

Gender Recognition Reform (Scotland) Bill

Assessment of draft Bill and consultation

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Introduction

1. The Gender Recognition Act 2004 Act¹ enables a person aged 18 years or older, on application to a body called a Gender Recognition Panel, to be granted a gender recognition certificate (GRC), where the applicant: has or had gender dysphoria; “*has lived in the acquired gender*” for two years; and “*intends to continue to live in the acquired gender until death*”. This, in turn, enables them to change the sex indicated on their birth certificate. There is no requirement to undergo any surgical or hormonal treatment and the current arrangement is compliant with the European Convention on Human Rights (ECHR).
2. In November 2017 the Scottish Government published its proposals to reform the 2004 Act and put legal recognition of gender identity on a self-declared basis. These proposals were opened to public consultation² which closed on 1 March 2018.
3. In November 2018 the Scottish Government published the consultation results (Scottish Government, 2018).³ Over 15,600 people responded, just under half (49%) of whom were resident in Scotland. The majority (60%) agreed with the proposal to introduce a self-declaratory system for legal gender recognition. Among those supporting self-declaration, the most common comment was that gender identity is a personal matter. Second, that the existing process takes too long, is too difficult or expensive. Third, that the current process is intrusive. Other respondents claimed that the current process may contribute to ill health. It was also suggested that a shift to a system of self-declaration would bring Scotland in line with “*international best practice*”.
4. Among those who did not support the proposals, the most frequently raised issue was concern that self-declaration may pose a risk to women’s safety in spaces including toilets, changing rooms, hospital wards and refuges. Associated with this concern was that the system would be open to abuse by those with malign intent.
5. Particular concerns were raised for the victims of rape or domestic abuse and the safety of women in the prison system. Respondents also expressed concerns that the proposals represented a general erosion of the identity or the rights of women based on their sex, with implications for all-women shortlists, quotas for public boards, employment quotas and sport. It was also noted that the consultation paper failed to distinguish between sex and gender. Some respondents also thought that, rather than reinforcing gendered stereotypes, more effort should be put into eradicating these.
6. In a statement to the Scottish Parliament on 20 June 2019, Cabinet Secretary for Social Security and Older People Shirley-Anne Somerville MSP announced that the Scottish Government would consult on a draft Bill to reform the Gender Recognition Act 2004 (GRA), and the process by which people can gain legal recognition of their self-declared gender identity.⁴

¹ [Gender Recognition Act 2004](#)

² Scottish Government (2018) [Review of the Gender Recognition Act 2004](#) (Consultation Hub)

³ Scottish Government (2018) [Review of the Gender Recognition Act 2004: consultation analysis](#)

⁴ Cabinet Secretary Shirley-Anne Somerville (2019) [Statement on Gender Recognition 20 June 2019](#)

7. In anticipation of the publication of the draft Bill, in October 2019 we published 20 key questions⁵ that we thought the consultation paper should address. We focused on how self-declaration will work in law, the evidence base for reform, and the Scottish Government position on the Equality Act 2010. These are all questions which the Scottish Government had either answered at best implicitly, or not at all in its 2017 consultation on GRA reform, or which remained contested.
8. In December 2019 the Scottish Government published its draft Bill⁶ and opened its plans to public consultation.⁷ The consultation closes on 17 March.
9. This report assesses the 2019 proposals for reform against our original 20 questions, to establish any gaps that remain unaddressed. We found that the current consultation paper answered five of our original questions (but raising more questions in each case), and partially answered two. Thirteen questions remained unanswered (of which around half related to data collection issues).
10. In early January 2020 we wrote to the Cabinet Secretary to raise several specific points which our initial reading of the consultation paper suggested needed clarification during the consultation period if consultees were to be able to respond properly. This letter is shown in **Appendix 1**.
11. Most importantly, the Scottish Government has still to clarify how acquisition of a Gender Recognition Certificate (GRC) affects a person's legal rights of access to single-sex services and spaces. Without knowing this, it is hard to see how people can give informed comment on proposals that will lower the barriers for access to a GRC, increasing the numbers of those who become eligible to apply for a GRC to include those who do not have a diagnosis of gender dysphoria.
12. The 20 questions are structured under five headings: legal effects of a Gender Recognition Certificate; gender self-declaration and the GRC-holding population; evidence base on international best practice; Equality Act 2010 and gender self-identification in practice (in relation to data collection).

Most importantly, the Scottish Government has still to clarify how acquisition of a Gender Recognition Certificate (GRC) affects a person's legal rights of access to single-sex services and spaces.

⁵ MurrayBlackburnMackenzie (2019) [20 questions on GRA reform and gender self-declaration](#) 7 Oct 2019

⁶ Scottish Government (2019) [Gender Recognition Reform \(Scotland\) Bill \[Consultation draft\]](#)

⁷ Scottish Government (2019) [Gender Recognition Reform \(Scotland\) Bill A consultation by the Scottish Government](#)

Part 1. Legal effects of a Gender Recognition Certificate (GRC)

Question 1. Does acquiring a GRC, and therefore a different legal sex, affect a person's legal rights under the Equality Act 2010?

Is this answered? **No.**

Background and analysis

- 1.1. Section 9(1) of the GRA says that a GRC says "*if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman.*"⁸
- 1.2. The consultation paper does not discuss how acquiring a GRC affects a person's legal rights of access to single sex services and occupations, and therefore their rights in relation to other people using the relevant services, particularly women.
- 1.3. Chapter 5 in the consultation paper discusses the Equality Act but only considers the legal ability of organisations to exclude those with the protected characteristic of gender reassignment (including GRC holders) from single sex provision, in particular circumstances. The consultation does not discuss the relevance of holding a GRC (which changes a person's legal sex) when those exclusions are not invoked.

How does a GRC affect a prisoner's legal rights on accommodation?

- 1.4. The legal effect of a GRC was recently raised in the Scottish Parliament (16 January 2020) in relation to how the acquisition of a GRC affects a prisoner's legal rights in relation to accommodation placements.
- 1.5. In response to a parliamentary question by Johann Lamont MSP, the Cabinet Secretary for Justice stated:

"Acquiring a gender recognition certificate does not and will not give a prisoner any new legal rights regarding the decisions that are made by the Scottish Prison Service about their accommodation"
(Lamont, SP OR 16 January 2020, col. 44).⁹
- 1.6. The Minister's response appears to be at variance with Ministry of Justice (MoJ) policy in England and Wales which states that "*transgender women prisoners with GRCs must be treated in the same way as biological women for all purposes*" unless there are exceptional circumstances, as shown in **Box 1**.

⁸ [Gender Recognition Act 2004 Section 9\(1\)](#)

⁹ Lamont, J. (2019) Scottish Parliament [Official Report 16 January 2020](#)

Box 1. 'The Care and Management of Individuals who are Transgender'

'The Gender Recognition Act 2004 section 9 says that when a full GRC is issued to a person, the person's gender becomes, for all purposes, their acquired gender. This means that transgender women prisoners with GRCs must be treated in the same way as biological women for all purposes. Transgender women with GRCs must be placed in the women's estate/AP unless there are exceptional circumstances, as would be the case for biological women.' Ministry of Justice, 2019 para. 4.64¹⁰

- 1.7. The MoJ position is based on case law (*R (on the application of AB) v Secretary of State for Justice and another* [2009] EWHC 2220 (Admin), [2009] All ER (D) 28 (Sep)) which ruled that the decision not to transfer a pre-operative transgender woman to a female prison constituted a breach of rights under Article 8 of the European Convention on Human Rights (for an overview, see *New Law Journal*, 2009)¹¹.
- 1.8. Guidance issued by the Equality and Human Rights Commission (EHRC) in July 2018 is also relevant. The implication of this would seem to be that the single sex exceptions in the Equality Act 2010 apply differently to a trans person with GRC, compared to trans person without a GRC. This is shown in **Box 2**.

Box 2. EHRC statement on sex and gender reassignment

'Under the Act, the protection from gender reassignment discrimination applies to all trans people who are proposing to go, are undergoing or have undergone (part of) a process of gender reassignment. At the same time, a trans person is protected from sex discrimination on the basis of their legal sex. This means that a trans woman who does not hold a GRC and is therefore legally male would be treated as male for the purposes of the sex discrimination provisions, and a trans woman with a GRC would be treated as female. The sex discrimination exceptions in the Equality Act therefore apply differently to a trans person with a GRC or without a GRC.'

