

A Critical Analysis of the Scottish Government's Draft Gender Recognition Reform (Scotland) Bill and its Adherence to the UN Convention on the Elimination of All Forms of Discrimination against Women

ESTHER HODGES*

ABSTRACT

In March 2022, the Scottish government introduced the draft Gender Recognition Reform (Scotland) Bill. The draft Bill aims to streamline the process for those seeking to obtain a Gender Recognition Certificate and so amend the sex on their birth certificate to the gender with which they identify. Its proposed reforms have attracted significant opposition from some. Drawing on qualitative analysis of submissions to the draft Bill's second public consultation, this article argues that opposition is typically based on a reductive, classical sociological conceptualisation of gender, which understands gender as an immutable binary ordained by nature and contends that trans women are not women. By making it easier for trans women to gain legal recognition for the gender with which they identify, those opposing the draft Bill on these grounds therefore argue that its reforms put the rights and freedoms of cis women at risk. This article explores this contention by critically analysing the draft Bill's adherence to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Setting analysis against a framework of two of the CEDAW's most relevant articles and its General Recommendation 28, it argues that the draft Bill is demonstrably in adherence with CEDAW because of its efforts to reduce discrimination against trans women through means which in no way increase the risk of discrimination against cis women. Drawing on postmodernism, this article elucidates a progressive conceptualisation of gender which contends it is not fixed. It argues the draft Bill,

* LL.M Human Rights candidate (University of Edinburgh), MSc (SOAS), BA Hons (Oxon).

and indeed CEDAW, could go further in their efforts to reduce discrimination faced by trans women by reducing their evidential reliance on binary conceptualisations of gender. In so doing, they could encourage greater feminist and queer coalitional work, discouraging efforts to pit women's rights against those of trans people to support the emancipation of all women.

Keywords: CEDAW; gender recognition; postmodernism; trans rights; women's rights

I. INTRODUCTION

Introducing the draft Gender Recognition Reform (Scotland) Bill (“the draft Bill”) to the Scottish Parliament on 3 March 2022, Cabinet Secretary Shona Robison said, “We are committed to advancing equality for women and protecting women's rights. That commitment is not affected by our support for trans rights.”¹ The draft Bill of which she spoke aims to streamline the process for those seeking to obtain a Gender Recognition Certificate (GRC) and so amend the sex on their birth certificate to the gender with which they identify.² Those in favour of the draft Bill contend that it improves rights recognition and reduces discrimination for trans people, including trans women. Those in opposition argue that it puts the rights and equality of cis women at risk.³ In Scotland, as in other parts of the United Kingdom (UK), this debate is contentious and highly polarised. Those advancing the draft Bill evidence cognisance of this fact, and of the competing views, as Robison's words attest.

Given the relevance of the debate to efforts to reduce discrimination against women—trans and cis—this article's contribution is to analyse the extent of the draft Bill's adherence to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Conducting this analysis, I argue that the draft Bill is in adherence with CEDAW because of its ambition to reduce discrimination faced by trans women through means which in no way increase the risk of discrimination against cis women. Drawing on postmodernism, however, I will contend that it does not go far enough in this attempt because its conceptualisation of gender is socially constructionist, and thus tacitly acknowledges the role of biological determinism. As such, it renders an opportunity for anti-trans movements to challenge the draft Bill on the grounds that trans women are not “real” women and reduces the opportunity for

¹ Shona Robison, words recorded in ‘Official Report Draft: Meeting of the Parliament (Hybrid)’, Session 6, The Scottish Parliament (3 March 2022) 65–66.

² Scottish Government, ‘Gender Recognition Reform Bill’ (Scottish Government) <<https://www.gov.scot/news/gender-recognition-reform-bill/>> accessed 3 April 2022.

³ “Cis” refers to people who live in the gender which is the same as the sex that was assigned at birth.

coalitional work between feminist and queer rights groups on the emancipation of all women.

To advance my discussion, I first review the pertinent legislation to chart the current process applicants must undertake to obtain a GRC under UK and Scots law. This groundwork enables me to draw out the key features of the proposed reforms in the draft Bill and its relevance to CEDAW. Second, I set out a conceptual framework of classical sociological, social constructionist and postmodern conceptualisations of “gender” to explore those found within the draft Bill, and in the positions of those who support and oppose its reforms. To support this work, I have conducted substantial primary qualitative analysis of public consultation responses published on the Scottish Government’s website. This supports the final section of this article, Section IV, where I critically assess the adherence of the draft Bill against a framework of two of CEDAW’s most relevant articles—Articles 2 and 5, those relating to the elimination of discrimination and changing social and cultural patterns—and the CEDAW Committee’s General Recommendation 28 (GR28) which clarifies CEDAW’s intent with regards to gender- as well as sex-based discrimination. This work, and this article’s premise and argument, is underpinned by a normative commitment to protecting and strengthening trans rights in Scotland.

