights Council resolution 50/7.

In this connection, I wish to bring to the attention of your Excellency's Government information I have received concerning some aspects of the **Gender Recognition Reform (Scotland) Bill (GRR) which is currently before the Scottish Parliament.**

The Gender Recognition Act 2004 (GRA) was introduced following a European Court of Human Rights ruling in 2002 (*Christine Goodwin v The United Kingdom and I v The United Kingdom*), which found that the United Kingdom had breached the rights of two transgender people under Article 8 (the right to respect for private life) and article 12 (the right to marry and found a family) of the European Convention on Human Rights.

According to the proposed amendment, it will be possible to reduce the period that trans persons seeking legal recognition of their gender must have lived in their acquired gender from two years to three months. Furthermore, it is proposed that the requirement that a Gender Recognition Panel consider and be satisfied by the required evidence will be removed. Subsequently that person would obtain a gender recognition certificate that certifies them legally in that gender. For persons identifying as women, the certificate would create a legal presumption that they have the right to access women-only services, across Scotland. There are a variety of services that attend to anyone identifying as a woman, i.e. they consist of services and spaces for women born female, transwomen and other gender non-conforming women offered either in parallel or simultaneously and include shelters and support groups for victims of violence.

However, I share the concern that such proposals would potentially open the door for violent males who identify as men to abuse the process of acquiring a gender certificate and the rights that are associated with it. This presents potential risks to the safety of women in all their diversity (including women born female, transwomen, and gender non-conforming women).

Currently, the GRA requires that a person over the age of 18 years wishing to obtain legal recognition of their acquired gender, must apply to a Gender Recognition Panel (a body of experts who consider the evidence, but do not meet applicants) for a Gender Recognition Certificate. Evidence of a diagnosis of gender dysphoria along with proof that they have lived in their acquired gender for at least two years, and a statutory declaration that they intend to live in their acquired gender for the rest of their life is required.

It is important to underline that trans persons are entitled to live a life that is free from discrimination, harassment to have their human rights safeguarded. They are also entitled to differentiated and equal services that recognize the specific experiences and needs of trans people. According to established international and regional law, States are under obligation to provide access to gender recognition in a manner consistent with the rights to freedom from discrimination, equal protection before the law, privacy, identity, and freedom of expression. According to the Office of the High Commissioner for Human Rights, the lack of legal recognition of their gender identity can contribute to reinforcing and perpetuating discriminatory attitudes towards transgender people, including denial of their identity. As such, it can increase their vulnerability to hate crimes.<sup>1</sup>

The UK's Equality Act 2010 provides protection of these rights, although I recognize that there is room for improvement. I am also fully aware of the legitimate concerns that some persons wishing to transition have had with the current modalities for acquiring a Gender Recognition Certificate. For example, it is a requirement that they first receive a mental health diagnosis of gender dysphoria, even though it has not been considered a mental illness under the policy of the UK Government since 2002 nor does the World Health Organization consider it as such. In addition, the process can be lengthy, and bureaucratic. These concerns and gaps in the process need to be addressed, as they violate international rights and standards. I therefore welcome the intention of the Scottish Government to address these concerns and to bring the procedure more in line with international standards. Such a review of the current legislation would also be in line with the recommendations made in the 2021 Women and Equalities Committee 's report on the reform of the Gender Recognition Act. Among other things, the Committee recommended a diagnosis of gender dysphoria should no longer be a requirement for obtaining a GRC.

#### *Insufficient clarity in the proposed self-identification procedure*

Currently, the Scottish Government does not spell out how the Government will ensure a level of scrutiny for the applications made to acquire a gender recognition certificate under the new proposal. It is not unreasonable to expect the Government to spell out what level of scrutiny will continue in the procedure, or detail important aspects of it, including the specific steps the procedure entails and the conditions for refusing such applications in the law itself or at least in the explanatory notes of the concerned legislation. Other governments that have adopted a self-identification procedure for the legal recognition of a gender identity have done so. Simplifying and fast-tracking the procedure does not necessarily make it fairer or more efficient.