Equality and Human Rights Commission, July 2018¹²

- 1.9. Without knowing how acquiring a GRC affects a person's legal rights, it is hard to see how people can give informed comment on proposals that will lower the barriers for access to a GRC and widen the eligible number and range of people.
- 1.10. If, as suggested by the Minister's response in relation to the placement of trans prisoners with a GRC, the Scottish Government interpretation of the law is different to that of the MoJ, Ministers need to clarify on what reading of the law their position is based.

¹⁰ Ministry of Justice (2019) [The Care and Management of Individuals who are Transgender](#)

¹¹ *New Law Journal* (2009) [Human rights - Transgender person - Gender status for prison allocation](#) 10 September 2009

¹² Equality and Human Rights Commission (2018) [Our statement on sex and gender reassignment: legal protections and language](#) 30 July 2018

1.11. A recent analysis of the relationship between the Equality Act and the GRA (Komorowski, 2020)¹³ published in the Journal of the Law Society of Scotland argued that under the Equality Act having a particular sex must mean being born that sex, or else having acquired a GRC - and that there was scope to argue about when the Act included the second group in that term.

Without knowing how acquiring a GRC affects a person's legal rights, it is hard to see how people can give informed comment on proposals that will lower the barriers for access to a GRC and widen the eligible number and range of people.

1.12. Komorowski argues that having the protected characteristic of "gender reassignment" without a GRC is not enough to allow someone to assume a new sex in law, however. This implies that if GRC holders have legal rights based on sex, which the Scottish Government appears to assume they do, it is the GRC that provides this.

1.13. It is becoming urgent for the Scottish Government to clarify its understanding of the position, even if that clarification is that it is not sure, and that it is therefore proposing to invite the Parliament to legislate under conditions of uncertainty.

1.14. As Komorowski (2020)¹⁴ concludes, "*before we change the law, we ought to understand what effect the current Act has.*"

"before we change the law, we ought to understand what effect the current Act has." (Komorowski, 2020).

¹³ Komorowski. J. (2020) [Sex and the Equality Act](#). Journal of the Law Society of Scotland, 13 Jan 2020

¹⁴ See note 13

Question 2. Does acquiring a GRC affect a person’s legal right to have their sex at birth or any identifying characteristics before transition (name, other aspects of personal history) kept confidential?

Is this answered? **Yes.**

Background and analysis

- 1.15. Section 22 of the GRA creates criminal penalties intended to prevent any identification of a person’s trans status or pre-transition identity, with some limited exceptions. These provisions are intended to prevent people whose knowledge that a person has a GRC is obtained as part of their job passing on that information in most circumstances.
- 1.16. The consultation paper notes that s22 of the GRA creates privacy protections for GRC holders. It clarifies that this need not prevent information sharing relevant to staff deployment, tacitly acknowledging that some organisations appear to have assumed that s22 prevents this (see **Box 3**). The paper suggests that the Scottish Government may either introduce new secondary legislation or guidance to address this, although it does not discuss in detail what this might include (see **Box 3**).

Box 3. GRA consultation paper: limits of Section 22

‘There are a variety of exceptions in section 22, at subsection (4) and in an Order made by the Scottish Ministers under section 22(6). One point which might arise when using the general occupational requirements exception is that some people in an organisation (e.g. people in its HR department) may know about a person’s trans history but those actually taking the decisions on staff deployment (e.g. line managers) may not. In these circumstances, and when there is a legitimate case to use the general occupational requirements exception, the Scottish Government considers that it would be appropriate for information about a person’s trans history to be shared in a strictly limited, proportionate and legitimate way.

To facilitate this, the Scottish Government will consider before any Bill to reform the GRA is introduced to Parliament if:

- *Further exceptions to section 22 should be made, by way of a further Order under s section 22(6).*
- *Scottish Government guidance on section 22 should be issued.’*

Scottish Government 2019 paras. 5.30-5.31¹⁵

- 1.17. As shown in **Box 4**, the consultation paper states that when applying for a disclosure certificate for employment purposes, a person must disclose their previous name to Disclosure Scotland as part of the application process, which means that “*people cannot take advantage of the GRA to hide a criminal offence*”.

¹⁵ See note 7

Box 4. GRA consultation: Disclosure certificates and previous identities

‘People cannot take advantage of the GRA to hide a criminal offence. Individuals can obtain disclosure certificates for employment purposes, but previous names must be provided as part of that process. If a trans person is applying for a disclosure certificate, they can apply using their present name, and that name is all that they have to include on the application form. Separately, and in the strictest confidence, they must also provide any previous names to Disclosure Scotland. It is a criminal offence to make a false statement in relation to an application for a disclosure certificate.’

Scottish Government 2019 para. 5.07¹⁶

- 1.18. Section 22 provides a broad disincentive to sharing the fact of a person’s GRC status (and thus any previous identity) within and between organisations of all sorts, whether with other staff or service users. It has been interpreted by at least one Scottish health board as precluding managers from being able to guarantee that women will only receive certain intimate treatments from another person born female, where they request that (The Times, 2019).¹⁷ This presumably explains the material included at paragraphs 5.30 and 5.31.
- 1.19. However, the general purpose of s22 will clearly remain to ensure that obtaining a GRC grants a person very substantial protection against the disclosure of their sex at birth, including previous identities.
- 1.20. The paper does not discuss how far a provision originally designed to protect the privacy of a very small group, understood to comprise largely people whose transition would otherwise be likely to go undetected, is equally appropriate for a group many times larger, comprising people the extent of whose transition is likely to be more variable, and access to which includes no external gatekeeping.
- 1.21. The government appears not to see the expected expansion and likely change to the GRC holding population as an issue here, saying simply, “*The Scottish Government considers it wholly appropriate to safeguard trans people in this way.*” (paragraph 5.29).¹⁸
- 1.22. In the specific context of disclosure certificates, as the consultation paper describes, whether a person discloses a previous identity as part of an application for a disclosure certificate is dependent on the applicant, who must contact Disclosure Scotland,¹⁹ independent of the employer. The system therefore relies on self-reporting.

However, the general purpose of s22 will clearly remain to ensure that obtaining a GRC grants a person very substantial protection against the disclosure of their sex at birth, including previous identities.

¹⁶ See note 7

¹⁷ The Times (2018) [Women ‘risk health over trans NHS workers fear](#). 18 December 2018

¹⁸ See note 7

¹⁹ Scottish Government (2020) [Information for transgender disclosure applicants](#)

- 1.23. These arrangements already appear to be open to anyone who has established a new transgender identity, even without a GRC, as long as they have changed one of the relevant identity documents²⁰ required by Disclosure Scotland: passports and driving licences are the main two that can be changed without a GRC.
- 1.24. Lowering the barrier to getting a GRC therefore would not at first sight affect who will be covered by these special arrangements. It will open this track up newly only to those who did not already have one of the necessary documents in their new identity and who would not previously have been able to change their birth certificate (for example, someone with no new passport or driving licence, and whose application for a GRC would have been rejected under the present rules for any reason). That group will now be able to rely on a new birth certificate to access the special disclosure arrangements.
- 1.25. The Scottish Government may have done some analysis to reassure itself that this change is too small to have a negative impact on the disclosure system, through deliberate abuse of self-declaration, but the consultation paper does not discuss this, if so.

²⁰ Scottish Government (2019) [Apply for basic disclosure: identity documents](#)

Part 2. Gender self-declaration and the GRC-holding population

Question 3. How many GRCs does the Scottish Government expect to be issued under a system of self-declaration, compared to the current system?

Is this answered? Yes.

Background and analysis

- 2.1. The Gender Recognition Act 2004 was originally agreed by the Westminster Parliament as a pragmatic step aimed at a very small number of people to alleviate the distress of gender dysphoria.
- 2.2. At the time of the passage of the 2004 GRA Bill, the UK Government stated it expected around 5,000 people to use the legislation. In line with this prediction, just under 5,000 people have used the legislation. The proposed shift to a system based on self-declaration, without any supporting medical evidence opens up the process to a larger and more diverse group of people.
- 2.3. **The consultation paper estimates that in Scotland around 250 GRCs may be issued a year, compared to around 30 a year now (see Box 5).**

Box 5. 2019 consultation: estimated number of GRC applications

'Based on international evidence (outlined in more detail below), the Scottish Government considers that the draft Bill, if enacted, is likely to lead to an overall increase in the number of successful applications.

