

Gender Recognition Reform (Scotland) Bill: MurrayBlackburnMackenzie consultation response

Introduction

Some people who wish to change their legal sex report that the current application process, put in place 16 years ago, can be protracted and frustrating. We agree that these concerns deserve careful attention.

We do not however, support the Scottish Government proposal for statutory self-declaration for a change of legal sex, which removes all medical gate-keeping. This changes the fundamental purpose of the Gender Recognition Act (GRA): from what is currently a pragmatic response to a particular form of medically-diagnosed distress; to an entitlement to affirmation of identity, and the translation of that affirmation into a change of sex in law.

The Scottish Government's belief that liberalising access to a change of legal sex in this way holds no potential negative impacts for women is poorly justified and implausible. The proposed shift in the purpose of the GRA means that the draft Bill takes in a larger, more diverse group of people than the present Act. It is not, as often presented, a simple administrative reform. The existence of "sex" as a protected characteristic under the Equality Act 2010 means that reform is not simply about a person's own individual relationship with the State, but also affects other people. The removal of medical evidence in particular broadens the category of people entitled to change their sex in law. It also makes the process more open to abuse. Altogether, this raises issues of privacy, dignity and safety for women and girls.

Overall, we think that the policy-making process for GRA reform to date has been inadequate and that there are significant gaps in the evidence base. From the start the Scottish Government has proceeded as if the only alternative to the status quo is a fully de-medicalised self-declaration model.¹ It has not analysed alternative options for meeting concerns raised about the current process. It has not recognised that an argument about the detail of the application process has been conflated with an objection in principle to any medical assessment, and with the desire for a fundamental rethinking of GRCs to embrace a much larger group, for a different purpose than the one agreed in 2004.

The consultation seeks comments on a draft Bill. We think it is difficult to comment sensibly on the detail of a Bill when the approach behind it remains so open to question. Appendix 1 summarises our position on the formal consultation questions: the remainder of this response sets out in detail the problems we see with the proposals in the consultation paper, which go beyond the specific questions.

Our main concerns are summarised below, and expanded on in the main body of the submission.

- 1. Lack of legal clarity:** The Government has not clarified how acquiring a Gender Recognition Certificate (GRC) and so changing legal sex changes a person's legal rights of access to single sex services and occupations under the Equality Act 2010.
- 2. Lack of clarity on the operation of single-sex exemptions:** The consultation does not make clear whether the Government thinks powers under the Equality Act 2010 which can be used specifically to exclude GRC holders from single sex provision should operate on an individual case-by-case basis, or on a policy basis, or how readily these can be used.
Without clarity on this and the above point, it is not possible to assess the impact of the draft Bill on single-sex provisions.
- 3. Lack of key definitions:** The draft Bill does not define 'acquired gender', aside from a circular reference to the 'gender in which a person is living'. The removal of all gatekeeping

¹ Scottish Government Freedom of Information response (19 February 2020) [Ref: 202000013022](#)

means that GRC applications will rest wholly on a person's self-declared commitment to a concept that has no clear definition in law.

