



Woman's Place UK
PO Box 1344
Cambridge,
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7th December 2020

Dear Ms Hilsenrath,

We are writing to you with regard to a submission made by the Commission to the Scottish Government's Sex and Gender in Data working group in September 2019, and specifically, a statement made by the Commission regarding the lawfulness of requesting, gathering and collating data on individuals' biological sex.

The statement is [published](#) on the Scottish Government's website and states,

"There are important human rights considerations that need to be considered when asking employees or service users to state their sex, especially in regard to people's right to privacy under Article 8 of the ECHR and the Human Rights Act 1998. Forcing trans employees or service users to disclose their sex as assigned at birth would be a potential violation of their human rights, particularly their right to privacy and dignity under Article 8. In addition, forcing a trans person without a Gender Recognition Certificate (GRC) to disclose their legal sex would result in that person being 'outed' as a trans person. It is also a criminal offence under the Gender Recognition Act 2004 for a person who has acquired the information in an official capacity, to disclose information relating another person's application for a GRC or their gender prior to grant of the GRC. In some instances, forcing people to 'out' themselves will also breach the Equality Act 2010."

Woman's Place UK (WPUK) campaigns to uphold and extend women's sex-based rights. One of our consistent aims has been to ensure there are mechanisms in place to collect robust, high quality data on sex, which is vital if we are to measure and remedy the discrimination experienced by women on the basis of sex.

We were therefore extremely concerned to note the Commission's reading of both UK law and the European Convention on Human Rights (ECHR) with regard to the lawfulness of requesting, gathering and collating data on sex.

We note, in a recent [freedom of information response](#), that the Office for National Statistics has levelled a similar line of argumentation regarding the collection of data on biological sex in the 2021 census.

Our concern led us to commission a formal legal opinion from Aidan O'Neill QC regarding the statement provided to the Scottish Government by the Commission. We have now received this.

Mr O'Neill concludes that :

"... privacy rights are not absolute and individuals do not have a universal veto on what can and cannot be asked of them. In any event, the Human Rights Act 1998 requirements apply only to public authorities or to private bodies when exercising public law functions.

Although the collation (and potentially the disclosure) of information and data about people's private lives (which would include, details such as their name, age, sex, address, nationality, racial or ethnic origins, marital status, sexual orientation, sexual history, gender identity, health records, credit history, political affiliation, voting record, financial health, criminal record, whether charges and/or convictions) the collation (and potentially the disclosure) of such data or information may be said to engage the rights protected by Article 8 ECHR, it will not constitute (unlawful) interference with those rights provided that the collation and/or disclosure is done in accordance with law and separately may be said to be "necessary" within the context of the proportionality test: that is to say that the collation and/or disclosure must involve the least interference with the right to respect for private and family life which is required for the achievement of the legitimate aim pursued.

The terms of this statement are too general and unspecific and divorced from any actual context to count properly as legal advice. What can be said, however, is that requiring a person without a Gender Recognition Certificate (GRC) to disclose their legal sex may be justified as a proportionate requirement made in pursuit of a legitimate aim. Such a requirement would not necessarily involve a person being "outed" as a trans person, if "outed" is understood to mean publicised or made common knowledge by its unauthorised or unwarranted disclosure by the recipient of the information to others.*

... there is nothing in the GRA to require the expunging or re-writing of past history, or to require that the previous state of affairs be expunged from the records of officialdom, or the eliminating or denial of the memories of individuals who knew the person in an non-official capacity in their original birth sex.

In sum it may certainly be said that that a mandatory question relative to "what was your sex at birth" will not constitute an unlawful intrusion into an individual's right to respect for their private life as protected under and in terms of the European Convention on Human Rights (ECHR) in particular Article 8 ECHR if the information is required by a public authority or a private body exercising public law functions in accordance with law, and the information is properly necessary for the achievement of a legitimate aim.

Among the legitimate aims which might be envisaged for asking such information might be:

- to coordinate and monitor the implementation of international law – for example the UN Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') and

the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence ('the Istanbul Convention');

- to develop and/or improve where necessary national policies against violence against women, based on maximum safety and protection of victims, support and assistance, adjustment of the criminal and civil law, raising of public awareness, training for professionals confronted with violence against women and prevention. This might include the protection of victims of sex-related violence by the provision of women only shelters;*
- to help to inform policymaking and separately to assess the impact on women's rights and experience, of measures taken (including positive action measures to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers).*
- the freedom of association (in cases of membership of single-sex private clubs) and the organisation of sporting activities (for example single-sex sports events);*
- in the carrying out by public authorities of their public sector equality duties under the EA 2010"*

In light of this advice, we are writing to request that the Commission withdraw the statement made to the Scottish Government, pending a review of its position here, taking full account of the relevant legal sources, and that it contacts any other organisations to which it has provided similar advice on this issue, informing them that that advice is now under review.

We are copying this letter to other UK public authorities with a role in ensuring the collection of robust, high quality data on sex.

We look forward to hearing from you.

Yours sincerely



Kiri Tunks



Judith Green



Ruth Serwotka

Co-founders, Woman's Place UK