The Republic of Ireland has a slightly smaller population than Scotland. Between September 2015 (when their new arrangements started) and August 2019, a total of 517 people had obtained recognition under Ireland's Gender Recognition Act 2015. This is an average of 129 applicants for each year of operation.

Denmark has a similar size population to Scotland. Denmark received an average of 279 applications per year in the first two years of operation of a reformed process for gender recognition based on an applicant's declaration.

*Norway, which has a population of 5.23 million has experienced a higher initial uptake than Denmark or the Republic of Ireland. In the first eight months of operation there, 706 applications were received. In the light of this information, **we consider it reasonable to estimate that the numbers of Scottish applications would be around 250 applications per year.***

Currently, around 30 people per year who were born or adopted in Scotland obtain legal recognition of their acquired gender under the GRA. There are no statistics available for applicants resident in Scotland who apply under the current arrangements.'

Scottish Government 2019 paras 3.8.8 to 3.8.12 (emphasis added).²¹

²¹ See note 7

- 2.4. In contrast, the 2017 consultation paper estimated that between 250 and 400 GRCs would be issued annually (see **Box 6**)

Box 6. 2017 consultation: estimated number of GRC applications

*‘Denmark has a similar size population to Scotland and has implemented a self-declaration system for legal gender recognition. In 2014, it received an average of 279 applications per year in the first two years of operation. The Republic of Ireland has a slightly smaller population than Scotland. Between September 2015 (when their new arrangements started) and May 2017, a total of 230 people had been recognised in their acquired gender in the Republic of Ireland. Norway, which has a population of 5.23 million has experienced a significantly higher uptake than Denmark or the Republic of Ireland. In the first eight months of operation there, 706 applications were received. **We consider it reasonable to estimate that the numbers of applications from people either born or adopted in Scotland or resident in Scotland, would be in the range of 250 to 400 applications per year.** Currently, an average of 25 people per year obtain legal recognition of their acquired gender under the 2004 Act who were born or adopted in Scotland.’*

Scottish Government 2017 para. 3.9.8 (emphasis added)²²

- 2.5. Given that the estimates in both the 2017 and 2019 consultations appear to be based on data from the same countries (Ireland, Denmark and Norway), it is unclear why these figures vary.
- 2.6. We note that higher numbers of GRCs have been issued in Norway (706 applications within the first eight months). The Scottish Government appears no longer to believe that this sets a relevant precedent (compared to its 2017 consultation) but does not state why.

Question 4. Could gender self-identification expand the GRC holding population to include the following groups: people who would not qualify for a medical diagnosis of dysphoria; people who have sought no medical advice or diagnosis of any sort; people who have done less to socially transition than is currently required?

Is this answered? Not properly.

Background and analysis

- 2.7. The change to the rules implies the answer to this question is yes, but the paper does not state in terms that the policy intention is to widen the range of people who will now be eligible for a GRC.
- 2.8. The consultation paper is written as though there would be no change to the group of people who would be entitled to a GRC. It refers throughout to the new arrangements being open to “*trans people*” and states that “*Since 2004, trans*

²² Scottish Government (2017) [Review of the Gender Recognition Act 2004: A Consultation](#)

people across the UK have had the right to legally change their gender through applying for a Gender Recognition Certificate” (Ministerial Foreword).²³

- 2.9. At no point does the consultation paper define who the Scottish Government understands to fall into this group. Nor does it include a definition of ‘trans’ in the glossary of terms. Rather, the paper states that “*Gender identity is a personal matter, with gender recognition sought by individuals who know their own mind*” (2019 para. 3.24).²⁴
- 2.10. In practice the proposals open up GRCs to some people who would not at present qualify for a GRC, including:
- those with no diagnosis of gender dysphoria;
 - those whose have only taken steps to transition relatively recently and;
 - (it appears) those whose self-definition of what it means to “*live in the acquired gender*” would not necessarily meet the expectations of the Gender Recognition Panel at present.
- 2.11. Losing the need for a diagnosis of gender dysphoria is the most important change proposed and is central to the Scottish Government’s rethinking of the purpose of the Act: from a pragmatic response to a medical condition; to an entitlement to affirmation of identity, and the translation of that into a change of sex in law.
- 2.12. This means that the draft Bill has a fundamentally different rationale to the 2004 Act, embracing a larger, more diverse group of people (for further discussion of this point see MurrayBlackburnMackenzie, 2019)²⁵.
- 2.13. While the Scottish Government accepts criticism of the existing application process as overly bureaucratic and intrusive, the paper does not discuss any alternative proposals to simplify or streamline this process, nor to reduce the cost to applicants, while still retaining some degree of third-party scrutiny.
- 2.14. Nor does the paper discuss what due diligence the Scottish Government has done on the role of the Gender Recognition Panel; whether the panel performs any sort of public interest role by deterring or screening out applications which are ill-intentioned or would not be in the best interest of the applicant themselves for any reason. This might normally be expected, in any context where there is a proposal to remove a scrutiny body entirely from a process.
- 2.15. Removing all input from medical professionals continues to generate significant concern about the potential for mischievous applications.

without any working definition of what living in the acquired gender means, it is difficult to see what would constitute a false declaration in relation to this element, or how this would be assessed by the courts.

²³ See note 7

²⁴ See note 7

²⁵ MurrayBlackburnMackenzie (2019) [Gender Recognition Act reform: The purpose of the GRA](#)

- 2.16. The Draft Bill sets out a legal requirement to have “*lived in the acquired gender*” for three months. However, what this involves appears likely to be self-policed and therefore very flexible. No criteria are included in the draft bill or discussed in the consultation paper.
- 2.17. Other policy contexts suggest transition might have the minimum requirement of a name change, changes to sex markers on documents such as a passport and/or driving licence, and stating what pronouns a person says they wish other people to use when referring to them.
- 2.18. The only deterrent to misuse would become a person’s unwillingness to take the risk of being found to have made a false declaration, which if proved would carry a criminal penalty of up to two years imprisonment.
- 2.19. However, without any working definition of what living in the acquired gender means, it is difficult to see what would constitute a false declaration in relation to this element, or how this would be assessed by the courts.

Losing the need for a diagnosis of gender dysphoria is the most important change proposed and is central to the Scottish Government’s rethinking of the purpose of the Act: from a pragmatic response to a medical condition; to an entitlement to affirmation of identity, and the translation of that into a change of sex in law

Part 3. Evidence base on international best practice

Question 5. Has the Scottish Government undertaken any analysis of the law, and its application in settings such as hospitals, schools and prisons in Ireland and other jurisdictions it considers to represent ‘international best practice’?

Is this answered? No.

Background and analysis

- 3.1. Within a four-year period (2014 to 2018) seven European jurisdictions introduced laws based on the self-declaration of gender identity. In both the 2017 and 2019 consultations, the Scottish Government has stated that it wishes to align the law in Scotland with “*international best practice*”.
- 3.2. The paper only discusses the application process in different jurisdictions and does not consider how the law applies in practice in specific settings; for example, what, if any exceptions or limitations are in place.

The international roll-out of gender self-declaration laws

- 3.3. The consultation paper does not state which countries the Scottish Government considers to represent “*international best practice*”, given that gender recognition laws vary, for example in relation to the minimum age for legal recognition, which ranges from six years upwards, the application process, and legal effects on areas such as marriage, succession and eligibility for military service.
- 3.4. It should also be noted that relatively few countries have taken up statutory self-declaration, and that where this has been done, exactly what detailed rights this grants in any particular state will vary, depending on how the policy has been implemented in detail and its broader approach to equalities legislation.
- 3.5. The paper does not consider the process for change within different jurisdictions, for example how widely governments consulted, and how rigorously policymakers assessed the potential impact on other rights-holders, or seek to understand the rapid roll-out of gender self-identification laws in other jurisdictions, which is taken for granted as an unproblematic precedent.
- 3.6. A recent report prepared by international law firm Dentons Europe LLP (2019)²⁶ on behalf of organisations advocating internationally for self-declaration provides some insights into the strategies used by these bodies. These include intervening early in the legislative process to shape the Government agenda, tying campaigns to more popular policies that act, in the report’s words, as a “*veil of protection*” (the report cites marriage equality legislation in Norway,

²⁶ Dentons et al. (2019) [Only Adults? Good Practices in Legal Gender Recognition for Youth](#)

Denmark and Ireland), de-medicalising campaigns, lobbying individual politicians, and avoiding excessive press coverage and exposure.

