

Q&A on Scottish Affairs paper

What do you mean by “ideologically driven”?

We mean lobbying that is driven by a strong conviction in the truth of a specific idea, particularly one which has potentially broad implications across government. We differentiate between this and other forms of highly-focussed lobbying, such as advancing a material interest in one area (for example, in a planning issue), because we believe it raises specific questions for public authorities. How well able are they to look beyond the strength and sincerity with which arguments are put to them? How good are they at recognising where there will be wider implications in accepting a specific proposition in one particular context, or where something is being advanced in one setting as part of a broader aim?

What is the ideology that your paper refers to?

A belief that self-declared gender identity should take precedence over biological sex in most, or even all, contexts, which has driven policymaking in a number of areas, two of which we highlight in our paper. This contrasts with the premise underlying existing anti-discrimination legislation in the UK which is – rightly, in our view – that a reading of the evidence shows that the physical, economic and social consequences of being born and living with a female body are so significant that women deserve specific rights and protections in law on that basis.

Do you support the right of LGBT groups to lobby government on this issue?

Absolutely. Lobbying in good faith on behalf of a particular interest group is a legitimate activity in a democracy. Our criticism in the article is reserved for government and public authorities, whose job it is to weigh up and balance the needs and concerns of all interest groups. They also have a responsibility in law to foster good relations between those with different protected characteristics. In the two case studies we cite, both public authorities have failed to do this.

What is an “institutional safeguard”?

An institutional safeguard is a mechanism to prevent an institution from being captured by one set of interests or interest groups. One mechanism available to public authorities (as well as some organisations outwith the public sector) to protect themselves against policy capture is an Equality Impact Assessment (EQIA), if done properly. An EQIA should consider the potential impact of a policy on all nine protected characteristics listed in the Equality Act 2010. Although it will often be proportionate to decide there are no impacts to discuss for some or all characteristics, each one should be thought about.

But both NRS and SPS undertook EQIAs on the census/transgender prisoner policy?

They did. However, the NRS' EQIA considered the protected characteristics of sex and gender reassignment together, which meant that any conflict between the two groups was not considered. The SPS' EQIA did not consider the potential impact of their policy on those with the protected characteristic of sex. Nor did they consult any interest groups that represent women. These EQIAs were not conducted with adequate seriousness.

It's not clear that the Equality Act 2010 refers to biological sex?

We are aware that some people hold different interpretations of the Act. Our reading of the Act, which we believe is well-founded and not unusual, is that when it uses “woman” and “man” to divide the population into two groups within the protected characteristic of “sex”, and further defines these as “female” and “male” people, the distinction intended is based on biological sex, as observed and recorded at birth¹. This is notwithstanding that the interaction with the GRA means that those with a Gender Recognition Certificate are also entitled to be recognised as a woman or a man, as appropriate, in most, although not all, circumstances where those categories are legally relevant. The conceptual shift which explains conflict over the interpretation of the Equality Act is what concerns us. We think it may go some way to explaining the drift in the minds of policymakers when it comes to issues of sex and gender identity.

Do you support using the census to gather data on people with transgender identities?

Yes, we support the proposal for a new voluntary question to collect data on the transgender population and believe it should include the opportunity for people to record how they identify. We believe collecting data separately both on sex and on transgender identities is the best way to produce the most helpful data about and for everyone.

What do you think the prisons policy should be?

We think whether there is scope to use women's prisons to hold some transgender prisoners who identify as women, and if so which, should be decided only after careful discussion with women prisoners, their representatives and staff who work in those settings. Any policy affecting moves into the women's estate should have as its central concern the potential impact on women prisoners' physical and mental well-being and safety. The SPS needs to develop other approaches to custody which support the physical and mental well-being and safety of those transgender prisoners who identify as women who cannot or do not wish to be placed in a women's prison, who already appear to make up the majority of cases under the existing policy.

¹ For a discussion of why DSD (sometimes called intersex) conditions are a separate issue which do not affect this analysis, we recommend this briefing by [DSDFamilies](https://www.parliament.scot/S5_European/Inquiries/CensusBill_DSDFamilies_CTEEAS518CB33.pdf)
https://www.parliament.scot/S5_European/Inquiries/CensusBill_DSDFamilies_CTEEAS518CB33.pdf