II. DOCTRINAL ANALYSIS OF GENDER RECOGNITION LEGISLATION IN SCOTLAND

To obtain a GRC under UK and Scots law, an applicant must currently fulfil criteria set out in the Gender Recognition Act 2004. A marked step forward for the rights of trans people, this Act was introduced following two cases that went to the European Court of Human Rights in 2002. In *Christine Goodwin v the United Kingdom*, the Court found that the UK had breached the rights of Goodwin, a trans woman, under Article 8 (right to respect for private life), and Article 12 (right to marry) of the European Convention on Human Rights.⁴ In *I v the United Kingdom*, the Court found the same with regard to a second trans woman.⁵ Both cases reflected binary understandings of gender,⁶ and in both the Court reasoned that the practice of restricting gender in national law to the sex registered at birth constituted a risk of violations to private life. This was considered to be as a result of trans people being regularly required to reveal their registered birth sex, for example in pre-employment checks. It was further reasoned to constitute a

⁴ *Christine Goodwin v the United Kingdom* App no 28957/95 (ECHR, 11 July 2002) para 124 (1)–(2).

⁵ *I v the United Kingdom* App no 25680/94 (ECHR, 11 July 2002) paras 73 and 84.

⁶ Ralph Sandland, ‘Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights’ (2003) 11 *Fem Leg Stud* 191.

violation of their right to marriage, for English law would legally recognise their marriage only to other women, even though they were living as women.⁷ Therefore, it was held that the UK must establish procedures to correct these violations.⁸ The subsequently-introduced Gender Recognition Act 2004 established the right for trans people in the UK to legally change their gender - including an amendment to their birth certificate—by obtaining a GRC through three ‘tracks’: standard,⁹ alternative,¹⁰ and overseas.¹¹ The track considered in this article is the standard track, as that is the one the draft Bill seeks to streamline.¹² To successfully apply for a GRC under this track, applicants must: have been diagnosed with gender dysphoria; have lived in their “acquired gender”¹³ for two years immediately prior to their application; and intend to live in their “acquired gender” for the rest of their life.¹⁴ A second piece of legislation should be noted as constituting an important aspect of the legal framework which supports the rights of trans people. It is the Equality Act 2010, which legally protects people from discrimination in the workplace and in wider society,¹⁵ and includes “gender reassignment” as a protected characteristic.¹⁶ It contains specific provision on trans rights, for example prohibiting gender reassignment discrimination in access to and provision of separate and single-sex services.¹⁷

In a Consultation Paper shared in 2019, whereby the Scottish Government made the case for the draft Bill, former Cabinet Secretary Shirley-Anne Somerville MSP acknowledged the process to obtain a GRC under the 2004 Act is arduous, further acknowledged the discrimination trans people face in society, and noted the Scottish Government’s responsibility to comply with international human rights law to reduce it.¹⁸ Therefore, the draft Bill proposes to streamline the process of applying for a GRC in a number of ways. First, it provides that eligible applicants¹⁹ will no longer have to provide medical reports or evidence of a medical diagnosis of gender dysphoria, with a statutory declaration on their intent and

⁷ Rhona KM Smith, ‘Goodwin v. United Kingdom App. No. 28957/95 and I. v. United Kingdom. App. No. 25680/94’ (2003) 97(3) AJIL 659, 660-661.

⁸ Betty C Burke, ‘No Longer the Ugly Duckling: The European Court of Human Rights Recognizes Transsexual Civil Rights in Goodwin v. United Kingdom and Sets the Tone for Future United States Reform’ (2004) 64 LA Law Rev 643, 643.

⁹ Gender Recognition Act 2004, s 1(1)[a].

¹⁰ *ibid*, s 3A(1)–(6).

¹¹ *ibid*, s 1(1)[b].

¹² Scottish Government, ‘LGBTI and gender recognition’ (Scottish Government) <<https://www.gov.scot/policies/lgbti/gender-recognition/>> accessed 11 April 2022.

¹³ I have placed quotation marks around “acquired gender” here to reflect the exact terminology in the Act, which is notable and which I shall return to for analysis in Section II. Conceptualisations of Gender.

¹⁴ Gender Recognition Act 2004, s 2(1)[a]–[c].

¹⁵ Equality Act 2010, Introductory Text.

¹⁶ *ibid*, ss 4 and 7.

¹⁷ *ibid*, Explanatory Notes, part 16 schedule 3 part 7 para 28.

¹⁸ Scottish Government, ‘Gender Recognition Reform (Scotland) Bill: A consultation by the Scottish Government’ (December 2019) 2.