- 3.7. Similarly, a 2017 report prepared by United Nations Development Programme and Parliamentarians for Global Action (UNDP/PGA) states that in Argentina equal marriage law was “*selected to spearhead the public campaign that served as a gateway for the proposal and approval of the gender identity law*” (2017: 36).²⁷ The UNDP/PGA report also notes how building alliances with the mass media was pivotal to gender identity reform (**Box 7**).

Box 7. Legal reform in Argentina: alliance with the media

‘Both the LGBTI Federation and ATTTA established a successful alliance with the mass media. A group of journalists and reporters supportive to the cause were consistently given first priority to cover the news and the stories of the individuals who executed legal actions. A journalist’s guide on the gender identity law was produced as a mechanism to promote positive messages directed to the general population. Building close relationships with members of the media was pivotal in creating a favourable environment for the equal marriage law and gender identity law within the public discourse.’

UNDP/PGA (2017) *Advancing the Human Rights and Inclusion of LGBTI People: A Handbook for Parliamentarians*²⁸

- 3.8. In addition to other countries adopting self-declaration laws, the consultation paper also cites as a “*further reason for change*” the enactment of the non-binding Yogyakarta Principles and a resolution of the Parliamentary Assembly of the Council of Europe (para. 3.38).²⁹ These are discussed below.

Yogyakarta Principles

- 3.9. The 2017 consultation paper stated that “*The view of the Scottish Government is that the 2004 Act requirements are unnecessarily intrusive and do not reflect the best practice now embodied in the Yogyakarta Principles and Resolution 2048*” (para. 3.10). The current consultation paper states that the Scottish Government views the Yogyakarta Principles as a further reason for change (para. 3.38).³⁰
- 3.10. The relevant principle is shown in **Box 8**. This is based on the belief that everyone has an inner gender identity which is separate from physical sex, and superior to it for social, political and legal purposes.

²⁷ United Nations Development Programme/Parliamentarians for Global Action (2017) [Advancing the Human Rights and Inclusion of LGBTI People: A Handbook for Parliamentarians](#)

²⁸ See note 27

²⁹ See note 7

³⁰ See note 7

Box 8. Yogyakarta Principle 31: The Right to Legal Recognition

‘Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.’

Yogyakarta Principles, 2017³¹

- 3.11. While stating that the Yogyakarta Principles are part of its reason for reform, the consultation paper does not consider the principles in more detail. For example, Yogyakarta Principle 31 also specifies that States should “*end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality*”. Principle 31 also states that while sex or gender continues to be registered, States should “*Ensure that a person’s criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender*”.
- 3.12. The consultation paper acknowledges that the Yogyakarta Principles have no standing in international law and place the Scottish Government under no obligations (this was not stated in the 2017 consultation).
- 3.13. However, it is still not made clear to readers that the Yogyakarta Principles were produced as, in essence, an international lobbying document to promote self-declaration of gender identity.

Resolution 2048 of the Parliamentary Assembly of the Council of Europe

- 3.14. The consultation paper also refers to Council of Europe Resolution (CoE) 2048³² as a further reason for change. This resolution calls on all Member States to: “*develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards ... and other similar documents*” (para. 3.40).
- 3.15. Like the Yogyakarta Principles, the CoE resolution adopts a strongly held belief in the existence of gender identity as a “*deeply felt internal and individual experience*”, and rests on the belief that sex is “*assigned at birth*” (Schembri 2015: 5).³³
- 3.16. Also like the Yogyakarta Principles, the explanatory memorandum³⁴ to Resolution 2048 contains no assessment of the impact of the proposals on those with other protected characteristics, including sex.

³¹ [The Yogyakarta Principles plus 10 \(2017\)](#)

³² Council of Europe Parliamentary Assembly (2015) [Resolution 2048 Discrimination against transgender people in Europe](#)

³³ Schembri (2015) [Discrimination against transgender people in Europe](#)

³⁴ See note 33 (Part B)

Neither the current consultation paper, nor the 2017 consultation paper set out whether or how the Scottish Government has subjected the Yogyakarta Principles or CoE Resolution 2048 to independent critical scrutiny.

European Court of Human Rights (ECtHR)

- 3.17. The Scottish Government is bound to observe findings of the ECtHR. The Court has ruled that states must have arrangements to protect the privacy of certain people seeking to be recognised as the opposite sex from that observed at birth, including provision to change a birth certificate. However, the current body of ECtHR law does not require states to introduce self-identification either for documentary or legal status change, and UK law as it stands appears to be fully compliant with current ECtHR rulings in this area.³⁵
- 3.18. The ECtHR position starts from the position of accepting that there are some people who have a strong need to live as though they were the opposite sex from that they were born as. It interprets the ECHR as requiring states to enable people who have this need to meet it as far as possible, including protecting their privacy. It allows that in assessing a person's need to change official records, states can reasonably require medical confirmation of psychological distress (but not genital surgery). The GRA 2004 follows this. Not all countries covered by the ECHR have yet made equivalent provision.
- 3.19. By taking Yogyakarta and Resolution 2048 to be best practice, the Scottish Government is departing from this thinking. It accepts instead, an argument that the law should be based on a (non-falsifiable) belief in the existence of a free-standing inner gender identity, which should be given primacy over physical sex for the purpose of official status; and that the only valid witness to this is the person themselves.

Question 6. Does the GRC equivalent in Ireland, Denmark and any other countries considered to represent 'international best practice' confer the same legal rights as a GRC in the UK?

Is this answered? No.

Background and analysis

- 3.20. Again, the consultation paper only discusses the application process in different jurisdictions and does not consider what specific legal rights a GRC equivalent provides in different countries.
- 3.21. **Box 9** notes the difficulties experienced in Ireland in relation to the placement of a transgender prisoner with a GRC since the introduction of self-declaration. While these concerns were made public in October 2019, they are not discussed in the consultation paper.

³⁵ For an overview of legal cases in this area see: European Court of Human Rights (2019) [Gender Identity Issues](#)

Box 9. Ireland ‘Male-bodied transgender inmate housed with women’

‘In October 2019 the Chair of the Law Society Criminal Law Committee Robert Purcell commented that the Gender Recognition Act 2015 had placed the Prison Service and Courts in a difficult position with regard to transgender prisoners. This was in relation to the placement of a transwoman prisoner with a GRC in Limerick women’s prison. The prisoner was convicted of ten counts of sexual assault and one count of cruelty against a child. Purcell stated:

*“The law that was enacted in 2015 did not envisage this situation, and it puts the Prison Service and the courts in a difficult position because, obviously, if somebody is self-declaring that they have to be recognised, then they have to be dealt with on that basis, even though physically, they have not have made the [physical] transformation”.
“I don’t think the legislation envisaged the ability of transgender people to be able to self-declare; and it didn’t foresee the problems it would cause if a transgender, self-declared person was held in a mixed prison”.’*

Law Society Gazette Ireland, 18 October 2019³⁶

Part 4. Equality Act 2010

Question 7. Does the Scottish Government support the single sex exemptions under the Equality Act 2010?

Is this answered? Yes, but it is not clear how exceptional it thinks their use should be.

Background and analysis

- 4.1. Under Section 11 of the Equality Act 2010, “sex” is a protected characteristic. For almost everyone, this refers to biological sex. However, for those who have changed their legal sex via a GRC, the position is less simple.
- 4.2. The Equality Act provides eight single-sex exemptions that allow employers, service providers, associations and charities to provide single-sex or separate sex services for a range of reasons. People with a GRC are generally entitled to use such services in line with their new legal sex, but Schedule 3 of the Act allows services not to include them if it can be shown this is proportionate and meets a legitimate end. Schedule 9 of Act similarly allows employers to limit certain roles to those who have a particular sex by birth.
- 4.3. The Ministerial Foreword notes “*Those exceptions are very important and the Scottish Government would encourage any organisations and service providers to know their rights on this issue*” (2019: 3).³⁷

³⁶ Law Society Gazette Ireland (2019) [Male-bodied transgender inmate housed with women](#) 18 October 2019

³⁷ See note 7

- 4.4. How far the Scottish Government believes these exemptions can only be used in exceptional cases is not clear, however. Paragraphs 5.17 and 5.20 appear to be especially important here, as shown in **Box 10**

Box 10. Consultation paper: single sex services exemption

'5.17. This provision would, for example, allow the operator of a domestic abuse refuge designed for women only to exclude a trans woman from the service if the operator judges that this is a proportionate means of achieving a legitimate aim. This is likely to involve carrying out a risk assessment...'

