

Reem Alsalem

Special Rapporteur on violence against women, its causes and consequences

The United Nations

*By email*

5 December 2022

Dear Ms Alsalem,

You were sent on 29 November a widely publicised letter from six organisations in Scotland (Engender, JustRight Scotland, Scottish Women’s Rights Centre, Scottish Women’s Aid, Amnesty International Scotland and Rape Crisis Scotland).

We write as a set of groups and individuals, from Scotland and elsewhere in the UK, exercised about the impact on women of the Gender Recognition Reform (Scotland) Bill currently before the Scottish Parliament. We do so to set out our alternative view, provide context to the letter noted above, and to comment on it. We have had limited time to gather signatories and believe others may wish to add their support.

We welcome your intervention.

We submit that the international ambition of improving safety and respect for those with transgender identities should not be accomplished at the expense of women’s rights to safety, privacy, and dignity on the basis of sex, including access to effective trauma-informed services.

We use “sex” here to mean what the Inner House of the Court of Session of Scotland [referred to](#) as “biological sex”. The Court of Session identify this definition as that which should be applied in any circumstances “affecting status, or important rights, in particular the rights of others”, and cite examples which “all have in common ... that they concern status or important rights.”

We note a great imbalance in the discussion here at international level. Professor Robert Wintemute, a co-author of the original Yogyakarta principles, has said ([here](#)): “If I had thought through the implications of Principle 3, I would have had to consider the potential for conflict with women’s rights, but I didn’t... Women’s rights weren’t raised.” He [added last week](#): “Five years ago, I would have supported the Bill. But I have listened to the concerns of lesbian, bisexual and heterosexual women and changed my mind.”

## UN instruments

We draw attention to the Preamble of the UN Convention on the Elimination of All Forms of Discrimination against Women which states:

“discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries.”

And to the recognition in Article One that discrimination:

“**on the basis of sex** ... 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.”

We further note that the Preamble to the UN Declaration on the Elimination of Violence against Women recognises:

“that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.”

And highlight that Article Three states:

“Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include, inter alia :

- a. The right to **life**;
- b. The right to equality;
- c. The right to **liberty and security of person**;
- d. The right to equal protection under the law;
- e. The right to be free from all forms of discrimination;
- f. The right to **the highest standard attainable of physical and mental health**;
- g. The right to just and favourable conditions of work;
- h. The right **not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.**”

## The issue at stake

At the heart of the issue here, directly relevant to your remit, is the value placed on women’s right and ability to set personal boundaries based on sex, when they need to, with certainty. We do not consider here other issues relevant to women’s rights raised by the Bill, such as fair competition in sports or the effectiveness of anti-discrimination measures.

We believe the answers to four questions determine how seriously the rights to boundaries based on sex are taken. These relate to situations where it matters to a woman that a person is

providing any service (including performing physically intimate procedures) or sharing any space where questions of privacy, dignity or safety arise, will be the same sex as her.

1. Should a woman *ever* be allowed certainty that a person in such circumstances will be the same sex?
2. If so, should such certainty be relatively *ordinary* or relatively *rare*?
3. How *difficult* should it be to achieve such certainty; for example, should it require personal negotiation?
4. Should it require a woman to share personal information, possibly revealing intimate personal history?

We believe that the organisations who have written to you do not value sufficiently the ability of women to be readily able to set personal boundaries in relation to other people on the basis of sex, when they need to.

We hope you might establish from the Scottish Government, and others writing to you in support of its proposals, their answer to the four questions set out above, not as a matter of current law, but as one of principle, and what rights, if any, they believe women should have to set personal boundaries based on sex.

Related to this, we also note the importance of women's psychological safety and how, in contexts where the sex of another person matters, that can be compromised if our accurate perception of a person's sex is contradicted, or its expression suppressed. We believe such policies and practices can amount to a form of coercive control.

#### Experience in countries which have legislated here already

We are aware that it is repeatedly argued that there is “no evidence” of negative effects from similar legislation in this area. We believe that an ‘absence of evidence is evidence of absence’ argument comes from adopting a hierarchy of rights in which women's rights based on sex are demoted. It also places an impossible burden of proof on almost wholly voluntary campaigners who find themselves opposing state machinery and state-funded actors. It should be rejected.