Furthermore, the procedure should meet the concerns of all transgender individuals including non-binary individuals who do not want to be labelled as either gender, by possibly creating an X gender marker or third gender.

In addition, the aforementioned report from the Women and Equalities Committee further recommended "robust guidance" should be developed on how a system of self-declaration would work in practice, giving the specific example of male

---

<sup>1</sup> Office of the High Commissioner for Human Rights, Written submission in response to request for an advisory opinion by the State of Costa Rica to the Inter-American Court on Human Rights, May 2016.

prisoners with a record of sexual assault or domestic violence, who self-identify as a woman, and that they should not be transferred to a woman's prison. The Committee considered appropriate safeguards were essential to ensuring that the rights of women born female and the use of the single-sex and separate-sex exceptions in the Equality Act 2010 are protected.<sup>2</sup> Furthermore, the Committee urged the Government Equalities Office and the Equality and Human Rights Commission to publish better guidance on the single-sex and separate-sex exceptions which it has done earlier this year.

The Yogyakarta principles advocate for the right to define one's own gender with regards to legal gender recognition. They are however not binding. While the European Court of Human Rights has highlighted the right to determine one's own gender identity, the Court has not yet held that the GRC should be based on self-determination. It has also left a margin of appreciation to State parties to adopt some restrictive measures if they have due regard for international and European law principles of fairness, non-discrimination, efficiency and ensuring respect for the dignity and privacy of the persons concerned. Abusive and disproportionate requirements should also be removed.<sup>3</sup>

It should further be emphasized that the proposal still recognizes only two gender options: male and female, and therefore continues to exclude those with non-binary identities from being able to choose a third gender marker option that better reflects their identity such as neutral, or non-binary gender marker.

*The duty to protect women and girls against violence including further sex and gender-based violence against them as well as associated trauma*

The Committee on the Elimination of Discrimination Against Women (2017) (hereafter the CEDAW Committee), in its General Recommendation 35 on gender-based violence against women, has highlighted, that discrimination against women is inextricably linked to other factors that affected their lives, that may include ethnicity, race, colour, political opinion, disability, migratory status, as well as gender identity and sexual orientation.<sup>4</sup> The CEDAW Committee also indicates that States have an obligation, in the adoption of measures to address gender-based violence against women, to take into consideration the diversity of women and the risks of intersecting forms of discrimination.<sup>5</sup> My mandate has long recognized that women experience discrimination and violence differently and on intersecting grounds. This includes transgender women who also face disproportionate violence in several countries around the world specific to their sexual orientation and gender identity and this has been well documented by my mandate and other human rights mechanisms.

However, the ongoing efforts to reform existing legislation by the Scottish Government do not sufficiently take into consideration the specific needs of women and girls in all their diversity, particularly those at risk of male violence and those who have experienced male violence, as it does not provide for any safeguarding measures to ensure that the procedure is not, as far as can be reasonably assured, abused by sexual predators and other perpetrators of violence. These include access to both single sex

---

<sup>2</sup> Women and Equalities Committee Reform of the Gender Recognition Act Third Report of Session 2021–22 Report.

<sup>3</sup> European Commission, Legal Gender Recognition in the EU, June 2020.

<sup>4</sup> CEDAW/C/GC/35, para. 12.

<sup>5</sup> CEDAW/C/GC/35, para. 23.

spaces and gender-based spaces. It is important to note that insistence on safeguarding and risk management protocols does not arise from the belief that transgender people represent a safeguarding threat. It is instead based on empirical evidence that demonstrates that the majority of sex offenders are male, and that persistent sex offenders will go to great lengths to gain access to those they wish to abuse. One way they can do this is by abusing the process to access single-sex spaces or to take up roles which are normally reserved to women for safeguarding reasons.

The safety and security of all persons must be protected by the law. This includes protection from revictimization, traumatization and other types of violence. The UN Special Rapporteur on Torture has highlighted that in addition to physical trauma, the mental pain and suffering inflicted on victims of rape and other forms of sexual violence is often exacerbated and prolonged due, inter alia, to subsequent stigmatization and isolation. This would also include women victims and survivors of gender-based violence, including transwomen.<sup>6</sup> It is imperative therefore that victims of gender-based violence are provided with a trauma informed response to their needs and that this is reflected in the services made available to them. Such services must also take an intersectional approach, recognising the unique experiences of victims of violence and the ways in which difference and disadvantage may hinder access to support and safety. This can include the provision of specialist services for victims of violence based on their ethnicity, religion, disability, migratory status as well as gender identity and sexual orientation.