5.20. As indicated above, the 2010 Act is generally a reserved matter for the UK Government. The UK Government's 2018 consultation on reforming the GRA in England and Wales said in paragraph 117:

"Trans people with a GRC can still be excluded from single sex services, or provided with a different service if it is proportionate to do so on the facts of the individual case. Although reliance on this exception should be rare, it is most likely to be needed in particularly difficult and understandably sensitive areas, such as the provision of women's domestic violence refuges. Whether it is proportionate to exclude a trans person would have to be judged by the service provider on a case by case basis, considering the trans person's needs and the impact on other service users. Refuges will continue to make sensible risk assessments of potential service users.

Such assessments are required of all users, whether or not they are trans: for example the refuge might want to prevent an abusive lesbian from entering when her abused female partner is inside, or it may exclude a woman with a history of violence and instability.³⁸"

Scottish Government 2019 paras. 5.17 and 5.20³⁹

- 4.5. Paragraphs 5.18 and 5.19 in the consultation paper state that the Scottish Government's requirement for a trans inclusion plan for domestic abuse refuges **for which it provides funding** does not prevent the exemption being used, if it is done with necessary justification in law, which the Scottish Government says is for the provider to establish.
- 4.6. The long quote from the UK Government's 2018 consultation paper (see **Box 10**) is offered with no comment by the Scottish Government. So, it is possible that the Scottish Government does not share its relatively narrow reading of when a person with a GRC can be excluded from a single sex service.
- 4.7. However, the careful wording of paragraph 5.17 (**Box 10**), which refers to "a *trans person*" rather than "*trans people*", as is otherwise used throughout the paper, suggests that the Scottish Government tends to read the Equality Act as requiring individual by individual decisions on exclusion, rather than supporting policies that allow a service to make a positive choice to provide a woman-only environment that is based on physical sex.

³⁸ See: Women and Equalities (2018) [Reform of the Gender Recognition Act – Government Consultation](#).

³⁹ See note 7

- 4.8. By contrast, the analysis in the Journal of the Law Society of Scotland (mentioned under Question 1) argues that the exemption could be applied as a principle and not only individual by individual (Komorowski, 2020).⁴⁰
- 4.9. It would be useful to have the Scottish Government's own assessment of what the law allows and what it thinks it should allow (given that control over the Equality Act might yet pass to the Scottish Parliament by some means).
- 4.10. The Scottish Government promises at paragraph 5.02 that it "*is developing guidance to make sure that policy makers and service providers understand better how to ensure that the rights of women and trans people can be collectively realised. The guidance will be used across the Scottish Government, will be available to all public authorities and will be publicly available*".⁴¹
- 4.11. No timetable is given for this work, and no detail on the process by which this will be done. The paper acknowledges that in the absence of more case law, even with further expected guidance from the UK Government, there is uncertainty about how the Act works here.
- 4.12. Readers are left with the combination of not having an answer to Question 1 on the legal effect of obtaining a GRC, and a continuing lack of clarity about the circumstances in which single sex services can be limited to women without GRCs.
- 4.13. This means that it is not possible to piece together a clear and reasoned view from Government on how lowering the barriers to obtaining a GRC is expected to alter the number and range of people born male who will acquire a new legal right of access to single sex services for women and how absolute that right will be. This makes it difficult to understand the potential impact of the proposals on women who use and value single sex provision and to make an informed comment on them.
- 4.14. Reading between the lines, it appears the Scottish Government may be relying on a belief that people have legal rights to be treated as their "*acquired gender*" for the purpose of single sex services, whether or not they have a GRC, and can only be excluded in rare circumstances (and so a GRC has little impact on who can access these spaces in law).
- 4.15. But making people read between the lines is not good enough: the Scottish Government needs to spell out what it believes the position is, and why, particularly when its interpretation appears open to challenge.

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⁴⁰ See note 13

⁴¹ See note 7

making people read between the lines is not good enough: the Scottish Government needs to spell out what it believes the position is, and why, particularly when its interpretation appears open to challenge

Question 8. Does the Scottish Government see any ongoing need for women-only spaces and services based on biological sex?

Is this answered? **Not clearly.**

Background and analysis

- 4.16. This question relates to question 7, but takes the point to the level of **general principle** rather than support for the existence of statutory provisions. At the legal level, the Scottish Government recognises the existence of provisions in law that allow limiting some services or roles to people of either biological sex. However, it appears to see little case for using them as a matter of principle.
- 4.17. This becomes most apparent in the draft Equality Impact Assessment (EQIA) which states “*There is a lack of any evidence around the actual experienced impacts of trans inclusion in services*” and that “*Much of the literature identified does not justify a blanket exclusion of trans women from services or spaces (they themselves are a vulnerable group), but rather highlights the need for individual assessments and tailoring the service for each individual’s needs*” (2019; 173).⁴²
- 4.18. The draft EQIA cites one academic paper, by Gottschalk (2009)⁴³ to support the assertion that there is little evidence to justify ever applying a blanket exclusion (and therefore having a service or role limited to a particular biological sex).
- 4.19. The Gottschalk paper is based on interviews with fifteen women who worked as principals, managers or coordinators in either Violence Against Women (VAW) or women’s health services. However, the paper draws the *opposite* conclusion to the one the Scottish Government cites it to support, and instead makes the case for retaining single-sex spaces, concluding that “*Trans-inclusion then is one of the greatest threats faced by women*”. This is shown in **Box 11**.

⁴² See note 7

⁴³ Gottschalk, L. (2009) [Transgendering women's space: A feminist analysis of perspectives from Australian women's services](#) Women's Studies International Forum, 32(3): 167-178

Box 11. 'Transgendering women's space: A feminist analysis of perspectives from Australian women's services'

'This article [argues] that the life experiences of women born and raised female and the experiences of MTFs, born and raised male, differ significantly and that male dominance and female submission is institutionalised in the socialisation experience. MTFs have had male socialisation, whether or not they felt comfortable in their assigned gender roles.

This article acknowledges that MTFs have special needs and equal rights before the law. However in the case of women-only space and in the current social and legal context, protecting the rights of one minority group, transgendered people, infringes on the rights of another minority group, women, with serious consequences for all women.

The dilemma of managing the 'rights' perspective is the reason why many of the participants in this study opted for transgender inclusion, even while understanding the difficulties this posed for their female clients. Many other participants were prepared to take a stand and make the difficult decision that MTFs need to create their own safe space.

MTF inclusion in women-only spaces, whether as clients or as workers, compromises the rights of women to seek support in a context where they are with, and receive professional help from, people with whom they have shared experiences. The inclusion of men or MTFs results in the elimination of women-only space and re-assimilation into male dominated institutions. Such mainstreaming can potentially remove the focus from women's issues and return to a situation described by Kaplan (1996) where women's needs in health and refuge become invisible and neglected. As proposed by Freedman (1979) the decline of the gains achieved for women by feminism is under threat by the erasure of women-only space. Freedman argues that the building of coalitions of women's groups and continuation of separatism is crucial. In this paper I argue in support of Freedman (1979). Trans-inclusion then is one of the greatest threats faced by women.'

Gottschalk, L. 2009: 177-178.⁴⁴

- 4.20. The consultation paper does not refer to evidence submitted to the Scottish Government in June 2019 by campaign group Women and Girls Scotland, based on a survey (self-selected sample) of 2,000 women across the UK.⁴⁵ Survey respondents recorded substantial support for access to spaces and services where women could be sure they would not encounter anyone born male, regardless of self-declared gender identity, for reasons of safety, privacy and dignity. The report also identified a risk of self-exclusion by some women from certain spaces and services if that guarantee could not be made. The report also cites findings from other research consistent with its findings.
- 4.21. The consultation paper fails to acknowledge this as a rare piece of evidence on this point. The Scottish Government should at minimum explain why these findings and the others it cites, are not regarded as relevant.

⁴⁴ See note 43

⁴⁵ Women and Girls in Scotland (2019) [Female Only Provision: A Women and Girls in Scotland Report 3](#) June 2019

- 4.22. The consultation paper also does not refer to research undertaken by Fair Play for Women (2018)⁴⁶ which reported that some professionals working in Violence Against Women (VAW) services were afraid to raise their concerns around gender self-identification policies, and that the voices of VAW survivors had not been given a voice in the Westminster consultation on GRA reform. Drawing on interview evidence, the report also argues that ‘survivors must be able to set their own boundaries and trust their own instincts’.