To this end, we note that:

- Many of the effects noted below are hard to track. But no country changing its laws here has even tried to.
- In Ireland a review of the legislation after three years ruled evidence on the impact on women as ‘[out of scope](#)’.
- Women in countries where these laws are already in place face barriers to speaking out.
- In Norway at least two women have been [pursued formally for hate crimes](#) after objecting to the presence of a male in a changing room. [Robberstad and Halvorsen \(2022\)](#) describe the interaction of laws on self-declaration and hate crime as an ‘unresolved legal issue’ in Norway.

- In November 2020, the then Director of Amnesty Ireland [co-signed a letter](#) which called "on media, and politicians to no longer provide legitimate representation" for those they designated as holding "bigoted beliefs" on gender recognition.
- The detail of the legislation, what rights are conferred, and the wider legal landscape in which it operates is highly relevant to its effects; however, the Scottish Government has looked only at application processes in other countries.
- [The interaction of a Gender Recognition Certificate \(GRC\) with the Equality Act 2010](#) remains a central and unresolved concern, which is subject to current litigation in the Scottish courts. The Scottish Government is arguing a GRC should have legal effect under the Equality Act 2010 in a way that, when combined with the proposals in the Bill, will put single-sex services at greater risk.
- Neither the Scottish Government nor the co-signatories to the letter you received have acknowledged this litigation. Outside court, the Scottish Government has refused to state its position, even to the Scottish Parliament.
- It is untrue that no cases have been reported of violent men obtaining access to women's spaces using a GRC. There are issues emerging in the prison system in Ireland (see the [Kardashian case](#) here, and two recent interviews with women held in Limerick Prison [here](#)).
- Cases occurring where *policies* have allowed self-declaration in practice, ahead of legal change, are also relevant to understanding the vulnerabilities of these systems. Those known include: [Katie Dolatowski](#) (Scotland), [Karen White](#) (England) and the [Wi Spa incident in the US](#) (which was subject to a major effort to discredit the woman reporting). Multiple worrying relevant stories are emerging from prisons and hostels in the USA, Canada, and Australia, among others.
- A large proportion of sexual offending is non-contact: most relevantly here, flashing and voyeurism.
- When male people are not allowed into women's spaces, it is relatively straightforward to observe that a male who is undressed, observing women, or both, in such a space is likely to be motivated by intention to commit a sexual offence. Once male people are normalised in these spaces, it becomes much more difficult to do so.
- An increase in this form of offending could easily go unreported; reporting concerns about the presence of males in women-only spaces can carry a high risk of social or formal penalties (see above).
- The under-reporting of sexual offending is a global issue. Only a minority of cases are likely to be reported, and of those that are, some may not be for years.
- In some situations, such as intimate medical and care settings, we know that women can take a long time to process that their experience was abusive. The fear of being accused of transphobia can be expected to add to the factors deterring women from raising a complaint.
- Statistical evidence has been compromised in countries adopting self-declaration by replacing sex with gender identity in datasets (as in Norway) and/or not tracking relevant cases, meaning it is no help. Thus, immediately after the law was changed, Denmark [saw a sharp rise in recorded rapes and sexual assaults](#). But without an appropriately detailed examination of the type of cases, it is impossible to know whether any of this increase might have been related to the introduction of self-

declaration rather than, say, changes in how sexual offending was dealt with in the criminal justice system. It does not appear that these figures have prompted such an investigation.

- The issues here are, however, about far more than known incidents of violent or sexual assault in women’s spaces.
- Women are concerned about a loss of confidence that they will not meet anyone clearly male in a women-only space. For some women, this loss may result in self-exclusion from spaces or services, for reasons of dignity, privacy, or safety. In some cases, women may exclude for personal reasons, including trauma responses and religious requirements.
- Self-exclusion leads women to avoid seeking help from VAWG services; discharging early from hospital wards, at risk to their health; greater social isolation, due to ceasing to attend certain activities and spaces; and a loss of independence due to greater reluctance to use public toilet facilities, with older women and women experiencing heavy or unpredictable menstrual flow among those most affected.
- Whether male offending patterns track biological sex or identity is relevant for policy and law-making here. A unique population-level [longitudinal quantitative research](#) from Sweden has been systematically ignored and misrepresented by activists promoting self-declaration. The research concluded with absolute clarity: *‘In this study, male-to-female individuals had a higher risk for criminal convictions compared to female controls but not compared to male controls. This suggests that the sex reassignment procedure neither increased nor decreased the risk for criminal offending in male-to-females.’* (Dhjene et al. 2011: 6). We are not aware of any study which contradicts this finding.
- Self-declaration systems are still relatively new, with only limited time for any wider effects to show. This situation is exacerbated by a lack of any attempt to look for such effects, and a wider context, in which those highlighting relevant cases are subject to unfounded accusations of hatred, involving social and legal sanctions.