¹⁹ Those born, or habitually resident, in Scotland.

admissibility deemed sufficient.²⁰ Second, it reduces the period they must have lived in their “acquired gender” from two years to three months,²¹ plus an additional three month reflection period.²² Although the CEDAW is not mentioned in the document, the Yogyakarta Principles - nonbinding Principles developed by experts in 2007, which set out how the framework of international human rights law should apply to those of diverse sexual orientation and gender identity - were noted as a development beyond Scotland that suggested the process by which gender recognition before the law should be simplified.²³ In particular, it cited Principle 3c, which contends that States should take all necessary steps to ensure State-issued identity papers (including birth certificates) “reflect the person’s profound self-defined gender identity”.²⁴

The key points to be drawn from this analysis are as follows. First, the Scottish Government deems that the current process for securing a GRC under the Gender Recognition Act 2004 is arduous and risks dissuading trans people from attempting to secure legal recognition for their gender, thus exposing many to the risk of discrimination. Second, although the CEDAW is not directly referenced anywhere in the draft Bill or the Scottish Government’s justification for it, it is relevant because its object is to eliminate discrimination faced by women, including trans women. It is further relevant because the Scottish Government’s use of the Yogyakarta Principles as part of their justification indicates their willingness to consider and adopt international standards to support their case. Third, language within the draft Bill—specifically use of the term “acquired gender”—is unchanged from that used in the Gender Recognition Act 2004, which in turn mirrors the binaries inferred in the *Goodwin* and *I* cases. This leads me to discuss conceptualisations of gender within the draft Bill.

III. CONCEPTUALISATIONS OF GENDER SET OUT IN THE DRAFT BILL AND BY CONSULTED PARTIES

Historically, Western conceptualisations of gender are informed by two main schools of thought: classical sociological and social constructionist. The former, dominant in the late nineteenth and early-mid twentieth centuries, “drew on and contributed to understandings of sex, gender and sexuality as binary categories

²⁰ Scottish Government, ‘Gender Recognition Reform (Scotland) Bill [As Introduced] 2022’, s 8(C)(1)[a].

²¹ *ibid*, s 8(C)(1)[a][iii].

²² *ibid*, s 8(B)(5).

²³ Scottish Government (n 18) 18–19 paras 3.38–3.39.

²⁴ International Commission of Jurists (ICJ), ‘Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity’ (March 2007) 3(c).

ordained by nature.”²⁵ It therefore took an essentialist view of gender as equivalent to sex - with sex determined by physical characteristics - and set out binary categories such as man and woman, masculine and feminine. Challenging this view, social constructionism, emerging in the mid-late twentieth century, “[shifted] away from biologically based accounts of gender to social analysis”.²⁶ Although not denying the role of biology in determining sex, social constructionists argued that social and cultural factors define gender, and therefore introduced the idea of the sex/gender binary. More recently, a third theoretical shift - postmodernism - has occurred that contends that gender is performatively enacted. Postmodern gender theorists such as Judith Butler argue that this means “[gender] is real only to the extent that it is performed.”²⁷ As a result, postmodernism contends that gender is not fixed and immutable, but is co-constitutive of cultural and social subjectivities that mean it can be multiple, nonstatic and context-specific. Decolonial scholarship supports the postmodern view, with Mohanty arguing that the supposed “universality” of woman as a subject of patriarchal oppression is a discursive tool used by Western feminisms to construct the “other” of what she terms the “uber-oppressed” Third World Woman.²⁸ Ethnographic studies also contest notions of universality in gender, with hundreds of diverse gender identities recorded globally including the *kothi* of India²⁹ and the Ugandan *mudoko dako*.³⁰ In the West, a number of “gender categories” continue to emerge including intersex, agender, and gender questioning. These categories align with postmodernism in transcending the sex/gender binary, and map to a new form of identity politics which can be a powerful social movement promoting the development and enjoyment of rights for groups within particular categories.

This has given some pause for thought, however. Mohanty raises the concern that these identities are new “boxes” that risk exclusion of those who do not neatly fit and threaten the potential formation of solidarities between groups. She argues instead for a recommitment to “complex politics of antiracist, anti-imperialist feminisms” which defy neat categorisation.³¹ Postmodern gender theorists tend to agree with the caution in this assessment; consider Otto, who argues for “more feminist and queer coalitional work and the adoption of a

²⁵ Diane Richardson, ‘Conceptualising Gender’ in Diane Richardson and Victoria Robinson (eds), *Introducing Gender and Women’s Studies* (London: Palgrave Macmillan 2008) 4.

²⁶ *ibid* 5.

²⁷ Judith Butler, ‘Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory’ (1988) 40(3) *Theatre J* 519, 527.

²⁸ Chandra Talpade Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’ (1984) 12(3) *Bound 2* 333, 334.

²⁹ Soumi Dey, ‘Being A ‘Kothi’: An Ethnographic Interrogation with A Male Transgender in Kolkata, India’ (2013) 11(6) *IOSR-JHSS* 51.

³⁰ Sylvia Tamale, ‘Out of the Closet: Unveiling Sexuality Discourses in Uganda’ in Catherine M Cole et al (eds), *Africa After Gender?* (Indiana University Press 2007) 17, 18.

³¹ Chandra Talpade Mohanty, ‘Transnational Feminist Crossings: On Neoliberalism and Radical Critique’ (2013) 38 *Signs* (Chic) 967, 987.

performative understanding of ‘sex’³² and Butler, who contends that feminists should resist the “presumed universality and unity of the subject of feminism” (woman), to defy juridical knowledge structures which have created and reinforced this category and the patriarchal oppression it engenders.³³ This, as my analysis will highlight, is particularly relevant when it comes to the rights of trans women and those of cis women.