“The silencing of anybody who has justifiable concerns about the impact on women and girls of including transwomen in women-only spaces is significant. Most who work in the women’s sector are afraid to share their concerns publicly as they witness the verbal and sometimes physical attacks on those who do speak out publicly. Concerns about the rights of women and girls are routinely labelled transphobic and those who do speak out have experienced various threats which also include threats to their organisations ... Everyone I speak to feels silenced and fearful of saying anything which detracts from the dominant position of trans rights activists.”

Professional E cited in Fair Play for Women, 2018: 9

Question 9. Does the Scottish Government believe that women should ever be free to organise around their shared experience of being born with a female body and all the physical, economic and social experiences that creates, without including people who do not share that experience?

Is this answered? No.

Background and analysis

- 4.23. Schedule 16 Part 1 of the Equality Act 2010⁴⁷ provides for single-characteristic associations, with the purpose of bringing together people who share a particular characteristic. The consultation paper does not discuss whether or not the Scottish Government believes this can ever be justified.
- 4.24. The limited recognition in the paper of existing provisions which allow services and roles to be limited by biological sex focusses on exceptional situations. It is not clear whether the Scottish Government accepts that some women might legitimately wish to organise themselves more generally round the fact of being female-bodied, for social or political purposes.

⁴⁶ Fair Play for Women (2018) [Supporting Women in Domestic and Sexual Violence Services. Giving a voice to silenced women: evidence from professionals and survivors](#)

⁴⁷ [Equality Act 2010 Schedule 16 Part One](#)

Question 10. Does the Scottish Government believe that the Equality Act 2010 currently permits single-sex policies that exclude everyone who has not used a GRC to change their legal sex to that covered by the policy?

Is this answered? No.

Background and analysis

4.25. See discussion under Questions 1 and 7. The contention over this specific point explains some of the tension in the current debate (see also Murray and Hunter Blackburn, 2019)⁴⁸ and the Scottish Government remaining silent on it is not helpful in addressing that tension.

Question 11. Does the Scottish Government believe that the Equality Act 2010 currently permits single-sex policies that exclude even those who hold a GRC for the sex covered by the policy?

Is this answered? Yes, but only partially: whether as individuals or a group is not clear.

Background and analysis

4.26. As the response to Question 7 notes, the consultation paper makes it clear that the law does permit such exclusions; but it is not clear whether the Scottish Government believes this can be done as a general principle, or must be decided looking at each individual.

Question 12. Does the Scottish Government attach any weight to the situation of women who experience a loss of privacy and dignity and a reduction in how safe they feel, if required to share certain spaces with or receive certain services from a person they can correctly identify as male by birth?

Is this answered? No, because its statements are contradictory.

Background and analysis

4.27. The Ministerial Foreword contains the strong statement, *“I recognise that some organisations have changed policies which are not required in law. And I know that they have done so in a well-intentioned attempt to be trans inclusive. However, they may have unintentionally made changes that make women feel uncomfortable and less safe. They need to take account of everyone’s rights when any changes are being considered, to ensure all rights, particularly those*

⁴⁸ Murray and Hunter Blackburn (2019) [Letters: There has been a lack of due diligence and scrutiny in policy-making in the field of gender identity](#) 31 July 2019 Herald

of women and trans people, are protected. This includes the protection of women's rights and safe spaces" (Scottish Government, 2019: 3).⁴⁹

- 4.28. However this statement is hard to reconcile with what appears to be a narrow understanding of when exemptions can be applied, as discussed under Question 7, and with the draft EQIA.
- 4.29. The discussion of Question 8 above noted that the draft EQIA appears dismissive of these issues. In addition to the shortcomings of the draft EQIA discussed above, it makes no reference to female privacy and dignity, and states that it has not identified any evidence to support existing concerns about the risk of assault by allowing males who self-identify as women to access female-only spaces. The relevant section of the draft EQIA assessment is shown in **Box 12**.

Box 12. Draft Equality Impact Assessment: Protected characteristic of sex (extract)

'10. The Scottish Government has not identified any evidence supporting the claim that trans women are more likely than non-trans women to sexually assault other women in women-only spaces. Much of the literature reiterates this lack of any evidence, legal, medical or otherwise, to support this characterisation of trans women as 'deviant' or predatory.

In addition to concerns about the inclusion of trans women in women-only spaces and services, some respondents expressed concerns that predatory men posing as trans women would seek to gain access to women only spaces and services for malicious reasons.

11. The Scottish Government has not identified any evidence supporting a link between women-only spaces being inclusive of transgender women, and non-trans men falsely claiming a trans identity to access these spaces and commit sexual violence. Other sources identified reiterated that there is a lack of any evidence to support this claim.'

Scottish Government 2019 paras. 174-175⁵⁰

- 4.30. To support the above assertions, the Scottish Government cite only two pieces of academic research, both of which are dismissive of any discomfort that women may feel sharing spaces with male-bodied people, regardless of how they identify.
- 4.31. The first paper (Dunne, 2017)⁵¹ argues that single-sex spaces and services should be dismantled, and draws parallels between female discomfort at seeing male bodies and seeing women who have undergone mastectomies in women-only spaces (for press coverage, see Sun 2020).⁵² The Scottish Government

⁴⁹ See note 7

⁵⁰ See note 7

⁵¹ Dunne, P. (2017) [\(Trans\)forming single gender services and communal accommodations](#). *Social and Legal Studies*, 26(5).

⁵² Sun (2020) [ID ROW SNP ministers enrage breast cancer patients after using expert who made 'offensive' remarks about mastectomies](#) 8 January 2020, Sun

has now distanced itself from this part of the paper (Somerville, 2020)⁵³. It still believes however that the paper contains other material which supports the statements in the draft EQIA. The Scottish Government has been asked to clarify which material that is (McAlpine, 2020)⁵⁴.

- 4.32. The second paper (Eckes, 2017)⁵⁵ is a legal case analysis that examines school toilet policies in the U.S. The paper compares safety and privacy concerns around the loss of sex-segregated bathrooms to the discriminatory arguments used to support the practice of racially segregating bathrooms in 1950s America. A comparison is also drawn between what the author describes as an appeal to “tradition”, and both slavery and denying women the vote. These extracts are shown in **Box 13**.

Box 13. The restroom and locker room wars: Where to pee or not to pee

‘Oftentimes safety concerns also arise. Unfortunately, this is not the first time safety issues have been debated as they relate to segregated restrooms. When public restrooms were being racially integrated in 1957, according to Scherer (2016), one newspaper asked “[w]ill the [W]hite girls be forced to take their showers with Negro girls?” These concerns were purportedly related to the “high venereal-disease rate among Negroes ...”. Similar to the arguments made in the 1950s, the current debate is also linked to discriminatory practices in schools. On this note, there is no evidence that any transgender student has tried to assault another student or created any such safety hazard in a restroom...

Some also argue that tradition demands that we continue to segregate students in restrooms based on their sex assigned at birth. Arguments related to tradition were made in the recent marriage equality debate (e.g., we should oppose same-sex marriage because of our long tradition of doing so). On this note, our country has also had a long “tradition” of slavery or denying women the right to vote. To be certain, there are some traditions that are worth preserving and some that are not. These privacy, safety, and tradition arguments are without merit; it appears that the objections are really related to simply having a transgender student in the restroom.’

Eckes, 2017: 33, 34

⁵³ Somerville, S-A. (2020) [Official Report Meeting of the Parliament 8 January 2020](#)

⁵⁴ McAlpine, J. (2020) [Question S5W-26947](#) 16 January 2020

⁵⁵ Eckes, S., 2017. [The restroom and locker room wars: Where to pee or not to pee](#). Journal of LGBT Youth, 14(3): 247-265.

Question 13. What is the Scottish Government view of the earlier requests by the Scottish Trans Alliance (STA) and Stonewall to the Westminster parliament to have the single-exemptions in the Equality Act removed?

Is this answered? **Yes.**

Background and analysis

- 4.33. The 2015 Scottish Trans Alliance submission⁵⁶ to the Women and Equalities Select Committee's Transgender Equality Inquiry stated that the Equality Act 2010 should be amended to: include gender identity as a protected characteristic; remove the exception that allows single sex services to discriminate against trans people; and remove the genuine occupational requirement (GOR) allowing some jobs to require applicants who are 'cisgender' and replace it with a GOR allowing posts delivering trans-specific services to require applicants who are transgender.
- 4.34. Similarly, Stonewall's submission (2015)⁵⁷ called for "A review of the Equality Act 2010 to include 'gender identity' rather than 'gender reassignment' as a protected characteristic and to remove exemptions, such as access to single-sex spaces". The Stonewall 'Vision for Change' (2017)⁵⁸ document also states that "Stonewall will advocate for the removal of all instances of permitted discrimination of trans people from the Equality Act" (see **Box 14**).