- 4. Failure to explain clearly how the nature of the GRC holding population would change:** The Government describes the proposals as though there would be no change to those able to apply for a GRC, but removes the requirement for a diagnosis of dysphoria, and the need to satisfy a specialist panel that a person has been socially transitioned for at least two years, and replaces these with only a self-assessment of three months' social transition. The government's assumption of a ten-fold increase in numbers in these circumstances, but no change to the range of people entitled to a GRC, is implausible.
- 5. Inadequate safeguards:** The draft Bill contains two safeguards, both of which are weak: a legal requirement to have "lived in the acquired gender" for three months, and a criminal sanction for false declaration. As 'acquired gender' is not defined, it is difficult to see what would constitute a false declaration related to this, or how this would be assessed by the courts.
- 6. No provision for possible de-transition:** The draft Bill contains no provision for what appears to be an increase in the number of people wishing to de-transition to their birth sex. This is particularly relevant to young people as the evidence suggests this group is most likely to apply for a GRC under self-declaration.
- 7. Too little consideration of the risks of lowering the age:** The significance of permanently changing legal sex cannot be underestimated and is not comparable to other rights acquired at 16 years (for example, voting in Scottish election, or even marriage, which does not require a permanent commitment in law and divorce is a clearly defined option). Medical practitioners have also expressed concerns that removing medical gatekeeping and affirming gender identity may increase the risk of medicalisation.²
- 8. Under-scoping of potential UK-wide effects** There are cross-border anomalies as a result of the different paths now being taken in Scotland and Westminster, as reform in England and Wales has been paused. People born in Scotland and living in other parts of the UK could obtain a GRC by self-declaration, or people could also qualify by moving to Scotland for a relatively short period. Those granted a GRC using self-declaration in Scotland will have the same rights when in other parts of the UK as any other GRC holders.
- 9. Over-reliance on assertions of 'international best practice' (IBP):** Although alignment with IBP is cited as a reason for reform, the consultation does not present evidence on how the law operates in other countries and the government has admitted it has not been able to find research into the impact of such laws on women. We think that the Scottish Government needs to look more critically at the precedents legislated for in other countries and to consider how gender self-declaration laws have gained traction across multiple jurisdictions, within such a limited time-frame. Recent evidence published on behalf of international campaigners explaining the strategies they have used to help secure reform suggests that legislative change was actively kept 'under the radar' in some countries and latched onto more popular reforms, such as equal marriage.
- 10. Poorly evidenced assessment of impacts on women:** The draft EQIA for sex both fails to understand and misrepresents the potential negative impacts on women of the proposals. Specifically the EQIA fails to analyse potential impacts that flow from (a) the likelihood that a GRC enhances a person's legal rights of access to single sex provision and (b) the likely increase not only in the number but also the range of people who have a GRC. The draft EQIA repeatedly takes absence of evidence at face value to mean evidence of absence. It does not acknowledge that in almost all settings data is simply not gathered in a way which would allow the issues it raises to be examined (for example, police recording practices). It fails to recognise that within the academic literature a large amount has been produced from

^{2 2} Byng, R., Bewley, S., Clifford, D., and McCartney, M. (2018) *Cteea/S5/18/Cb/26 Culture, Tourism, Europe and External Affairs Committee Census (Amendment) (Scotland) Bill*

within a school of thought that supports self-declaration in principle, while the resources and opportunity for researchers to obtain funding for and publish work from other perspectives has been far more limited. It does not acknowledge or discuss how this may affect the available evidence base and specifically relies substantially and uncritically in the draft EQIA on secondary assessment and analysis of the evidence by authors who clearly come from a theoretical perspective strongly disposed to support self-declaration, and misunderstands those who do not.

Building consensus on gender recognition reform

In February 2020 Cabinet Secretary Shirley-Anne Somerville stated that the Scottish Government aimed to build “*maximum consensus*” on its proposals. However, the consultation has exposed increasing levels of concern about the proposals. The ex-SNP Head of Communications Kevin Pringle has recently argued that reform should be put on hold³, an opinion which has been echoed by other observers, both from within the SNP, across the political spectrum and beyond it. On the weekend of International Women’s Day, a public protest was held outside the Scottish Parliament.

To build consensus, the Scottish Government will need to provide much greater clarity on key concepts, in particular how a GRC affects a person’s legal rights of access to single-sex services and spaces, and how the GRC holding population is likely to change. This would allow the Government directly to address concerns that implications for women’s safety, privacy and dignity are being misunderstood and overlooked.

The Government also needs to consider alternatives and allow other options for meeting concerns about the current GRC application process to be considered, and better engagement with diverse viewpoints is needed. While the Cabinet Secretary has recently met with some of those with concerns about reform, this should have happened much earlier during the policy development stage.

Next steps

It is highly unlikely that consensus will be secured based on the current approach to reform. While legislation could be passed within the current parliamentary term, this is unlikely to settle what is a controversial area of political and policy debate. Proceeding on the basis of the government’s current analysis carries a strong risk of legislation that is under-prepared and vulnerable to challenge, with collateral consequences that government and parliament would not intend.

To avoid this, the Scottish Government could instead go back several stages, and secure cross-party support for a fully transparent process to review existing gender recognition legislation.