We are not surprised that you have reported receiving many messages from women in many countries in Europe and beyond thanking you for raising these issues and expressing concerns about similar planned legislation in their countries. We expect you will receive many from women in countries that have introduced laws in this area with inadequate attention being paid to their impact on women and girls’ dignity, privacy and safety.

#### Points made in the letter of 29 November

Regarding the letter from the six Scottish organisations, we note the following:

- The assertion that “a wide range of individuals and groups [fed] into the process at length” does not give a fair account of a process that has been partial, closed, and biased. We can provide further detailed evidence of this. We agree that the process has been prolonged, to the detriment of all involved, but this time has not been used well by the Scottish Government.
- The commentary on the Equality Act 2010 overlooks that under the current state of legal confusion a GRC may, in practice, be used by individuals to persuade service providers or employers to admit them to a single sex service, space or role from which they would otherwise be excluded. Relatedly, it overlooks that fear of such challenges will influence

- providers in deciding whether to make use of their powers to make single sex services available. We draw your attention [to this article](#) by barrister Naomi Cunningham.
- Regarding the Yogyakarta Principles, see the comments by Prof Wintemute noted above.
  - International standards and best practice should indeed go further than the ECHR, not least on issues relating to violence against women and girls. In our strong view, the Bill has the opposite effect by creating under-scoped new risks to the exercise of women’s rights to safety, privacy, and dignity on the basis of sex.
  - The parliamentary process was demonstrably biased (again we can provide further evidence to support this). The majority of the Committee over-relied on “absence of evidence” arguments and, even then, wrongly asserted that no “concrete” examples had been provided of problems arising from these systems.
  - The reliance on a statutory declaration accompanied by criminal penalty for falsity is not a “robust” safeguard. [Research on deterrence](#) shows that effectiveness relates to the likelihood of being caught. The Scottish Government is unable to explain how any person could be shown not to be living in their acquired gender, beyond not having changed personal documents.
  - “International human rights best practice” is used repeatedly as a means of closing down criticism. The question of what *best practice for all* looks like has been inadequately considered by those who promote it (again, we cite Professor Wintemute).
  - The observations on single sex spaces again overlook the issues set out by Ms Cunningham on the Equality Act. They also overlook that whatever may be said about what the law technically *permits*, the organisations who contacted you already take a narrow view of how it should be *applied*.
  - With specific reference to prisons, the issue is not how policy operates now. It is nonetheless, disputable that the current policy is working well: we draw your attention to the first-hand experiences of female prisoners in the Scottish prison estate (page 3 [here](#)) and to the current case reported [here](#).
  - Aside from this, the Bill raises the question of whether the Scottish Prison Service policy would withstand legal challenge from a GRC holder, given GRCs will now be far more readily available to those in prison. We draw your attention to data [showing](#) that half of the 16 transgender inmates in Scottish prisons began transitioning while “being cared for in custody following their remand or conviction for their current offence”, and that six have “current or previous” convictions for sex offences.
  - On the assertion that there are no issues or problems in practice regarding the provision of specialist services for women who have suffered violence and abuse, we contrast the statements in the letter with the written submission made to the Committee by [HEAL survivors group](#), the experiences of women [reported here](#), and a [report](#) of women’s experiences produced by the Scottish Women’s Convention.
  - HEAL question the ambiguity of references to trans-inclusive services and that this can encompass a variety of approaches, with very different implications for women’s experiences in those services.
  - HEAL also detail the difficulty women have had in obtaining clarity and reassurance from national bodies about the availability of single sex services in Scotland, and how women can identify and access services with certainty, and without fear of how they will be treated.
  - The statement that “in those 15 years, there has not been a single incident of anyone abusing this” cannot be reliably made. The most the signatories can say is that they are

not aware of any such incidents, based on whatever steps they have taken to establish this with face-to-face providers on the ground (which none of the signatories are, see below) over this period.