*The access to single sex spaces for women and girls and their viability*

Capitalizing on the reform process that is currently underway, I would like to invite the Scottish Government to broaden its discussions, examinations, and reform process beyond the changes it wishes to introduce to specific articles of the GRA, and to also consider important and related issues. One of these issues is the viability of single sex spaces for women and girls.

Under the Equality Act 2010, trans persons, including transwomen, are covered by the protected characteristic of “gender reassignment”; effectively protecting them against direct and indirect discrimination and includes discrimination on the grounds that the person has the protected characteristic or is perceived to have the protected characteristic<sup>7</sup> (section 13, Equality Act 2010). This protection is subject only to specific sex-based exceptions that permit discrimination in the context of women-only services where it is “a proportionate means of achieving a legitimate aim”. Such services may be provided for only one sex or separately by sex. These include, but are not limited to, domestic violence shelters, rape counseling services and prisons. Similarly, employers can limit who performs a given job or task by sex in cases that include but are not limited to, intimate medical examinations as well as strip searching.

Paragraph 740 of the Equality Act 2010’s Explanatory Notes clarifies that for the purposes of the Act, the term sex is not equal to gender identity as it gives the following example of the operation of a single sex service: “A group counselling session is provided for female victims of sexual assault. The organizers do not allow transsexual people to attend as they judge that the clients who attend the group sessions

---

<sup>6</sup> Report of the Special Rapporteur on Torture (A/HRC/7/13), 2008, para 34, A/HRC/3/157, 2016, para 51.

<sup>7</sup> [https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/39007.htm#\\_idTextAnchor\\_251](https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/39007.htm#_idTextAnchor_251)

are unlikely to do so if a male- to female- transsexual person was also there. This would be lawful”.

In April 2022, the Equality and Human Rights Commission (EHRC) published updated non-statutory guidance on the sex and gender reassignment provisions in the Equality Act 2010<sup>8</sup> elaborating on the circumstances under which the Equality Act allows for the provision of separate or single sex services. The guidance says that women’s need for privacy, dignity and safety can justify providing a single sex service, excluding anyone born male however they identify, as a proportionate means to achieve a legitimate aim.

The EHRC guidance further states that “for example, a legitimate aim could be for reasons of privacy, decency, to prevent trauma or to ensure health and safety”. The EHRC also confirmed that “there are circumstances where a lawfully established separate or single-sex service provider can prevent, limit, or modify trans people’s access to the service”.

Preventing further trauma for victims of violence is therefore deemed a legitimate justification for providing single sex services. Avoiding retraumatisation and revictimization because of patriarchal male violence against women in all their diversity, including women that are of the female sex, is essential for allowing survivors/victims to heal and live their lives to their fullest potential. The prevention of retraumatisation is recognized in General Recommendation 35 of the CEDAW Committee, which states that “States parties should provide accessible, affordable, and adequate services to protect women from gender-based violence [and] prevent its reoccurrence”; and that “States parties must eliminate the institutional practices and individual conduct and behaviour of public officials that constitute gender-based violence against women, or tolerate such violence, and that provide a context for lack of a response or for a negligent response”.

It is worth mentioning that Scotland’s Equally Safe strategy did not see a contradiction between having a strategy that was inclusive of lesbian, bisexual, trans and intersex (LBTI) women whilst also utilizing the single sex exception in the Equality Act where it is an appropriate approach to achieving a legitimate aim.<sup>9</sup> According to international human rights law, States have an obligation to guarantee non-discrimination in the enjoyment of human rights. However, differential treatment on prohibited grounds, including on the grounds of sex and gender identity, may not be discriminatory if such differential treatment is based on reasonable and objective criteria, pursues a legitimate aim, and if its effects are appropriate and proportional to the legitimate aim pursued, being the least intrusive option among those that might achieve the desired result.<sup>10</sup>

