

Losing sight of women's rights: the unregulated introduction of gender self-identification as a case study of policy capture in Scotland

Dr Kath Murray and Lucy Hunter Blackburn
University of Edinburgh

Summary

Over recent years policies that represent a profound conceptual change in our understanding about what it means to be a woman or a man have been introduced in Scotland, premised on ideas about self-defined gender identity. Departing from the legal definition of sex in the Equality Act 2010, as based on biological sex, this shift has taken place across a range of policy areas, including criminal justice, health, local government equalities policies, and guidance for women's services, without due diligence, democratic oversight or scrutiny.

This paper presents two detailed cases studies where unregulated gender self-identification principles have gained traction: the census and Scottish Prison Service policy on transgender prisoners. While badged as inclusive, in both cases the analysis shows how decision-making has been directed towards the interests of one specific interest group, to the detriment of another, women and girls. Highlighting the failure of institutional safeguards designed to ensure that public policies are consistent with the law, the paper raises serious questions about policy capture and the vulnerabilities of democratic policy-making to ideologically-driven lobbying.

Background

Within the last two years, respective proposals by the Scottish and UK Governments to reform the Gender Recognition Act 2004 (GRA) to allow people to change their legal sex based only on making a legally-registered self-declaration have sparked an intense debate on how sex and gender identity should be defined in law and policy.

This paper considers how gender self-identification, without any requirement that a person has gone through any form of legal process, had already become a feature of Scottish policy-making and practice long before public consultation began on reforming the GRA.

Case studies

The first case study examines policy development on the sex question in the UK censuses. Tracing the piecemeal introduction of self-identified gender identity principles from 2001 onward, the analysis shows how decision-making on the sex question has been shaped by a reference to a limited group of interests that have excluded those of women. Looking ahead, the paper argues that how the sex question is framed in Scotland's 2021 census will set a key precedent for how sex is understood as a policy and legal category, and that the current attempt to put the principle of gender self-identification on a statutory basis risks setting a legal precedent that will challenge the very basis of the Equality Act 2010. The paper also argues that the current policy direction, which conflates sex and gender identity, carries significant risks in terms of data quality and reliability.

The second case study looks at Scottish Prison Service (SPS) policy on transgender prisoners, focusing on decision-making in relation accommodation and intimate searches. While the policy was relevant to the well-being and safety of two vulnerable groups of prisoners, the analysis shows that decision-making focused exclusively on the interests of transgender prisoners, and ignored those of female prisoners. Notably, the Equality Impact Assessment, intended to consider how a policy might affect the nine protected characteristics in the Equality Act 2010, failed to recognise that the policy would affect female prisoners and prison officers. The analysis also shows that the operation of SPS transgender prisoner policy remains opaque, with most information in the public domain accessed by Freedom of Information and/or media reports.

Institutional safeguards and policy capture

More broadly, the paper highlights the failure of institutional safeguards designed to ensure that public policies are consistent with the law. It is clear that public authorities have repeatedly failed to assess properly the impact on other groups who have specific protections under the Equality Act 2010, as the Act requires, and that little thought has been given to the possibility that such policies might be open to abuse by individuals with malign intent, irrespective of gender identity.

As gender self-identification becomes more common, either by law or, as in Scotland, without legal change, there is evidence to suggest that failing to anticipate such abuse is naïve. While proponents of GRA reform maintain that the unregulated introduction of gender self-identification in Scotland has not led to any problems, this remains unsubstantiated, principally because organisations have not systematically gathered information on the impact of the changes already made.

On one analysis, the analysis simply reflects that women remain, as a class, less powerful than men. From another perspective, it is a story about policy capture that demonstrates how a small number of influential actors appear to have secured a monopoly on how sex and gender identity are understood within Scottish policy-making. That such a paradigm shift has taken place without formal scrutiny or proper monitoring, far ahead of legal change, raises serious questions as to why there has been such a persistent failure to consider the possible wider impacts of gender self-identification, especially on women, and the adequacy of institutional safeguards against well-organised lobbying.

This is now a significant challenge for the Scottish Government, which needs to review its policies, make clear its commitment to upholding the sex-based protections in the Equality Act 2010, and find a way to allow for open debate on sex and gender identity issues. The dynamics and processes that have allowed this change to happen on such a scale with so little scrutiny for so many years, also deserve much closer attention, to understand the specific vulnerabilities of women's rights, and the vulnerabilities of democratic policy-making more generally to ideologically-driven lobbying.