Using the preceding theoretical framework, the conceptualisations of “gender” in the draft Bill can now be analysed. The draft Bill refers to “either gender”,³⁴ and to “acquired gender”, in relation to “the gender in which the [applicant for a GRC] is living when the application is made.”³⁵ “Either” suggests a binary conceptualisation of gender, but reference to “in which the person is living” also reflects an acknowledgement that gender is in part determined by social factors and not wholly defined according to sex. The term “acquired gender”—mirroring that found in the Gender Recognition Act 2004—indicates a view that gender can be changed or “acquired” according to factors which may or may not include social and cultural determinants. Therefore, the draft Bill’s conceptualisation of gender leans towards the social constructionist view and does not deny the role of either sex (biologically determined) or gender (socially and culturally influenced). In this way its conceptualisation of gender is similar to that set out in the Yogyakarta Principles, which determine that gender identity refers to individuals’ “deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth”.³⁶ Otto, however, registers concern that such conceptualisations “step away from hard-won social constructivism”,³⁷ relying closely as they do—despite acknowledging the role culture can play—on a continued understanding of bio-determinism. In this way, and much as Sandland argues regarding the *Goodwin* and *I* cases,³⁸ the draft Bill is conservative in shoring up traditional binary ideas of gender and sex.

This point becomes more important when considered against the different conceptualisations of gender evident among those consulted on the draft Bill’s reforms. The Scottish Government held two public consultations on the changes proposed and published an analysis of the over 16,000 responses it received to the second of these, which was held between December 2019 and March 2020. This analysis determines that opinions on the draft Bill fell into two main “camps”: those broadly in support of the proposed changes (largely comprised of Lesbian,

³² Dianne Otto, ‘Queering gender [identity] in international law’ (2015) 33(4) *Nordic Journal of Human Rights* 299, 299.

³³ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (2nd edn, Routledge Classics 2006) 5.

³⁴ Scottish Government (n 20) s 8(A)(1).

³⁵ *ibid*, s 8(C)(3).

³⁶ International Commission of Jurists (ICJ) (n 24) preamble 8.

³⁷ Otto (n 32) 301.

³⁸ Sandland (n 6) 191.

Gay, Bi, and Trans (LGBT+³⁹) groups, youth groups, local authorities, and third sector organisations),⁴⁰ and those broadly opposed (mainly “Women’s Groups and Religious or Belief Bodies”).⁴¹ Over 200 organisations submitted responses, which have been published, and primary qualitative analysis thereof—conducted by this author through extensive desk-based research—reveals trends in the conceptualisations of gender within the camps. The former camp was broadly aligned to the social constructionist view, acknowledging the distinction between sex and gender, and expressing support for the view that trans people should be recognised according to their gender, not their sex characteristics. In addition, many went further than social constructionism towards postmodern conceptualisations, acknowledging that gender goes beyond the binary by noting concern that the draft Bill contains no provision for non-binary people. This view was expressed not just by LGBT+ and queer organisations - such as Stonewall Scotland,⁴² Argyll & Bute Trans Youth,⁴³ and Beyond Gender⁴⁴—but by local authorities and workers’ unions such as Aberdeenshire Council⁴⁵ and UNISON.⁴⁶ Conversely, the second camp was much more aligned to the classical sociological view. Religious groups were particularly vehement on the view that sex is biologically determined. Catholic Truth stated: “There is absolutely no scientific or medical evidence to support the belief that a man can become a woman and a woman can become a man”.⁴⁷ Many women’s groups too noted disbelief that trans women are really women, therefore revealing an essentialist view of the biological determinism of sex and gender by implication. For example, Fife Women’s Aid noted that the draft Bill “fail[s] to assess the impact on women who require single-sex or sex-segregated services and those who require care ... from workers who

³⁹ The “+” is intended to encompass other gender- and sex-nonconforming identities including asexual, queer and intersex.

⁴⁰ Scottish Government, ‘Gender Recognition Reform (Scotland) Bill: Analysis of responses to the public consultation exercise’ (September 2021) 5 para 1.22.

⁴¹ *ibid* 5 para 1.24.

⁴² Stonewall Scotland, ‘Response’ (Scottish Government, 2 September 2021) <<https://www.gov.scot/collections/gender-recognition-reform-scotland-bill-consultation/#consultationresponses>> accessed 11 April 2022 10.

⁴³ Argyll & Bute Trans Youth, ‘Response’ (Scottish Government, 2 September 2021) <<https://www.gov.scot/collections/gender-recognition-reform-scotland-bill-consultation/#consultationresponses>> accessed 11 April 2022 2.

⁴⁴ Beyond Gender, ‘Response’ (Scottish Government, 2 September 2021) <<https://www.gov.scot/collections/gender-recognition-reform-scotland-bill-consultation/#consultationresponses>> accessed 11 April 2022 2.

⁴⁵ Aberdeenshire Council ‘Response’ (Scottish Government, 2 September 2021) <<https://www.gov.scot/collections/gender-recognition-reform-scotland-bill-consultation/#consultationresponses>> accessed 11 April 2022 1.