I have, unfortunately, been made aware of reports that indicate a failure to provide single sex spaces to female survivors of male violence, who, because of their

---

<sup>8</sup> EHRC. Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment provisions. 27 April 2022 <https://www.equalityhumanrights.com/en/advice-and-guidance/separate-and-single-sex-service-providers-guide-equality-act-sex-and-gender>

<sup>9</sup> Scottish Government/Inspiring Scotland. Delivering Equally Safe guidance notes. <https://www.inspiringScotland.org.uk/wp-content/uploads/2021/04/DES-Guidance-notes-April-2021.pdf>

<sup>10</sup> See e.g., CCPR General Comment No. 18: “Non-discrimination” (1989), and CESCR General Comment No. 20: “Non-discrimination in economic, social and cultural rights” E/C.12/GC/20 (2009).

experiences, do not feel able to access a trans inclusive service, leading to their self-exclusion from support and refuge services. Information of such self-exclusion with regards to services provided by rape crisis centers given the lack of sufficient single sex spaces is provided in a report on single sex services published by the Scottish Women's Convention<sup>11</sup> and in correspondence with the EHRCJ Committee.<sup>12</sup> Respondents to the Scottish Government consultation in 2018 also raised this issue.<sup>13</sup>

There are also concerns around self-exclusion arising from cultural and religious factors, the impact of which also needs to be considered in terms of the provision of services for women victims of violence who may be disproportionately marginalized from accessing such services as a result. It should be noted that religion and belief is a protected characteristic under the Equality Act 2010. A failure to provide single-sex services to women born female alongside gender specific services targeting women in all their diversity could amount to unlawful indirect discrimination because of religion under the Equality Act 2010. The International Covenant on Civil and Political Rights (ICCPR) guarantees freedom of religion or belief under international law. Furthermore, article 18 of the Universal Declaration of Human Rights adopted in 1948 states that "everyone has the right to freedom of thought, conscience and religion". Furthermore, and according to international human rights law, the obligation to fulfil human rights means that States must take positive action to facilitate the enjoyment of basic human rights. It is also recognized that substantive equality may require positive action by the State to address the specific disadvantage and needs of women,<sup>14</sup> in this case migrant women and women belonging to certain minorities who may already be facing high barriers that prevent them from reaching out and approaching services and spaces for victims of violence.

Similarly, there are also likely to be reports of transgender persons, including transwomen and persons with fluid gender identities, who are also self-excluding due to the lack of differentiated support and where sufficient data and studies are simply not available.

It is vital that service providers in Scotland continue to be able to provide both single-sex and gender-based services, and funding must be ringfenced for a certain proportion to be single sex, balancing the needs of the different demographics without placing them in conflict.

#### *The deprioritisation of sex related data collection*

In the case of Scotland, it has been difficult to determine the exact scale of self-exclusion, given that hard and comprehensive data is lacking for several compelling reasons. There is a general concern that a climate has been created where such research

---

<sup>11</sup> Scottish Women's Convention. Single Sex Spaces. July 2022. Inspiring Scotland/Scottish Government. <https://www.scottishwomensconvention.org/files/single-sex-spaces-report-1660641977.pdf>

<sup>12</sup> Scottish Parliament Equalities, Human Rights and Civil Justice Committee. Gender Recognition Reform Letter from HEAL Survivors Group. 26 October 2022. <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-equalities-human-rights-and-civil-justice-committee/correspondence/2022/gender-recognition-reform-letter-from-heal-survivors-group>

<sup>13</sup> Scottish Parliament Equalities, Human Rights and Civil Justice Committee. Gender Recognition Reform Letter from HEAL Survivors Group. 26 October 2022. <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-equalities-human-rights-and-civil-justice-committee/correspondence/2022/gender-recognition-reform-letter-from-heal-survivors-group>

<sup>14</sup> See Office of the High Commissioner for Human Rights, Women's Rights are Human Rights, 2014.