Box 14. Stonewall 'Vision for Change': Equality Act

'Stonewall will lobby Government for reform of the Equality Act, to include 'gender identity' as a protected characteristic and to remove the use of the terms 'gender reassignment' and 'transsexual' from the Act. Removing current ambiguities in the Act will ensure that all trans people, including those who identify as non-binary, are unequivocally protected and included. It will also signal to trans employees and service users, as well as public bodies and employers, that discrimination of trans people is not acceptable. In addition, Stonewall will advocate for the removal of all instances of permitted discrimination of trans people from the Act, as well as for updates to the explanatory notes and statutory codes of practice accordingly. Stonewall will lobby political parties in England, Scotland and Wales to include full equality for trans people, and the reform of the Equality Act, as part of their political commitments.'

Stonewall (2017)

- 4.35. As noted under Question 7, the Ministerial Foreword describes the exemptions as "very important", even if the Scottish Government appears to accept a narrow interpretation of their scope.

⁵⁶ Scottish Trans Alliance (2015) [Written evidence submitted by Scottish Transgender Alliance, Equality Network to the Transgender Equality Inquiry](#) 21 August 2015

⁵⁷ Stonewall (2015) [Women and Equalities Select Committee Inquiry on Transgender Equality](#) 27 August 2015

⁵⁸ Stonewall (2017) [Vision for Change: Acceptance without exception for trans people](#)

Part 5. Gender self-identification in practice: data recording

Question 14. In relation to the 2021 census, can the Scottish Government explain how can we collect reliable data on either sex or gender identity if both are conflated into the same question?

Question 15. What analysis has the Scottish Government undertaken to establish the potential impact of changing the sex question in the census to one that is explicitly based on self-identification on data quality?

Question 16. What analysis has the Scottish Government undertaken to assess the impact of the decision to remove sex recorded at birth from NHS records, as recorded in the CHI system, and to record self-identity, on the delivery of sex-specific and single-sex services?

Question 17. In relation to criminal justice data, what analysis has the Scottish Government undertaken to quantify the potential effects of self-identification principles on the quality of data on those crimes disproportionately committed by males, such as violent and sexual offending?

Question 18. Criminal proceedings in Scotland data show that only three females were convicted of sexual assault in 2017/18, compared to 299 males. Given these low numbers, does the Scottish Government acknowledge that a small percentage of male people being recorded instead as female would skew this data?

Question 19. Has the Scottish Government undertaken any analysis of the potential impact of recording based on gender identity in the monitoring of inequalities in male-dominated industries, for example the tech sector?

Question 20. Does the Scottish Government support the recommendations in Caroline Criado-Perez's book *Invisible Women* that we must meticulously collect sex-disaggregated data to tackle sex-based discrimination?

Are these questions answered? No.

Background and analysis

- 5.1. The draft EQIA notes that some respondents raised concerns about the impact on gender self-declaration on data collection in the 2017 consultation. The consultation paper does not however discuss data collection in relation to the census, NHS records, criminal justice statistics, the recording of employment data and/or the impact on equal pay claims, or the need to collect sex-disaggregated data to tackle sex-based discrimination.
- 5.2. Instead the draft EQIA refers to the Scottish Government Working Group on Sex and Gender in Data,⁵⁹ which is chaired by the Chief Statistician and will consider what guidance should be offered to public bodies on the collection, disaggregation and use of data on sex and gender
- 5.3. The membership of the Working Group is drawn exclusively from organisations that have implemented or support gender self-identification policies and/or approaches to data collection. These include National Records of Scotland and the Office for National Statistics, both of whom have recommended that the sex question in the 2021 census is framed in terms of self-declared gender identity.
- 5.4. There is also a marked lack of balance in the associated Stakeholder Group, which has no independent academic representation. We have met the Chief Statistician to raise this and other concerns about the work being undertaken here. Our letter following that meeting is shown in **Appendix 2**.
- 5.5. The letter also highlights our concerns with the EHRC submission to the Working Group (2019)⁶⁰, which suggests it is not possible to collect data relevant to monitoring issues relevant to the legally protected characteristic of sex without breaching the ECHR. We think that this is a contentious position and, if it were to influence the outcome of this Working Group, that formal legal advice should be sought.
- 5.6. The consultation paper notes that the Equality Act (Paragraph 20 of schedule 9) provides that it is not discrimination based on gender reassignment “*to do anything in relation to an annuity, life insurance policy, accident insurance policy or similar matter involving the assessment of risk if it is reasonable to do so based on reliable data*”.
- 5.7. This is an acknowledgement in the Act that a person’s sex at birth may continue to be relevant to assessment of risk in certain contexts, regardless of how that person identifies. That this possibility, and the concept of reliable data based on sex, is included in the Equality Act bears noticing, even if legal protection for that idea is limited to the insurance industry,

⁵⁹ Scottish Government (2019) [Sex and Gender in Data Working Group](#)

⁶⁰ Equality and Human Rights Commission (2019) [Sex and Gender Working Group – Meeting 23 September 2019. Equality and Human Rights Commission submission.](#)

Appendix 1. Letter to the Cabinet Secretary for Social Security and Older People

In early January 2020 we wrote to the Cabinet Secretary to raise several specific points which our initial reading of the consultation paper suggested needed clarification during the consultation period if consultees were to be able to respond properly.

The list overlaps with the questions above but includes some new points, for example on how the proposed new criminal offence of false declaration will work, and the definition of “*ordinarily resident*”. The letter is shown below and we will post any response on our website.

6 January 2020

Dear Ms Somerville,

CONSULTATION ON THE GENDER RECOGNITION REFORM (SCOTLAND) BILL

We write in relation to the consultation on the draft Bill reforming the Gender Recognition Act 2004 published by the Scottish Government on 17 December. We welcome this additional consultation, but believe the proposals as published raise a number of questions, listed below, which need to be clarified urgently by government, if a meaningful consultation is to take place.

Q.1. Is it Ministers’ policy intention to widen the range of people who will be entitled to have a GRC compared to the current position, and if so, in what ways?

Q.2. Does acquiring a GRC give a person new legal rights of access to single sex services and occupations under the Equality Act 2010 (before any consideration is given to making specific arrangements to exclude GRC holders from these, as discussed in Chapter 5)?

Q.3. Specifically, what is Ministers’ understanding of the relevance of a person holding a GRC to the ability of the prison service to exercise its discretion over the accommodation of transgender prisoners, in the light of the outcome of R (on the application of AB) v Secretary of State for Justice (2009)?

Q4. What is the view of Ministers of the implications for third parties who are referring to a person who has a GRC of the judgement last month in the case of Forstater vs the Centre for Global Development?

Q5. What criteria do Ministers envisage the courts would use to decide whether a person has made a false declaration about having lived and/or intending to live in their acquired gender?

Q6. What courses of action do Ministers understand would be open to a notary public who suspected someone was seeking to make a false declaration and do Ministers intend it to be possible to refuse to grant a GRC based on reported concerns about a possible false application?

Q7. How do Ministers envisage that cases of de-transition would interact with the provisions criminalising a false declaration?

Q.8. How do Ministers intend that “ordinarily resident” will be defined for the purpose of the Act, including whether they intend this to require any minimum period of residence in Scotland?

Q.9. Have Ministers undertaken any detailed analysis of the law, and its application in settings such as hospitals, schools and prisons in Ireland and other jurisdictions it considers to represent ‘international best practice’, including how far the GRC equivalent in these countries confers the same legal rights as a GRC in the UK?

We would be very grateful for clarification of these points, without which we think consultees may be unreasonably hindered in responding to the consultation.

Yours sincerely

Lucy Hunter Blackburn
Kath Murray
Lisa Mackenzie

Appendix 2. Letter to the Chief Statistician

20 January 2020

Dear Roger,

Thank you for meeting us last week to discuss our views on sex and gender data, and your plans for making recommendations for Ministers. We appreciated your willingness to hear our concerns, which we are now writing to place on the record.