⁴⁶ UNISON SCOTLAND, ‘Response’ (Scottish Government, 2 September 2021) <<https://www.gov.scot/collections/gender-recognition-reform-scotland-bill-consultation/#consultationresponses>> accessed 11 April 2022 2.

⁴⁷ Catholic Truth, ‘Response’ (Scottish Government, 2 September 2021) <<https://www.gov.scot/collections/gender-recognition-reform-scotland-bill-consultation/#consultationresponses>> accessed 11 April 2022 1–2.

are female”, thus implying that trans women aren’t female.⁴⁸ Meanwhile, Portobello Against Misogyny argued, “[s]ex is clearly defined in law, and women, as a group, have fought for and won rights and protections on the basis of sex.”⁴⁹ This final point is key: it sets up the debate that, by supporting the rights of trans women and seeking to reduce the discrimination they face, the Scottish Government risks increasing the discrimination faced by cis women, won on the basis of sex. I now consider this debate. Before doing so, it is important to note that not *all* women’s groups opposed the draft Bill. Engender⁵⁰ (a feminist organisation working to realise women’s equality in Scotland) and Wise Women Glasgow⁵¹ (which works to support women with personal safety concerns) were among those in broad support of its reforms.

IV. CRITICAL ANALYSIS OF THE DRAFT BILL’S ADHERENCE TO CEDAW

CEDAW was adopted by the United Nations (UN) General Assembly on the 18 December, 1979, with the progress States Parties make in their obligations to it monitored by the CEDAW Committee. The UK is a State Party, having ratified the Convention in 1986,⁵² in so doing making no reservations related to Articles 2 or 5.⁵³ Although Scotland, as a member of the Union, cannot ratify the Convention directly, the Scotland Act 1998 designates the observation and implementation of international obligations as nonreserved matters, which means the Scottish Parliament is required to legislate to give effect to those obligations⁵⁴—including CEDAW. To critically analyse the Scottish Government’s draft Bill for its adherence to CEDAW, I have selected for close examination CEDAW’s Articles 2

⁴⁸ Fife Women’s Aid, ‘Response’ (Scottish Government, 2 September 2021) <<https://www.gov.scot/collections/gender-recognition-reform-scotland-bill-consultation/#consultationresponses>> accessed 11 April 2022 11.

⁴⁹ Portobello Against Misogyny, ‘Response’ (Scottish Government, 2 September 2021) <<https://www.gov.scot/collections/gender-recognition-reform-scotland-bill-consultation/#consultationresponses>> accessed 11 April 2022 1.

⁵⁰ Engender, ‘Response’ (2 September 2021) (Scottish Government, 2 September 2021) <<https://www.gov.scot/collections/gender-recognition-reform-scotland-bill-consultation/#consultationresponses>> accessed 11 April 2022 1.

⁵¹ Wise Women Glasgow, ‘Response’ (Scottish Government, 2 September 2021) <<https://www.gov.scot/collections/gender-recognition-reform-scotland-bill-consultation/#consultationresponses>> accessed 11 April 2022 3.

⁵² UN OHCHR, ‘Ratification Status for United Kingdom of Great Britain and Northern Ireland’ (UN OHCHR) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=185> accessed 3 April 2022.

⁵³ United Nations, ‘Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women’, CEDAW/SP/2006/2 (10 April 2006) 31–33.

⁵⁴ UK Government, ‘Scotland Act 1998 Explanatory Notes’ (UK Government) <<https://www.legislation.gov.uk/ukpga/1998/46/notes/division/5/5/9/3?view=plain>> accessed 3 April 2022 para 7(2)[a].

(eliminating discrimination) and 5 (modifying social and cultural patterns). I also consider the CEDAW Committee's GR28, which clarifies the scope and meaning of the Convention's Article 2 with regards to gender- as well as sex-based discrimination.

A. ARTICLE 2

Article 2 of CEDAW requires that "States Parties condemn discrimination against women in all its forms, [and] agree to pursue by all appropriate means and without delay".⁵⁵ It further sets out that States Parties should do so by embodying the principle of equality in legislation;⁵⁶ refraining from engaging in any act or practice of discrimination against women;⁵⁷ and taking all appropriate measures to modify or abolish existing laws that discriminate against women.⁵⁸ I argue that the draft Bill complies with CEDAW on this point because it seeks to reduce discrimination faced by trans women in their recognition before the law, and poses no discriminatory threat to cis women. In addition, although it does not completely remove the discrimination faced by trans women regarding their legal gender, it evidences the Scottish Government at least making progress in this regard. To develop this argument, I first determine the types of discrimination faced by trans women in Scotland which result from, or are correlated to, challenges they face in having their gender recognised before the law. I then determine how the draft Bill seeks to address this, before elucidating the two main critiques of the draft Bill with regard to discrimination elimination.