This should start from a commitment to upholding rights under the European Convention on Human Rights (ECHR) equally for everyone, with no hierarchy of protected characteristics, and involve properly from the start the full range of interests and perspectives. The process should be based on addressing clearly scoped specific objections to the status quo, distinguishing between practical objections and objections of principle. This would seek to establish a shared position on the effect of current law, particularly the interaction of the GRA and the Equality Act, an agreed evidence base, and agreement on the purpose and intended beneficiaries of the GRA. It could then explore and formulate a range of policy solutions, not necessarily limited to legislative issues, so that any change is based on a secure consensus.

³ Sunday Times (1 March 2020) [Kevin Pringle: We should take our time to get reform on transgender law right.](#)

Detailed analysis of key concerns

1. Lack of legal clarity

- 1.1 The Government has not clarified how acquiring a GRC affects a person's legal rights of access to single sex provisions, and therefore their rights in relation to other people using those services.
- 1.2 The most recent relevant statement from the Equality and Human Rights Commission (EHRC)⁴ in July 2018 indicates that the Equality Act applies differently to a trans person with GRC, compared to a trans person without.
- 1.3 In England and Wales, the legal effects of acquiring a GRC are shown in Ministry of Justice prison policy (2019).⁵ This is based on case law⁶ and reflects that the discretion available to the prison authorities on the placement of trans prisoners is narrower for those with a GRC, compared to those without.
- 1.4 However, in Scotland the Cabinet Secretary for Justice has stated that acquiring a GRC "*does not and will not give a prisoner any new legal rights in relation to accommodation placements*" (SP OR 16 Jan 2020, col. 44).⁷ If the Scottish Government interpretation of the law is different to that of the MoJ, then Ministers need to clarify on what reading of the law their position is based. They have yet to do this.
- 1.5 This point extends beyond prisons. Specifically, it extends to the operation of single sex services under Schedule 3 paragraphs 26 and 27 of the Equality Act 2010 and the operation of the genuine occupational requirement under Schedule 9(1) of the Equality Act 2010. The question is at what point a person acquires rights in law to be treated as the opposite of their birth sex for the purposes of different parts of the Equality Act; whether it is before acquiring a GRC, or on acquiring a GRC (whether for some or all purposes).
- 1.6 Komorowski (2020)⁸ argues, based on a close reading of the statute and case law, that a person without a GRC cannot be regarded as having a legal sex other than their birth sex for the purposes of the Equality Act. He sets out a carefully reasoned case for why a person covered by the Equality Act's protected characteristic of gender reassignment (under section 7) who has not yet acquired a GRC retains their birth sex as their legal sex for the purposes of the Act. If the Scottish Government has a reading which departs from this, it needs to spell out why. Specifically, if it believes that a change of sex for the purpose of the Equality Act does not require a GRC, it needs to explain why it believes section 9(1) of the GRA refers explicitly to a GRC changing a person's sex in law (rather than, as is commonly believed, referring to a change of birth certificate). As Komorowski concludes, "*before we change the law, we ought to understand what effect the current Act has.*"
- 1.7 In its response to the previous consultation on GRA reform, the Faculty of Advocates (2018) described law reform in this area as "*a legally complex and challenging proposal, requiring careful balancing of disparate rights and interests*".⁹ In resisting clarifying the interaction between the Equality Act and possession of a GRC, appearing if anything not to recognise any, and being unable to explain the basis for its position, the Scottish Government has declined to engage with this point.

⁴ Equality and Human Rights Commission (2018) [Our statement on sex and gender reassignment: legal protections and language](#) 30 July 2018

⁵ Ministry of Justice (2019) [The Care and Management of Individuals who are Transgender](#)

⁶ R (on the application of AB) v Secretary of State for Justice and another [2009] EWHC 2220 (Admin), [2009] All ER (D) 28 (Sep)

⁷ Lamont, J. (2019) Scottish Parliament [Official Report 16 January 2020](#)

⁸ Komorowski, J. (13 January 2020) [Sex and the Equality Act](#). Journal of the Law Society of Scotland.