and/or data collection has not been facilitated. General Recommendation No. 28 makes it clear that in complying with their obligations to eliminate discrimination against women under article 2 of CEDAW, State parties should “provide for mechanisms that collect relevant sex-disaggregated data, enable effective monitoring, facilitate continuing evaluation and allow for the revision or supplementation of existing measures and the identification of any new measures that may be appropriate”. It is concerning, therefore that data in Scotland is generally not collected based on sex, but solely on gender, in a number of areas, despite the clear need for both, and that there has been a reluctance on the part of the Scottish Government to ensure this happens. Furthermore, the link between the denial of single sex spaces and self-exclusion is an issue that has already been raised with the Scottish Women and Equalities Committee of the UK Parliament in 2015 and that was resubmitted to the attention of the Scottish Parliament as part of the evidence on the proposal to reform the GRA. Some women’s sector and women’s services professionals have also concurred with female survivors on the need to provide such female sex only services.<sup>1516</sup>

Here again, sex specific studies are missing and only partially available. While it is positive that Government-funded studies have assessed difficulties that transwomen experience in sex-separated spaces, including how these difficulties affect their safety and psychological well-being, studies are yet to take place that examine how women in prison born and shelters and that were born female might be affected by gender self-ID.<sup>17</sup> In this respect, I welcome the recommendation by the Equality and Human Rights Commission on 14 November 2022 to publish reports on the impact of the legislation of the Bill on the provision of single-sex services, on trans persons, and religious groups – amongst others, and monitoring its impact in practice.

*The lack of clarity on the relationship between Scotland’s Gender Recognition Act and the UK Equality Act*

It would be important to clarify the relationship between the Gender Recognition Reform (Scotland) Bill and the Equality Act 2010. There continue to be several interrelated issues spanning the two pieces of legislation that have not been sufficiently clarified and that require further considerations and possibly subsequent amendment. Chief among them, is that the proposal submitted by the Scottish Government fails to clarify the implications of self-identification for the exceptions under the Equality Act that are provided based on sex. So far, there have been varying understandings and applications by different parts of Government, civil society organizations and service providers. Clarification in statute is therefore needed.

Persons that have been granted a full GRC, including transwomen, are to be treated “for all purposes” in law as their acquired gender, although there are some statutory exceptions. It is unclear whether they can also claim discrimination based on sex in their acquired gender under the Equality Act, given that the latter’s definition of sex appears to be biological sex and not legal sex. The Scottish Government’s own position on this issue has been less than clear and at times contradictory. Whereas the Scottish Government has declared on more than one occasion that it believes that the rights granted by the Equality Act 2010 will not be affected by reform of the 2004 Act,

---

<sup>15</sup> Ibid.

<sup>16</sup> Shonagh Dillon. A Scottish Sister speaks. <https://shonaghdillon.co.uk/a-scottish-sister-speaks/>

<sup>17</sup> <https://www.crimrxiv.com/pub/gsp2blxf/release/1>

it has also argued that for the purposes of the Gender Representation on Public Boards (Scotland) Act 2018 that it believes that GRC holders are included in the definition of woman and thereby qualify for positive discrimination measures enabled under the 2010 Act.

It is my understanding that the new incoming Government of the UK intends to specifically define “sex” for the purposes of this Act and other legislation. Such specification should be given prior to the finalization of the amendments to the GRA.

Furthermore, it is not clear how a risk assessment will operate under the fast-tracked and simplified gender recognition certification procedure, given the access that a change in status will potentially provide to a vulnerable community: women and girls that are victims of violence irrespective of their gender identity or sexual orientation. It has thus been argued that the ability to determine a prior history of violence for the transitioned person in question will become more difficult, in terms of establishing the link between their previous history and their current personhood/identity. Introducing penalties for the fraudulent use of such certificates, as has been discussed by the Scottish Government, should not be the only response to such concerns, given the high likelihood that the remedy will only be applied once a risk has materialized and the lack of guidance in the bill about how such fraud would be identified. There needs to be a consideration of adequate safeguarding *during* the procedure of certification itself. Furthermore, the Government of Scotland is also yet to clarify what procedure is in place for dealing with cases of those individuals that transition back to their previous gender identity.

