



25 April 2023

Dear Mr Wilkes

Thank you for inviting us to participate in last month's roundtable discussion to discuss the Commission's preliminary findings in Scotland related to the protected characteristics of sex, marriage and civil partnership, and pregnancy and maternity.

We are pleased to hear that the Commission will be producing a detailed note of the meeting, which we look forward to receiving in due course.

We were also pleased to note that the Scottish Human Rights Commission has given its consent for the report to cover issues relating to human rights in Scotland.

We are writing now to reiterate a number of points that Lisa raised during the course of the meeting. We hope these points, and the points raised by other groups, will be reflected in the final report produced by the Commission in the autumn.

As we learned during the presentation, the Commission is drawing on a number of key datasets to make an assessment of how legal rights and protections based on sex are being realised. Robust, high quality data on sex is essential to evidence-based policy-making relating to the needs and interests of women and girls.

However, we are concerned that – across many key datasets, including the census – 'sex' is no longer a stable variable.

Scotland's census 2022

The 'sex' question in last year's census was framed as a question about respondents' self-declared gender identity, not their biological sex. This was despite the fact that there was a new, separate question about respondents' 'trans status', which was welcomed by many social scientists. We are still awaiting detailed outputs from the census. However, National Records of Scotland have already [confirmed](#) via a freedom of information response that they are unable to say how many individuals responded to the sex question with their biological sex and how many responded with their self-declared gender identity.

Scottish Government guidance

In September 2021, the Scottish Government Chief Statistician issued [guidance](#) to all public authorities in Scotland, which stated that they need no longer collect data on biological sex as a matter of routine. It is clear that a number of public authorities had already changed their data recording practice, e.g. [Police Scotland](#), the [Scottish Household Survey](#). Claims that the collection of data on biological sex might breach Article 8 rights in the Commission's own [submission](#) to the Chief Statistician were refuted in a [legal opinion](#) provided to Woman's Place UK by Aidan O'Neill KC.

Gender pay gap (GPG) data

The presentation also referred to 'gender' pay gap data, reporting on which is a statutory requirement for most UK companies. However, [guidance](#) jointly issued by the UK Government Equalities Office (GEO) and Acas in February 2019 advised employers to collect data about their employees' self-declared gender identity and not their biological sex. Current [guidance](#) from the GEO states that employers must *"be sensitive to how an employee identifies their gender. The gender pay gap regulations do not define the terms 'men' and 'women'."* This is despite the fact that the GPG regulations refer back to the Equality Act 2010.

Representation on public boards

The presentation referred to female representation on public and private boards as an indicator of women's status in public life. As you will know, MSPs passed the Gender Representation on Public Boards Act (GRPBA) in 2018, the aim of which was to ensure 50:50 male/female representation on Scottish public boards. However, [revised guidance](#) issued by the Scottish Government in April 2022 stated that a biological male who had acquired a Gender Recognition Certificate would count as a woman for the purposes of the GRPBA.

The Commission is rightly focussed on an intersectional approach to the needs and interests of women and girls. The loss of robust, high quality data on sex matters if we are to measure and remedy disadvantage and discrimination faced by women based on their sex and other protected characteristics such as age, race, disability, faith etc. In recent years, the UK's leading social scientists have [repeatedly warned](#) about the particular effects on data about sub-groups of the population.

Sex is no longer a stable variable in many large scale, public datasets, and we caution the Commission's reliance on these data to provide an accurate picture of women's experiences of discrimination and disadvantage.

We also concurred with comments made during the roundtable regarding concerns about the loss of single sex spaces and services for women and girls. We trust the Commission is aware of the [analysis of responses](#) to of the Scottish Government's Strategic Review of Funding and Commissioning of Violence Against Women and Girls Services, which noted:

“The most frequent cross-cutting theme concerned the need for single-sex services and female-only staff. Respondents highlighted that single-sex services should be made into law, widely available, clearly advertised and co-exist with non-single-sex options. Responses suggested that single-sex spaces are vital to ensuring victims of VAWG feel safe and protected, otherwise women might self-exclude due to religious or cultural reasons.”

Lisa also highlighted concerns about the failure of NHS boards in Scotland to offer abortions to women after the first trimester of pregnancy, meaning that women often have to [travel](#) to England. We suggest that the Commission contact the [British Pregnancy Advisory Service](#) [Abortion Rights Scotland](#) and [Back Off Scotland](#) for more detail on this issue.

Please do not hesitate to contact us again should you require any further information.

Yours sincerely

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