⁹ Faculty of Advocates (28 February 2018) [Response from the Faculty of Advocates to the Review of the Gender Recognition Act 2004](#)

2. Lack of clarity on the operation of single-sex exemptions

- 2.1 The consultation does not clarify on what basis it thinks the provisions allowing the exclusion of people with the protected characteristic of gender reassignment in some situations (commonly called the “single-sex exemptions”) in the Equality Act 2010 should operate, although the wording at paragraph 5.17 *suggests* that the Government reads the Act as requiring individual case-by-case decisions rather than sometimes allowing policies that exclude all persons with a GRC from single-sex provisions.
- 2.2 In response to a recent Parliamentary Question about the placement of transgender persons on single-sex hospital wards, Cabinet Secretary Shirley-Anne Somerville stated: “Health boards should **assess each situation individually** and sensitively, using their experience and expertise to determine the appropriate course of action while fulfilling their responsibilities under the 2010 Act”, and made no distinction between GRC and non-GRC holders. (SP OR 4 March 2020, our emphasis).¹⁰
- 2.3 The Cabinet Secretary also referenced the EHRC 2011 Statutory Code of Practice, which supports an individual case-by-case approach. However, how well the interpretation in the 2011 Code reflects the face of the Equality Act 2010, and its explanatory notes, is open to question.
- 2.4 Komorowski (2020) argues that the exemption could be applied as a principle and not only on an individual by individual basis. Solicitor Rebecca Bull (2020) argues that the interpretation in the 2011 Code is incorrect, and derives from case law that predates the GRA 2004, and that if applied, would ‘render female-only policies unworkable’.¹¹
- 2.5 In an event at the Scottish Parliament (14 January 2020)¹² violence against women expert Karen Ingala-Smith explained how time is critical when making refuge placements, and that it is not possible to properly risk assess a transwoman for any risks specifically related to their being born male in such circumstances. At another parliamentary event (roundtable, 29 January 2020) Rebecca Bull noted that an individual case-by-case approach would put an unfair burden on frontline service employees, such as desk staff in leisure facilities.
- 2.6 While the consultation paper states that the Scottish Government is ‘developing guidance for policy makers and service providers on ensuring that ‘the rights of women and trans people can be collectively realised’, there is no timetable for this work.
- 2.7 Without clarity on both the operation of the single-sex exemptions and the more general legal rights afforded by a GRC under the Equality Act 2010, it is not possible to assess how liberalising access to GRCs will affect the number and range of people born male who will be able to claim legal rights of access to single-sex provisions for women, and with what absolute limitations.

3. Lack of key definitions

- 3.1 The draft Bill hinges on the concept of ‘acquired gender’, however this is not defined, aside from a circular reference to ‘the gender in which a person is living’ (section 8C93). This means it is not possible for respondents to give an informed response to Q1.
- 3.2 While the 2004 Act does not define ‘acquired gender’, this is buttressed by the scrutiny role of the Gender Recognition Panel (GRP). The GRP requires applicants to submit a range of current documents showing a person living full-time in the “acquired gender”, including “typically five or six different documents ... including where relevant a passport, driving

¹⁰ Somerville, S.A. (4 March 2020) [Meeting of the Parliament: Portfolio Question Time](#)

¹¹ Bull, R. (2020) [Briefing Note: Impact of Gender Recognition Reform on Sex Based Rights](#)

¹² Ingala Smith, K. (20 January 2020) [The importance of women only spaces and services for women and girls who've been subjected to men's violence.](#)

licence, payslips or benefit documents, utility bills or other documents of an official nature which show social/official transition going back at least two years.¹³

- 3.3 The removal of the GRP assessment, as well as of the requirement for a diagnosis, means that GRC applications will in future rest wholly on a person's self-declared permanent commitment to a concept that has no definition in law.