We would like to reiterate our view that biological sex⁶¹ is a key determinant of a person's experiences and outcomes, and one of the most important variables for the purposes of policy, planning and research. This view is supported by decades of robust research evidence and analysis, which has examined the relationship, including causal relationships, between being born physically one sex or another, and a person's physical, social, economic and political experiences and outcomes from birth onwards. As such, in the meeting, we said it felt frustrating that we now needed to actively defend data collection on this basis. We also said that a failure to collect robust data on sex would weaken the ability of public authorities to fulfil their legal duties under the Equality Act 2010 in relation to equalities monitoring.

We spoke about the reliability of statistics. We suggested, as just one example, that the shift from police recording based on sex to recording based on gender identity means that Criminal Proceedings in Scotland official statistics are no longer reliable, in particular statistics for certain types of low volume crime committed by females, such as sexual assault. It should also be noted that this shift in police recording practices was not properly documented, nor subject to an impact assessment requirement, see here: <https://www.scotland.police.uk/assets/pdf/434027/526774/526798/19-0696-response?view=Standard>

We also mentioned a recent article on the international increase in female offending rates, which we thought might to some extent relate to changes in recording practices by criminal justice agencies. This can be accessed here: <https://www.theguardian.com/us-news/2020/jan/06/female-fugitives-women-crime-rates-rise>.

In relation to reliability, we discussed the size of the transgender population and agreed that despite estimates, such as that provided to you by the EHRC, this was unknown.⁶² We also discussed the composition of the transgender population, which we noted appears to be heterogeneous, comprising people who have transitioned in different ways, to different degrees and at different ages (for further information we recommended the large-scale LGBT survey undertaken by the GEO which can be accessed here: <https://www.gov.uk/government/publications/national-lgbt-survey-summary-report>).

Given the uncertainty regarding both the size and composition of the trans population, we think that any shift from recording based on sex to recording based on gender identity

⁶¹ We briefly discussed the relevance of DSD (sometimes called intersex) conditions. The evidence provided by a specialist body to the parliamentary committee considering the 2021 census is available here https://www.parliament.scot/S5_European/Inquiries/CensusBill_DSDFamilies_CTEEAS518CB33.pdf. We also note that in the context of the census the Scottish Government has clarified that this is an entirely separate issue to self-declared gender identity.

⁶² The EHRC submission to the Working Group states: 'The number of trans people is not big enough to skew data that is collected on sex and it is therefore deemed generally unnecessary, from a data collection view point, to merely focus on legal sex'.

would actively introduce risks to reliability. This will be felt particularly at a subpopulation level (for example within age-groups) and therefore will become a larger issue whenever data on sex is cross-tabulated with other characteristics. We also noted that data for equalities monitoring may be used for relatively small groups (a single employer, or subject area within a university, for example) where small numbers of cases classified differently according to sex and self-declared gender identity could affect the data produced, again particularly where there was already a strong imbalance by sex. We noted that collecting data on pay gaps by self-declared gender identity already had the potential to obscure patterns based on sex in some sectors, and within individual employers. (Guidance from the GEO and Acas already instructs employers to collect data on their 'gender' pay gap based on their employees' self-declared gender identity and not their sex: https://archive.acas.org.uk/media/4764/Managing-gender-pay-reporting/pdf/Managing_gender_pay_reporting_07.02.19.pdf)

Although not discussed in the meeting, we note that the Working Group Risk Register does not acknowledge the risk that, as a result of this project, data reliability will be diminished. We appreciate that this is a risk you will be hoping to avoid, but this is true for any risk on a register. We would urge that this one is added to the register precisely so that there is a formal commitment to evaluating the outcomes of this work against that criterion and to taking mitigating action. This risk also appears to be being ignored by the National Records of Scotland in their recommendation for a sex question based on respondents' self-declared gender identity. We also note that the EHRC submission makes no reference to subpopulation effects in its comments on the size of the trans population (see footnote 1).

You asked us whether there was any situation where we thought that authorities should collect data based on gender identity instead of sex. Having reflected further on this question, we could not think of any circumstances where gender identity should *replace* sex in any administrative data which is then drawn on to produce aggregate statistics on sex. It remains our view that if data on gender identity is required, it should be collected separately to sex, and the two concepts should not be conflated.

We noted that we needed more data, rather than less, on how far the experience and outcomes for those declaring a gender identity different from their sex as recorded at birth compared to other people of each sex more generally. We noted the UK LGBT Survey was helpful in allowing some analysis of that type (for example, on pay), which was only possible because it had collected data both on sex at birth and self-declared gender identity.

We expressed our concerns about the composition of the Working Group, which consists wholly of representatives from bodies who have either: implemented gender self-identification for the purposes of data recording (Police Scotland, NHS Scotland); actively supported conflating sex and gender identity in data collection (Office of National Statistics, National Records of Scotland, EHRC); have already introduced policies based on gender self-identification ahead of legal change, or actively supported such an approach (Scottish Prison Service, COSLA); or are in the process of introducing legislation to provide for gender self-identification in law (Scottish Government). We said that we were particularly concerned that the Working Group did not include any expert quantitative social science academics and suggested that a meeting should be convened with quantitative data users, separate to any public meeting, as soon as possible. We were concerned that the exclusion of this group was also apparent in their exclusion from the associated stakeholder group (we do not think our inclusion is sufficient to represent

the interests of this group). We felt that this lack of balance risked compromising the process.

While not discussed in the meeting, we note that the EHRC submission to the group suggests that asking a person their legal sex (with or without a Gender Recognition Certificate) may breach the Equality Act 2010, and that under the Public Sector Equality Duty (PSED) public bodies may ask for a person's self-identified sex instead of their legal sex (that the submission refers to 'forcing' a person to answer in their biological or legal sex appears to us to import into the discussion a clear bias).⁶³ This suggests that it is impossible to collect data relevant to monitoring issues relevant to the legally protected characteristic of sex without breaching the ECHR. That seems to us at minimum a contentious position that should not be taken at face value. If this view were to influence the outcome of this exercise, without formal legal advice on it being sought, we believe it would raise a question about the reasonableness of any resulting conclusions. The submission also states that data collected by public bodies would be better aligned with the census which collects data on self-identified sex. This is a view which clearly begs the question, by presupposing that what public bodies are doing now is the correct approach, which is of course what the review is intended to examine.

We remain concerned that Scotland is at a serious risk of losing the capacity to gather data that, for decades, has provided the building blocks for policy-makers and researchers to monitor and tackle discrimination based on sex, and that steps taken towards this to date have been taken without adequate due diligence, impact assessment, proper consultation with all interests affected, and general transparency. We are yet to hear any robust arguments for why public bodies in Scotland should cease to collect reliable data on sex, as distinct from self-declared gender identity.

We were reassured to hear that the final responsibility for decisions here would rest with yourself as the Scottish Government's senior statistician, rather than with the group. However, we wish to place on the record that as matters stand we are concerned about the process being followed here, particularly the level of engagement with different interests, and the degree of influence being given to organisations already committed in some way to prioritising self-declared gender identity over biological sex.

UK official statistics continue to be regarded as highly trustworthy by the British public⁶⁴. A failure to consider the implications of replacing data on sex with data on self-declared gender identity imperils those levels of trust. We hope that the Working Group will engage earnestly with the concerns we have expressed above.

If it would be possible to have a copy of the minutes taken of the discussion, we would be grateful. As we are concerned about the transparency of processes, and an absence of this around this subject more generally, we will put this letter on our website.

Kind regards,

Lucy Hunter Blackburn and Dr Kath Murray

⁶³ [Sex and Gender Working Group – Meeting 23 September 2019. Equality and Human Rights Commission submission.](#)

⁶⁴ <http://natcen.ac.uk/our-research/research/public-confidence-in-official-statistics/>

MurrayBlackburnMackenzie

About us

Established in late 2018, MurrayBlackburnMackenzie is a policy analysis collective, made up of Dr Kath Murray, Lucy Hunter Blackburn and Lisa Mackenzie

[Dr Kath Murray](#) is a Research Fellow in Criminology at the University of Edinburgh. Her doctoral research on stop and search led to major legal and policy reform, for which she received an Economic and Social Research Council (ESRC) Outstanding Impact prize.

[Lucy Hunter Blackburn](#) is a former senior civil servant (Head of Higher Education Division, Head of Reducing Reoffending Division and Director of Policy at Historic Scotland). Lucy is near to completing a PhD at the University of Edinburgh looking at student finance.

[Lisa Mackenzie](#) is a former communications specialist in the UK Government and has worked in a number of Whitehall departments, including the Department for Social Security and Home Office, as well as the Commission for Racial Equality.

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