- An understanding of women’s responses to male violence and abuse should always allow for the possibility of unreported incidents, while a trauma-informed approach further requires recognition of the potential to provoke trauma responses and for self-exclusion as a negative effect.

## Conclusion

We regret that the signatory organisations of the 29 November letter have not sought at any point to engage with those who are concerned about the impact of the legislation on women in Scotland.

In Scotland, day-to-day, face-to-face support for women who have been subject to violence and abuse is provided by numerous independent organisations, rather than those who have written to you. Most of these provider organisations (62 in total) now receive central government funding under the national Equally Safe (Violence Against Women and Girls) Fund, only recently placed [at arm’s length](#) from the Scottish Government.

[RCS](#) campaigns at national level and sets standards for a network of 17 local direct service providers. It receives national funding to manage a national phone line (5pm-midnight); provide specialist support to individual women going through the justice system; and undertakes educational work. [SWA](#) describes itself as ‘coordinating, influencing and campaigning’. It is the national office of a network of 34 independent local direct service providers and receives national funding to manage a national Domestic Abuse and Forced Marriage Helpline (24 hours). Two organisations (Just Right, Scottish Women’s Rights Centre, itself a project of RCS) provide legal and advocacy support to individuals.

There has not been any substantial consultation with local providers of VAW services in Scotland on the position taken by third sector bodies at national level. We draw your attention to the comments from [Isabelle Kerr](#) quoted below and further evidence that women working within front-line services in Scotland have felt constrained from contradicting the position taken by organisations at national level, as illustrated in this [interview](#).

We note that Isabelle Kerr, who recently retired as Manager of Glasgow and Clyde Rape Crisis Centre and has 40 years’ experience working in the women’s sector in Scotland and internationally, has said that women contacting services in Scotland can no longer “even ask if I can have a woman to support me” (6 October 2022, at 32.0mins [here](#)). She added that she and one other woman working in the sector had been “hounded out of our jobs because of what we believe”. She observed that Engender, RCS, SWA and Zero Tolerance had previously issued a statement which asserted that services in Scotland had included males who identify as women for many years, and that no problems had ever been reported. On this Ms Kerr commented: “none of that was accurate...not one single rape crisis centre and not one single women’s aid centre was consulted before that statement was put out... There are groups on the ground who are scared to speak out because it is a condition of funding.” She added “trauma doesn’t recognise legislation.”

We ask you to consider our submission alongside others you have received.

SIGNED:

**Organisations**

Fair Play For Women  
For Women Scotland  
Frontline Feminists Scotland  
Keep Prisons Single Sex  
MurrayBlackburnMackenzie  
Scottish Feminist Network  
Sex Matters  
Woman's Place UK  
Women and Girls in Scotland  
Women's Declaration International (Scotland)  
Women's Rights Network  
Women's Rights Network Scotland  
Women Speak Scotland  
Women Voting With Our Feet

**Individuals**

Julie Bindel , Journalist, author and feminist campaigner  
Shonagh Dillon, CEO, Aurora New Dawn  
Vivienne Hayes MBE, CEO, Women's Resource Centre  
Rhona Hotchkiss, Former Governor in Charge, Scottish Prison Service, Chair - North  
Ayrshire Women's Aid  
Karen Ingala Smith, CEO, nia and author of 'Defending Women's Spaces'  
Dickie James MBE, CEO, Staffordshire Women's Aid  
Isabelle Kerr OBE, former manager, Glasgow and Clyde Rape Crisis Centre  
Elaine Miller, Fellow of the Chartered Society of Physiotherapy  
Clarrie O'Callaghan, Director, Femicide Census  
Professor Jo Phoenix, School of Law, University of Reading  
Onjali Q. Rauf MBE, Founder and CEO of Making Herstory  
Lisa-Marie Taylor, CEO, FiLiA  
Sophie Walker, Founding Leader, Women's Equality Party (2015-19)  
Dianne Whitfield, former CEO, Coventry Rape and Sexual Abuse Centre  
Harriet Wistrich, Solicitor

cc Secretary of State for Foreign, Commonwealth and Development Affairs, Rt Hon James  
Cleverly MP