4. Failure to explain clearly how the nature of the GRC holding population would change

- 4.1 The Government describes the proposals as though there would be no change to those eligible to apply for a GRC, but removes the requirement for a diagnosis of dysphoria and the need to satisfy a specialist panel that a person has been socially transitioned for at least two years, replacing these with a self-assessment of three months' social transition, followed by a three month "period of reflection". The draft Bill therefore opens the GRC process to a much wider group than is currently eligible. This includes: those with no diagnosis of gender dysphoria; those whose have only started to take steps to transition relatively recently; and those whose self-definition of what it means to "live in the acquired gender" may not meet the expectations of the GRP.
- 4.2 Davy (2015)¹⁴ specifically argues that tying transgender status to dysphoria is problematic because it links being transgender with a willingness or desire to conform to norms associated with the opposite sex. Similarly, Drummond (2012)¹⁵ argues that that "gender queering" means that conventional ideas of trying to "pass" should be rejected, to the extent that retaining clear physical indications of birth sex, such as a beard, should not be seen as incompatible with seeking recognition as a woman. Drummond sits on the Stonewall Trans Advisory Group¹⁶ and therefore should not be treated as a marginal voice.
- 4.3 Gender dysphoria has generally been understood as a condition which creates a strong tension between people's sense of self and their physical appearance. In passing the GRA in 2004 Parliament clearly understood it was putting in place legislation for a group who were expected to feel compelled by their condition to make considerable changes and for whom strong privacy protections were therefore necessary to conceal the fact of transition.
- 4.4 Removing the dysphoria criterion, and allowing applications based on a shorter and self-defined period of social transition, is very likely to lead to more GRCs being issued to individuals who identify as transgender but whose birth sex remains readily recognisable, (as Davy (2015) and Drummond (2012) argue should be normalised). It would be naïve to assume that this would not happen and the implications of opening the way to that change in the GRC holding population needs proper consideration.
- 4.5 There has already been one case reported in Denmark where an individual who had made absolutely no changes from appearing as a conventional male insisted on access to a women's changing areas, based on having acquired a GRC equivalent by self-declaration, arguing that it was wrong to impose any stereotypical assumptions about appearance on those moved to change their sex in law.¹⁷ Commenting on the Danish case in a paper that explores the unintended conflicts that can arise from gender self-declaration, Professor Halverson (Faculty of Law, University of Oslo) describes the evident problem (in translation):

¹³ HM Courts and Tribunal Service: [Guidance on Completing the Standard Application Form for a Gender Recognition Certificate](#)

¹⁴ Davy, Z. (2015) [The DSM-5 and the Politics of Diagnosing Transpeople](#)

¹⁵ Drummond, A. (2012) [Grrl Alex: A Personal Journey to a Transgender Identity](#)

¹⁶ [Stonewall Trans Advisory Group](#)

¹⁷ TV2 (6 May 2015) [Ibi-Pippi after gender change: That's why I don't want to look like a woman](#)

“An obvious problem is how the biological women in the changing room should be able to know that a person who looks to them like a man is a legal woman. After all, legal men (who look like biological men) have no right to stay there.” (Halvorsen, 2018).¹⁸

- 4.6 A recent Times article by transwoman India Willoughby illustrates how self-identification could affect the GRC-holding population. In the article, Willoughby, who is fully medically transitioned, describes a visit to HMP Stafford, an all-male prison housing sex offenders where five inmates self-identify as women. The analysis notes the incongruity between mainstream campaigning for self-declaration, based on de-medicalisation, and the demand for services by those ‘suffering from genuine gender dysphoria [who] are stuck on five-year waiting lists’, and shows how self-identification broaden the trans category to those have not sought to change their appearance:

“Before I leave Stafford, the guard takes me to meet Chelsea, the middle-aged, pony-tailed self-IDer I had been introduced to earlier. I ask whether she wants to undergo medical transition. She says no, she’s happy as she is. Chelsea is married with a wife and children.

“Don’t you want to dress or look like a woman?” I ask. “No,” replies Chelsea. “It’s not worth the hassle. I’m happy in men’s clothes. I’m not interested in passing as a woman.” (The Times, 15 March 2020)¹⁹

- 4.7 On the specific issue of the retention of male genitalia, although data are limited, it is commonly reported the large majority of those who identify as women will not have had genital surgery. Nolan et al (2019) estimate that in the US around only 5-13% of those identified as transwomen have had “bottom surgery”, with around half desiring this in the future²⁰. In 2018, NHS Scotland estimated that only around half of the transgender population might be interested in medical interventions of any sort.²¹
- 4.8 Surgery is not a current requirement for a GRC; however this position was taken in 2004 on the assumption that pre-operative applications would be relatively unusual (there does not appear to be any data on whether this has proved to be correct). We think it ought to be assumed that liberalising access to GRCs to affirm identity rather than to respond to the distress of dysphoria is likely to mean in practice an increase in the number and proportion of GRC holders who have not undertaken genital surgery and who may have no plans to do so.
- 4.9 The Scottish Government assumes a ten-fold increase in numbers, from around 30 to around 250 a year. It is implausible to predict such a large increase in these circumstances, but no change to the range of people taking up a GRC.
- 4.10 The consultation paper estimates the increase in numbers by looking at Ireland and Denmark, as two countries of similar size to Scotland which have introduced self-declaration. In its previous consultation it also included Norway in the comparison, where application rates have been much higher (706 applications in the first year of operation) (Scottish Government 2017: 309.8).²² The Government does not explain why it is no longer using Norway as a comparator.
- 4.11 GRC holders benefit from stringent privacy protections under Section 22 of the Act, which prevent their transgender status and previous identity from being sought or shared in many situations. These provisions were devised to protect the privacy of those whose transition would otherwise not be immediately obvious. The consultation paper notes in general