The CEDAW Committee highlighted discrimination faced by trans women as a concern in their concluding observations on the UK's eighth periodic report in 2019. Specifically, the Committee called on the UK - and ergo Scotland - to, "Review and amend the public sector equality duty in order to address situations of intersectional forms of discrimination, such as discrimination faced by ... transgender women."⁵⁹ Although there is no precise data on the number of trans women in Scotland, a needs assessment in 2018 estimated the population of trans people in Scotland to number just under 24,000.⁶⁰ It can therefore be inferred that trans women compose a significant minority. There is a significant body of evidence to suggest that they experience discrimination. 41% of trans people

⁵⁵ UN OHCHR, 'Convention on the Elimination of All Forms of Discrimination against Women 1979 [CEDAW]' (1979) art 2.

⁵⁶ *ibid*, art 2(a)-(b).

⁵⁷ *ibid*, art 2(c).

⁵⁸ *ibid*, art 2(f).

⁵⁹ UN Committee on the Elimination of Discrimination against Women, 'Concluding observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland', CEDAW/C/GBR/CO/8 (8 March 2019) para 15(c).

⁶⁰ Rachel Thomson, Jessica Baker and Julie Arnot, 'Health Care Needs Assessment of Gender Identity Services', Scottish Public Health Network (ScotPHN) (May 2018) 11.

responding to a 2018 survey by Stonewall, the UK's largest LGBT+ rights organisation, said they had experienced a hate crime or incident because of their gender identity in the last twelve months.⁶¹ Given the current challenges associated with obtaining a GRC, many trans people do not have one. These people may subsequently be forced into revealing the sex they were assigned at birth in pre-employment checks, meaning workplace discrimination is particularly relevant. A 2021 survey conducted by LGBT Health and Wellbeing, a charity working in support of trans rights in Scotland, found that trans people experience discrimination at work and when looking for work, with 40% of respondents saying their trans identity had a “quite” or “very” negative impact on their job prospects.⁶² 34% of respondents identified as “woman” or “transwoman”.⁶³

The draft Bill reduces discrimination potential of the sort elucidated in the preceding paragraph in the following ways. First, because it seeks to make it easier for trans people to obtain a GRC, it is likely that challenges faced in the workplace will be reduced; because more trans people will have GRCs, they will no longer have to reveal the sex they were assigned at birth. Second, it alleviates requirements of proof that applicants have lived in their “acquired gender” for two years, which reduces the likelihood of discrimination against particularly vulnerable trans people, like homeless women, who may not have documentation like driver’s licences which constitute evidence. Third, it reduces the risk of circularity whereby employers seek a GRC as a condition of change of name at work, in turn reducing trans people’s chances of successfully applying for a GRC because they cannot use evidence from work to support their claim. Though illegal, this practice is noted to be common.⁶⁴ Finally, the draft Bill is in adherence with CEDAW Article 2(f) which notes States Parties should, “modify or abolish existing laws ... which constitute discrimination against women”.⁶⁵ This is because it changes the legislative environment in favour of trans people, making it easier for them to get a GRC and thus benefit from the provisions for gender recognition set out in the Gender Recognition Act 2004.

There are two main critiques of the draft Bill that indicate potential non-adherence to Article 2. The first comes from those who broadly support the proposed reforms. Their critique is that the requirement for an applicant to live in their acquired gender for three months is arbitrary and constitutes a risk of discrimination. Although it represents a reduction of the current requirement to live in the acquired gender for twenty-four months, it still puts a burden of proof upon the applicant. This, I concur, has grounds and suggests the draft Bill does

⁶¹ Government Equalities Office, ‘Trans People in the UK’ (2018) 1.

⁶² LGBT Health & Wellbeing, ‘Trans People and Work: Survey Report’ (2021) 12 and 5 respectively.

⁶³ *ibid* 9.

⁶⁴ UNISON SCOTLAND (n 47) 1.

⁶⁵ UN OHCHR (n 56) art 2(f).

not go as far as it might to reduce the potential for discrimination against trans women. I return to this point in my discussion of Article 5.

I argue, however, that the second—more widely touted—critique has no grounds. It comes from those who broadly oppose the proposed changes on the grounds that the removal of the requirement for a diagnosis of gender dysphoria will make the system open to abuse “allowing predatory men to access women’s safe spaces”.⁶⁶ Here it can be inferred that “women” means “cis women”. There is little evidence to support these concerns. Former Cabinet Secretary Shirley-Anne Somerville, introducing the second public consultation, was clear that risks to women’s spaces are not posed by trans women, but cis men. She noted: “[The concerns] are about men who seek to abuse women ... That’s not a ... problem created by, or the fault of, trans people.”⁶⁷ Her assertion is backed up: as my doctrinal analysis highlighted, the Equality Act 2010 permitted trans people equal access to women-only spaces, and in the intervening twelve years there is no indication that attacks against women in said spaces have increased.⁶⁸ It is also notable that the rape support centres which responded to the second consultation broadly supported the proposed reforms. The Edinburgh Rape Crisis Centre noted, “The changes proposed in this Bill will have no negative impact on our ability to support the survivors of rape and sexual assault” and argued that they will likely make it easier for trans people to seek support.⁶⁹ The Forth Valley Rape Crisis Centre agreed with this assessment.⁷⁰ If there were any real risks to women’s safety, they would almost certainly have opposed the reforms. In sum, it is this article’s assessment that the draft Bill adheres with CEDAW’s Article 2 and is indicative of the Scottish Government making efforts to improve the legislative environment for trans women, per Article 2(f) of CEDAW. Furthermore, there is no evidence to suggest that its proposed reforms increase the risk of discrimination against cis women.