These are complex issues with very practical and real consequences for more than one protected group and the intersections between other protected groups and the wider society. I therefore strongly appeal to the Scottish Government to dedicate sufficient time to complete a thorough assessment of all foreseeable consequences of the proposed amendments and to ensure that its compatibility with related legislation, such as the Equality Act and other related legislation, is carefully elucidated to achieve legislative conformity. My recommendation echoes that of the Equality and Human Rights Commission that appealed to the Government of Scotland to give parliamentarians sufficient time for a considered debate of the complexities involved and expressed its concern that the current timetable may not allow for it.<sup>18</sup> In finalizing this Bill and for future legislation, the Scottish and the UK Governments must also make sure that current and future amendments to laws that have an impact on women and children are in conformity with the UK’s international human rights obligations, particularly in relation to the prevention of violence and the provision of services for victims of such violence.

It should also, as a minimum, await the outcome of judgments on these very issues in front of both the Scottish and UK courts. In February 2022, an appeal division of the Court of Session heard the case *For Women Scotland v The Lord Advocate and the Scottish Ministers*, which concerned Scottish Government legislation (the Gender Representation on Public Boards (Scotland) Act 2018) which provides for positive action measures aimed at increasing to 50% the percentage of women serving as non-

---

<sup>18</sup> See the Equality and Human Rights Commission’s Stage 2: Briefing: Gender Recognition Reform (Scotland), 14 November 2022 found here: <https://www.equalityhumanrights.com/en/our-work/news/equality-regulator-briefs-msps-gender-recognition-reform>.



executive members on Scottish public boards. The organisation challenged the definition of ‘woman’ used in the 2018 Act, arguing that it did not reflect that used in the Equality Act 2010 and that this alteration was beyond the limits of the Scottish Government’s legislative competence in a reserved matter.<sup>19</sup> The court upheld the claim. A second judicial review was heard on 8<sup>th</sup> and 9<sup>th</sup> of November 2022, following the Scottish Government’s revision of statutory guidance on 19 April 2022, which stated that the term woman will also include persons who have been issued a GRC certifying that their acquired gender is female.<sup>20</sup> Judgment is awaited in that case.

*Insufficiently fair and inclusive consultations on the proposed amendments*

I welcome the large interest that the public has expressed in participating in the consultations, as the Government published in September 2021 that it received and analyzed 17,058 responses to its call for consultations on the GRR that were launched on 17 December 2019 and closed on 17 March 2020. I would however urge the Government to listen carefully to all parties presenting their views and concerns regarding this law. According to General Recommendation 35 of the CEDAW Committee, States should develop and evaluate all legislation, policies, and programmes in consultation with civil society organizations, in particular women’s organizations, including those that represent all women affected by intersecting forms of discrimination.<sup>21</sup>

While I commend the Government for listening to the voices of transwomen, including organizations that represent them, I am concerned that the consultations for this proposal do not appear to have been sufficiently inclusive of other groups of women, most notably female victims of violence. It has been reported that five survivors of male violence approached the Scottish Parliament EHRCJ to speak in a private session about their concerns in relation to the Bill and their own experiences of self-exclusion. The convenor reportedly informed the group that the Committee did not have time to see them and to put their objections in writing.

I would like to recall the UK’s obligation to make sure that all processes that affect the lives of all women and girls put them at the center of their deliberations, as well as its responsibility to take and enforce all measures to end violence against women. Second-guessing and questioning the needs of survivors of violence born female for single sex assistance and protection services is not victim-centered and ignores and undermines the survivor’s involuntary trauma, agency, and dignity.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency’s Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

---

<sup>19</sup> <https://www.judiciary.scot/home/sentences-judgments/judgments/2022/02/18/for-women-scotland-v-the-la-the-scottish-ministers#:~:text=For%20Women%20Scotland%20sought%20a,members%20on%20Scottish%20public%20boards>

<sup>20</sup> <https://forwomen.scot/18/07/2022/judicial-review-2/>

<sup>21</sup> CEDAW/C/GC/35, para. 34(a).

Please accept, Excellency, the assurances of my highest consideration.

Reem Alsalem

Special Rapporteur on violence against women and girls, its causes and consequences