¹⁸ Halvorsen, M. (2019) [About the law on change of legal gender](#) Law and Justice vol. 57: 457-473

¹⁹ Times (15 March 2020) [India Willoughby: Sorry, prisoners: calling yourself a woman doesn’t make it so](#)

²⁰ Nolan et al (2011) [Demographic and temporal trends in transgender identities and gender confirming surgery](#)

²¹ NHS Scotland [National Gender Identity Clinical Network Scotland -Frequently Asked Questions](#)

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

terms that there may already be a need to clarify using secondary legislation powers the circumstances in which this provision does not apply. We agree this would be useful, and note that the Government need not wait for amendment to the primary legislation to do so. The consultation paper does not however discuss how far the s22 protections would remain equally relevant to all GRC holders with the changing size and nature of the GRC-holding population, and whether there is any risk that they would be brought into disrepute if applied to a broader range of cases.

5. Inadequate safeguards

- 5.1 The draft Bill introduces two much weaker safeguards in place of the current criteria which have to be shown to be satisfied: a legal requirement to have “lived in the acquired gender” for three months, and a criminal sanction for false declaration, which if proved would carry a criminal penalty of up to two years imprisonment. However, without a working definition of what it means to be ‘living in the acquired gender’, it is difficult to see what would constitute a false declaration related to that, or how this would be assessed by the courts.
- 5.2 The only examples Government has been able to give of how a false declaration would be proved rely on a person disclosing directly their original false intent or by a close relative or someone else reporting false intent, on grounds which are not clear.²³ The Government does not appear able to describe if there are ways in which a person could behave or present before or after applying for their GRC which would be seen as simply incompatible with an authentic intent. Asked about the interaction with cases of detransition, it has stated “*Whether or not an offence has been committed would depend on the applicant’s intention at the time of making the declaration*”.²⁴
- 5.3 The absence of a legal definition of “living in the acquired gender” is currently substituted for by the GRP’s ability to issue guidance on what evidence applicants should produce. Removing the GRP from the process means that this guidance ceases to be relevant. The current evidence requirements are already restricted to changes made to documents. However, these are at least examined in the context of a person also demonstrating evidence of a diagnosis and the changes having at least two year’s standing.
- 5.4 If the Government cannot identify any minimum aspects of what social transition involves to demonstrate authenticity, then it is incorrect to assert that obtaining a GRC “*will require the same level of commitment from the individual as the existing system does*”, as the consultation paper states. In contrast to now, as the proposals stand there will be nothing preventing a person who has undergone little or no change to how they present themselves, to their name or to their official documents, from obtaining a GRC, provided that they never disclose any false intent to anyone else.
- 5.5 The consultation paper does not discuss whether the privacy provisions in Section 22 might be attractive to anyone wishing to hide any form of difficult history, whether criminal or financial or otherwise, and so provide an incentive for self-declaration, particularly if proof of false declaration is hard to obtain, even where a person changes very little about how they live.

Removal of a scrutiny body without due diligence

- 5.6 Any proposal to remove a scrutiny body from a process, in this case the GRP, should be subject to due diligence. An FOI response²⁵ suggests that the Scottish Government have undertaken no such analysis to ascertain whether the panel performs a public interest role by deterring or screening out ill-intentioned applications, or those that would not be in the best interest of the applicant. This was also confirmed in a meeting we had with civil servants on 9 March 2020. At the time of the original Act, obtaining a GRC and changing legal sex were seen as substantial moves and the Panel and its processes viewed as a

²³ Response to PQ S5W-26957: Joan McAlpine, South Scotland, Scottish National Party 24 January 2020

²⁴ Letter to MBM Policy 21 February 2020

²⁵ Scottish Government Freedom of Information response (4 February 2020) Ref. 202000011327

way of preventing people from going through this process without having given it serious thought. The proposals reject that, with only the three month “reflection period” in its place.