B. GENERAL RECOMMENDATION NO 28

GR28 aims to clarify the scope and meaning of Article 2 of the Convention, specifically clarifying that *gender*-based as well as *sex*-based discrimination should

⁶⁶ Scottish Government (n 41) iii.

⁶⁷ Scottish Government (n 18) 29 para 5.06.

⁶⁸ Mermaids, ‘Safety & Dignity: trans rights are no threat to single-sex spaces’ (Mermaids, 14 June 2020) <<https://mermaidsuk.org.uk/news/safety-and-dignity/>> accessed 4 April 2022.

⁶⁹ Edinburgh Rape Crisis Centre, ‘Response’ (Scottish Government, 2 September 2021) 3 <<https://www.gov.scot/collections/gender-recognition-reform-scotland-bill-consultation/#consultationresponses>> accessed 11 April 2022.

⁷⁰ Forth Valley Rape Crisis Centre, ‘Response’ (Scottish Government, 2 September 2021) 3 <<https://www.gov.scot/collections/gender-recognition-reform-scotland-bill-consultation/#consultationresponses>> accessed 11 April 2022.

be tackled.⁷¹ Although not part of the Convention’s original text, it is an important element of the CEDAW framework and reflects the dynamism with which the CEDAW Committee interprets the Convention text.⁷² Significantly, it evidences a development in CEDAW’s conceptualisation of gender, defining “gender” as “socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men”.⁷³ Therefore, it evidences a definition of “woman” that is not solely based on sex characteristics, and—as Meyer contends—is therefore inclusive of trans women.⁷⁴ This article has argued that the draft Bill conceptualises gender in a way that understands the social and cultural meanings attached to biological differences. Correspondingly, it seeks to make it easier for trans people to obtain GRCs by diminishing the role of sex-based characteristics in influencing gender recognition. As such, the draft Bill adheres to GR28.

I also contend, however, that neither GR28 nor the draft Bill go as far as they might to eliminate discrimination against trans women. This is because the conceptualisations of gender they contain continue to reflect biological determinism. GR28 defines “sex” as “refer[ring] to biological differences between men and women”⁷⁵ and, as previously discussed, the draft Bill also tacitly acknowledges the role of sex-based differences in determining an individual’s gender. As such, both reaffirm social constructionist conceptualisations of gender which offer an easy argument for those who oppose the draft Bill: namely, that trans women are not really women because their sex characteristics mean they are “men”. In tacitly reinforcing this categorisation, the draft Bill is active in the production of a category “woman” which is not as inclusive as it might be. It thus sets up the potential for opposition between women and queer rights groups, who should rather act in coalition to contend patriarchal oppression. Otto makes the point that biological determinism orders women’s treatment in international law, and reflects “men” and “male” as the full standard of humanity to which women and other genders must measure up.⁷⁶ She therefore contends that feminists and queer rights activists must form coalitions to challenge this determinism to “develop a more liberatory and inclusive conception of gender in international

⁷¹ UN Committee on the Elimination of Discrimination Against Women, ‘General recommendation No. 28 on the core obligations of States parties under article 2 on the Convention on the Elimination of All Forms of Discrimination against Women’, CEDAW/C/GC/28 (16 December 2010) para 5.

⁷² Rikki Holtmaat, ‘The CEDAW: a holistic approach to women’s equality and freedom’ in Anne Hellum and Henriette Sinding-Assen (eds), *Women’s Human Rights: CEDAW in International, Regional and National Law* (Cambridge 2013) 95, 104.

⁷³ UN Committee on the Elimination of Discrimination Against Women (n 72) para 5.

⁷⁴ Elise Meyer, ‘Designing Women: The Definition of Women in the Convention on the Elimination of All Forms of Discrimination against Women’ (2016) 16(2) *Chi J Int’l L* 553, 556.

⁷⁵ UN Committee on the Elimination of Discrimination Against Women (n 72) para 5.

⁷⁶ Otto (n 32) 302.

(and domestic) law”⁷⁷ which will support both women’s rights and those of people of diverse gender identity. This, as my preceding analysis has shown, has not been the case with regards to the draft Bill, which some (cis) women’s groups perceive as a threat to their rights and autonomy, and thus contend vigorously. I conclude this section by reaffirming that although the draft Bill is in adherence with CEDAW’s GR28, this is in part because of its acknowledgement of the role biological determinism plays in determining the category “woman”, thus shoring up division between queer and women’s rights groups who should rather be in coalition for the active emancipation of all women. As such, it does not go as far as it might to reduce discrimination faced by trans women; nor, in fact, does CEDAW.

