

Scotland's Gender Policy Has Created a Political and Constitutional Crisis

The ruling SNP's progressive stance has sparked a fight with the U.K. government and is unpopular at home.

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Demonstrators take part in the Let Women Speak rally in George Square, Glasgow, in support of the U.K. Government's use of a Section 35 order to block Scotland's recent Gender Recognition Reform Bill. (Photo by Jane Barlow/PA Images via Getty Images.)

When a convicted rapist was sent to Scotland's only women-exclusive prison last month, First Minister Nicola Sturgeon faced public outcry.

Isla Bryson was arrested and brought to trial last year as Adam Graham, a biological male, following the rape of two women Bryson had met online. Scotland adopted a policy in 2014 allowing prisoners to be housed according to their preferred gender, and during the trial Bryson identified as a woman. Upon being convicted, Bryson was briefly — and temporarily — transferred to the women's prison while awaiting sentencing.

The story has set the Scottish government's gender policy into tailspin, the fiasco coming just days after the U.K. government blocked the passage of a controversial new bill that would have allowed individuals to [change their gender](#) without a medical diagnosis of gender dysphoria. Now, long simmering social tensions over the meaning of sex have ignited a new political and constitutional crisis on both sides of the border.

Under the 1997 devolution agreement that led to the establishment of the Scottish Parliament in 1999, the U.K. government reserved the right to suspend any legislation passing through lower parliaments that impinged on "reserved matters," including laws that cover the whole country.

The Gender Recognition Reform (Scotland) Bill undermines the U.K.'s Equality Act 2010, according to [a report published](#) by the center-right think tank *Policy Exchange*. The GRR legislation targets discrimination by making it easier to obtain a gender recognition certificate in one part of the country. The bill not only removes the need for a medical diagnosis of gender dysphoria. It reduces the period of transition from two years to six months and reduces the allowable age for gender reassignment from 18 to 16.

Lawyers argue that since the certificate would remain valid in the rest of the U.K., existing law protecting women's spaces, gender-separated competitions, among other domains, would be compromised.

Prime Minister Rishi Sunak invoked Section 35 of the Scotland Act 1998 to block the bill. It is an unprecedented move that the Cabinet did not pursue in previous legal disputes with Scotland's government, including during the Scottish National Party's controversial reforms to [hate speech law](#) in 2020.

Sturgeon claims it as part of a "pattern ... of seeking to undermine and delegitimize the Scottish Parliament." And critics of the suspension may wonder why Scotland's democratically elected

chamber should budge, rather than having the rest of the U.K. change its standards.

But opponents of the law, including from within the Scottish National Party, which governs Scotland in a power-sharing agreement with the progressive Green Party, have long expressed concerns about how progressive trans policy might harm women's safety. Those concerns date to the aforementioned 2014 prisons policy that allowed Bryson to be housed at a women's prison.

The policy has affected a tiny number of prisoners—about 20 of 7,500. But it was enough to attract attention, especially when [it became clear](#) that felons were abusing the policy to access women's spaces.

Subsequent reports revealed that the policy was developed in cooperation with Scottish Trans Alliance and Stonewall Scotland, two largely government-funded lobbying groups, but that no [women's groups were consulted](#) for four years after implementation. Policymakers [seemed confused](#) too about the use of “sex” and “gender”—despite the importance of these concepts to the proper functioning of UK equalities law.

Last month, the SNP's chief delegate to the U.K. Parliament told the BBC that the Bryson case was “[in no way related](#)” to the government's reforms to wider gender law. But prisons policy has long been a backdrop. “Changes to public policy on gender recognition are taking place without there having been a change in the law,” [complained](#) Labour MSP Elaine Smith in 2018. “Those changes are unregulated and unscrutinised, and they specifically affect women in prison who are especially vulnerable.”

Previously, the SNP could use its executive independence to humiliate the U.K. government. Scottish people [favored](#) a home-spun pandemic policy, complete with separate medical advisers and lockdown schedules.

Recent events, however, have put support for the party, its leadership and Scottish Independence, its *raison d'être*, [at a five-year low](#). And on this issue, public opinion is against Sturgeon.

A recent [survey](#) showed that around 60 percent of the Scottish public opposes the bill's key measures, including reducing the age for reassignment. Only 20 percent support removing the need for a dysphoria diagnosis to change gender.

Sturgeon plans to take the government to court over the suspension. Her colleagues have told the nine rebels who voted against the bill to [leave the party](#). But dissent remains, including from vocal SNP members representing Scottish seats in the U.K. Parliament, such as barrister Joanna Cherry.

Labour leader Kier Starmer, a human rights barrister, has cited "[concerns](#)" over the legislation's safeguards for children as he courts the center ground. But 18 of his 20 Labour colleagues in the Scottish Parliament voted in favor. The Tories, meanwhile, have long been clear in their opposition, though Jackson Carlaw — a former leader — also voted in favor.

The dispute has exposed awkward fractions in British party politics. Since the Scottish independence referendum in 2014 — in which 45 percent of Scottish voters opted for seceding the United Kingdom — the SNP remains an electoral and legislative juggernaut north of the border.

But the party has been reluctant to consider the implications of having a transgender policy that is out of step with public opinion. The recent assertion by one [Green Party member of the Scottish Parliament](#) that "sex is not, as some would like to imagine, binary and immutable" reflects the dominant strand of thought within Scottish progressivist politics. Only in the past month, with the Bryson case dominating headlines, did it become obvious that such a position was not only legally incoherent but [politically disastrous](#).

Sturgeon now concedes that she believes that Bryson is "almost certainly" not transgender, and is using identity as "[an easy way](#)

[out.](#)” Meanwhile, the transfer of transgender prisoners has been suspended subject to review.

Sturgeon maintains that the gender recognition bill, had it gone through, would have had “[no impact on the decisions and procedures](#)” of the Scottish Prison Service. Politically as well as legally, for now, it’s back to the drawing board.