Safeguards and prisons

- 5.7 The specific case of people in prison deserves attention here. Some male prisoners may be motivated simply by a wish simply to get a move out of the male estate, and not only by wishing to gain access to women. This is acknowledged in written evidence submitted by British Association of Gender Identity Specialists to the Transgender Equality Inquiry:

“...the ever-increasing tide of referrals of patients in prison serving long or indeterminate sentences for serious sexual offences [vastly] outnumber the number of prisoners incarcerated for more ordinary, non-sexual, offences. It has been rather naïvely suggested that nobody would seek to pretend transsexual status in prison if this were not actually the case. There are, to those of us who actually interview the prisoners, in fact very many reasons why people might pretend this. These vary from the opportunity to have trips out of prison through to a desire for a transfer to the female estate (to the same prison as a co-defendant) through to the idea that a parole board will perceive somebody who is female as being less dangerous through to a [false] belief that hormone treatment will actually render one less dangerous through to wanting a special or protected status within the prison system and even (in one very well evidenced case that a highly concerned Prison Governor brought particularly to my attention) a plethora of prison intelligence information suggesting that the driving force was a desire to make subsequent sexual offending very much easier, females being generally perceived as low risk in this regard.” (Barrett, 2015)²⁶

- 5.8 As long as prisoners do not disclose their motivation to anyone else, under the government’s plans it appears they would need at most only to ask for a change of name and document markers within the prison system and within six months would be able to obtain a GRC, which, despite Government assertions (see above), statute and case law at present would strongly suggest would leave the prison service no grounds to refuse to house them in a women’s prison if a woman prisoner with a similar profile would be so housed. Such a case has occurred in Ireland (discussed further below). They could return to their original name and using documents with their original sex markers on release, and it is not clear in what way they could be vulnerable to any sanction.

6. No provision for possible de-transition

- 6.1 The draft Bill contains no provision for those who wish to de-transition. This is particularly relevant to young people, who may be more likely to apply for a GRC. For example, following the introduction of gender self-declaration in Belgium in 2018, transmen aged 16 to 24 years accounted for nearly a third of all legal sex change registrations (30%).²⁷
- 6.2 When we met with Scottish Government officials, it was asserted that cases of transition are rare. We would note that no systematic data is collected, and that even if such cases are rare the absence of any provision in the current GRA is a short-coming and the opportunity should have been taken to correct this. Officials noted that there is specific provision in the Irish legislation that the Scottish draft does not copy: we are not clear why that is the case. We are also concerned that the Scottish Government has not considered the interaction between false declaration and de-transition, both as it may actually occur and as it may be perceived.

²⁶ Dr James Barrett (20 August 2015) [Written evidence submitted by British Association of Gender Identity Specialists to the Transgender Equality Inquiry](#)

²⁷ MurrayBlackburnMackenzie (2 February 2020) [Gender recognition reform in Belgium: Lessons for Scotland](#)

7. Too little consideration of the risks of lowering the minimum age

- 7.1 The significance of permanently changing legal sex cannot be underestimated and is not comparable to other rights acquired at 16 years (for example, voting in Scottish election or even marriage, which does not require a permanent commitment in law and the divorce process is clear). Recent research from the University of Edinburgh found that the brain continues to develop well into adulthood and does not reach maturity until about 25 to 30 years of age.
- 7.2 In England, Wales and Scotland, referrals to Gender Identity services have increased sharply in recent years, particularly among natal girls (Telegraph 2018,²⁸ Times 2019²⁹). Between 2014 and 2017 the most frequent age of referral (mode) to the Sandyford Clinic in Glasgow was 16 years (Thompson et al. 2018: 46).³⁰
- 7.3 Medical practitioners have expressed concern that removing medical gatekeeping and affirming gender identity may likely lead to more medicalisation. Note also that the use of puberty blockers for under 18s is currently subject to a Judicial Review in England. Referring to the general trans population (rather than young people specifically), Byng et al. state:
- “De-pathologising’ of trans people by removing medical ‘gatekeeping’ will likely lead to more medicalisation; more people will continue on to request and undergo medical and surgical interventions as a result. A proportion of these will not benefit, some will regret and some will detransition”*
- “self-identification could lead to a neglect of the proper, formal exploration of the wider reasons a person may want to transition; these are often unconscious and need time to emerge.” (Byng et al. 2018)³¹*
- 7.4 We note that in considering the possible lowering of the age for a GRC from 18 to 16, the Irish Government still intends that this group should be subject to certain further safeguards, including parental consent, “a simple revocation process”, voluntary access to family mediation support and measures to “to bring greater clarity to the fact that legal gender recognition is separate and distinct from any question of medical intervention”.³²