C. ARTICLE 5

Article 5 requires States Parties to take all appropriate measures to “modify the social and cultural patterns of conduct of men and women.”⁷⁸ Its intent is to eliminate prejudices and practices that are based on the idea of the inferiority or superiority of either of the sexes,⁷⁹ or on stereotyped gender roles for men and women. It is relevant here because its paragraph (a) acknowledges the role that society and culture play in the creation and performance of gender. This article is therefore “the least gender-specific provision in CEDAW”⁸⁰ and, although it does not acknowledge the existence of sexes or genders in addition to men and women, it can be read as “putting an obligation on States Parties to combat systemic or structural gender discrimination.”⁸¹ In this obligation, strong political will to create structural change is critical. It is therefore of note that the Scottish Government conducted two of its largest ever public consultations⁸² on the changes proposed by the draft Bill, as it suggests that it conceives of these changes as constituting cultural change. Further, by seeking to make the changes inclusive and consultative, it has aimed to create an enabling environment for debate on the key issues to facilitate said change. This is significant because the CEDAW Committee has previously recommended that States Parties “intensify cooperation ... with civil society organisations, women’s groups and community leaders, traditional and religious leaders” in seeking to enact cultural change for the elimination of

⁷⁷ *ibid* 300.

⁷⁸ UN OHCHR (n 56) art 5(a).

⁷⁹ The author acknowledges that it is simplistic to refer to “either” sex, as there are sex characteristics and sexual identities which do not fit this binary (for example, intersex).

⁸⁰ Gabrielle Simm, ‘Queering CEDAW? Sexual Orientation, Gender Identity and Expression and Sex Characteristics (SOGIESC) in International Human Rights Law’ (2020) 29(3) *Griffith Law Review* 374, 385.

⁸¹ Holtmaat (n 73) 96.

⁸² Robison (n 2) 62.

discrimination against women,⁸³ an entreaty it makes often.⁸⁴ Therefore, I contend that the draft Bill—and the process through which the Scottish Government has gone in consulting on its provisions—is in adherence with Article 5.

I add, however, that once again it does not go as far as it might because of its retention of the requirement that someone seeking to obtain a GRC must live in their acquired gender prior to making an application. Although the draft Bill significantly reduces this period from twenty-four months to three months, this nonetheless raises important questions around what constitutes proof of living in an acquired gender. The requirement is demonstrative of a regressive understanding that “living in” a particular gender requires acting according to the traditional and societal gender roles that Article 5 obligates States Parties to challenge. In addition, although the Scottish Government has noted concern that the tone of debate on trans rights is polarised,⁸⁵ it has not helped this by characterising one of the main parties opposed to the draft Bill to be women’s rights groups, which it does in analysis of the second public consultation.⁸⁶ As my own analysis has shown, a number of women’s rights were actually in *favour* of the proposed reforms. To ignore this fact is to further polarise debate, falsely pitting the rights of trans women against those of cis women.

V. CONCLUSION

In this article, I have critically analysed the extent to which the draft Bill adheres to CEDAW and found that it is in adherence with the framework of Article 2, Article 5, and GR28 against which I have examined it. It aligns with Article 2 in seeking to reduce the discrimination faced by trans women, and—contrary to the argument of those who allege it constitutes a risk to the rights of cis women—constitutes no such risk. It further adheres to GR28 as it seeks to reduce *gender*-based discrimination, and with Article 5 because it—and the process through which the Scottish Government have gone to consult on its changes—evidences strong political will to facilitate social and structural change with regards to gender. In these ways, it demonstrates a significant improvement on the provisions contained within the Gender Recognition Act 2004 with regard to the process of obtaining a GRC. The implications of this are positive for the advancement of trans rights; the CEDAW has significant normative power in influencing national legislature, and that the draft Bill adheres to its provisions clearly enhances its legitimacy under Scots and UK law.

⁸³ UN Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the Committee on the Elimination of Discrimination against Women: Nigeria’, CEDAW/C/NGA/CO/6 (8 July 2008) para 323.

⁸⁴ Holtmaat (n 73) 121.

⁸⁵ Robison (n 2) 63.

⁸⁶ Scottish Government (n 41) 5 para 1.24.

This article, however, has further argued that the draft Bill does not push and challenge the CEDAW as far as it might. This damages the realisation of trans women's rights and limits the draft Bill's potential for the facilitation of queer and feminist coalitional work to reduce patriarchal structural oppression. Indeed, the draft Bill reflects a conceptualisation of gender that is aligned with social constructionist views, therefore continuing to acknowledge biological determinism and to reinforce oppressive structures within society which themselves rely on biological determinism and the order of the sexes. Furthermore, the Scottish Government's summary of the second public consultation's outcomes has in some ways further polarised the debate on trans rights. This is because it suggests that women's rights groups are generally in opposition to the draft Bill's proposed reforms, which—as my analysis has shown—is not the case. The implication of this is to further polarise the debate on trans rights, making an already fractious public debate even more so. In turn, this creates the risk of increased discrimination against trans women who are perceived to be men seeking to threaten the safety and security of cis women.

Therefore, this article concludes by contending that both the draft Bill and the CEDAW could do more for the elimination of discrimination against all women—cis and trans—by adopting a postmodern conceptualisation of gender which defies categorisation of oppressed subjects in legislative frameworks and focusses clearly on tackling gendered inequalities for the active emancipation of all women.