

EQUALITIES AND HUMAN RIGHTS COMMITTEE

DRAFT BUDGET SCRUTINY 2020-21

SUBMISSION FROM MURRAYBLACKBURNMACKENZIE

1. Introduction

We note that the Scottish Government does not fund any third sector equalities organisations whose main purpose is to represent the interests and rights of women and girls as based on the legal definition of sex in the Equality Act 2010, which we read as referring to biological sex.

A lack of funding in this area is reflected in Scottish Government policy, as well as policies by other public bodies and agencies, which often fail to consider the interests of women and girls. Instead, policies that affect women and girls are more likely to be formulated on the basis of gender self-identification principles,¹ as advocated for by a number of high-profile publicly funded third sector organisations. We think that this funding imbalance has contributed towards policies that have weakened the protections available to women and girls under the Equality Act 2010 on the basis of their sex, in particular, the availability of, and access to single-sex services and spaces.

We believe that the Scottish Government needs to rectify this imbalance, to make clear its commitment to upholding the rights of all groups with protected characteristics under the Equality Act 2010, and to ensure that the sex-based rights of women and girls are represented in its support for third sector organisations.

2. Why biological sex matters

Over the last 150 years women have gained the right to education, win property rights, and achieve political representation, all previously denied them due to their sex.

Recognising the consequences of being born female, the Sex Discrimination Act 1975 defined a woman as 'a female of any age', and stated that 'A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if on the ground of her sex he treats her less favourably than he treats or would treat a man.' This definition of 'woman' was carried forward to the Equality Act 2010 which identified 'sex' as a protected characteristic and set out further rights to single-sex services and spaces, in some circumstances.

The fundamental argument underpinning these gains is that the physical and social consequences of being born and living with a female body are so significant that women need specific protections in law and policy.

¹ Note: unlike 'gender reassignment' which is a protected characteristic under the Equality Act 2010, gender identity is not defined in law (see [Freedman, 2018: col. 2](#)).

Sex-based disadvantages may relate directly to female biology, for example, pregnancy and maternity discrimination, child-birth mortality, female genital mutilation and female infanticide. The so-called ‘gender pay gap’ is largely a ‘motherhood penalty’ (TUC and IPPR, 2016), while sexual violence and domestic abuse can be related to the lower status ascribed to the female class.

3. Sex and gender-identity in Scottish policy-making

Despite decades of evidence that clearly demonstrate the centrality of biological sex to women’s structural disadvantage, this is not reflected in current Scottish Government priorities. Instead, the Scottish Government believes that gender equality, which relates to how people self-identify and express themselves socially, should be prioritised. This preference is evident in both national and local government policy. For example:

- The Scottish Government Equality Evidence Strategy 2017-2021² has reframed the protected characteristic of sex in terms of gender equality.
- In 2018 the Convention of Scottish Local Authorities (COSLA) instructed its officials to replace ‘sex’ with ‘gender’ in formal documents and correspondence, in line with the Scottish Government position, which was ‘moving towards a non-binary definition’ (Times, 2019).³
- A review of Scotland’s 32 Local Authorities showed that only seven correctly listed ‘sex’ as the protected characteristic in the Equality Act 2010 (MurrayBlackburnMackenzie, 2018).⁴
- The Gender Representation on Public Boards (Scotland) Act 2018 has widened the definition of ‘woman’ to include those with the protected characteristic of gender reassignment. This has the effect of watering down the benefit of the legislation as a way of compensating for the accumulated life-long obstacles faced by people born with female bodies.
- The Census (Amendment) (Scotland) Bill sought to redefine the long-standing sex question, as a gender self-identification question, with a non-binary response option. While the Scottish Government has recently announced the sex question in the 2021 census will be binary, the National Records of Scotland are currently proposing to introduce guidance that will advise respondents to answer in terms of their self-identified gender (subject to further testing).

4. Third sector funding and policy capture

The prioritisation of gender self-identification over sex in policy-making is both reflected in, and reinforced by Scottish Government funding arrangements for third sector equalities organisations. The Scottish Government currently funds a number of high-profile organisations that advocate for policy-making based on gender self-identification principles. We are not however, aware of funding for any organisation

² Scottish Government (2017) [Scotland’s Equality Evidence Strategy 2017-2021](#).

³ Times (2019). [Top civil servant’s tweet leads to accusations of pro-trans bias](#). 6 February 2019.

⁴ MurrayBlackburnMackenzie (2018) [Scottish local authorities, ‘sex’ and the Equality Act 2010](#). 2018.

that explicitly advocates for the interests and rights of women and girls on the basis of the protected characteristic of sex.

Our recent paper (Murray and Hunter Blackburn, 2019),⁵ published in the journal *Scottish Affairs*, considered two areas of policy where officials prioritised the interests of one group of rights-holders (those with transgender identities) over another group (women and girls), instead of balancing the two. In both cases, in what we describe as a process of policy capture, the respective public authorities consulted with third sector organisations that represented the former group and failed to consider the impact of its policies on the latter.

Given that the Scottish Government and other public bodies regularly consult with third sector organisations when developing policies, we believe that that an imbalance in funding for third sector organisations has put women and girls at a disadvantage, and that a more equitable approach is now needed.

⁵ Murray, K. and Hunter Blackburn, L. (2019) [Losing sight of women's rights: the unregulated introduction of gender self-identification as a case study of policy capture in Scotland](#). *Scottish Affairs* Vol. 23 (3).