8. Underscoping of potential UK-wide effects

- 8.1 When legislating for the 2004 Act, the Scottish Government stated that it supported a UK-wide Bill to avoid cross-border anomalies:
- “The Executive has supported a UK bill from the outset, because that method offers early compliance with the European convention on human rights. It will integrate the devolved and reserved policies that are affected by legal recognition and it will avoid cross-border anomalies.” (Henry, SP OR 28 January 2004)³³*
- 8.2 The UK Government has put its own plans for reform on hold, which introduces such an anomaly.
- 8.3 The Scottish Government proposals mean that Scottish residents granted a GRC using self-declaration will have the same rights when visiting other parts of the UK as any other

²⁸ Telegraph (16 September 2018) [Minister orders inquiry into 4,000 per cent rise in children wanting to change sex.](#)

²⁹ Times (28 December 2019) [Sharp rise in child cases at gender clinic](#)

³⁰ Thomson, R., Baker, J. and Arnot, J. (2018) [Scottish Public Health Network \(ScotPHN\) Health Care Needs Assessment of Gender Identity Services](#)

³¹ Byng, R., Bewley, S., Clifford, D., and McCartney, M. (2018) [Cteea/S5/18/Cb/26 Culture, Tourism, Europe and External Affairs Committee Census \(Amendment\) \(Scotland\) Bill.](#)

³² [Minister Doherty Publishes her Report on the Review of the Gender Recognition Act 29 November 2019.](#)

³³ Deputy Minister for Justice Hugh Henry [Scottish Parliament Official Report: Justice Committee 28 January 2004](#)

GRC holders. People born in Scotland and living in other parts of the UK could obtain a GRC by self-declaration. People could also qualify by moving to Scotland for a relatively short period (MBM 2019).³⁴

- 8.4 If statutory declarations made in other parts of the UK are acceptable for the Scottish GRC process, a specific immediate issue arises in relation to prisoners in England and Wales, regardless of the Scottish Government's understanding of the law, given that MoJ policy already recognises that GRC holders have greater rights to be considered for transfer. Based on 2011 census data and prison population data, it is estimated to be likely that there are around 1,000 Scottish-born prisoners in England and Wales.³⁵

9. Over-reliance on assertions of 'International Best Practice'

- 9.1 Between 2014 and 2019 eight European countries adopted versions of laws based on self-declaration. The expansion of gender self-identification laws in Europe is cited as a reason for reform, however no evidence is presented on how the law operates in other jurisdictions.
- 9.2 A report prepared by law firm Dentons (2019)³⁶ identifies strategies used by campaigners to help secure reform in other countries. These include intervening early in the legislative process to shape the Government agenda, tying campaigns to more popular policies that enable reform - in the report's words, to operate 'below the radar' - citing equal marriage legislation in Norway, Denmark and Ireland, and de-medicalising campaigns. Campaigners are also advised to avoid media coverage, which is attributed to the stalling of reform in the UK.
- 9.3 Indicative of such an approach, in Denmark a closed consultation took place, which elicited nine responses (we were unable to find evidence of a public consultation).³⁷ In Ireland a pre-legislative public consultation in 2010 secured 40 responses (2011; 13),³⁸ while the 2014 Maltese public consultation received 26 responses.³⁹ In Denmark, the first European country to introduce gender self-declaration, the Bill passed through Parliament in just 43 days,⁴⁰ prompting some members to express disquiet at the legislative pace.⁴¹
- 9.4 In Norway, the gender recognition Bill was introduced in March 2015 and passed in June 2015. Halvorsen (University of Oslo) observes that legislators failed to fully consider the possible problems and conflicts arising from the legislation. Critiquing the lack of guidelines on how the law should be applied in potential areas of conflict, Halvorsen states that "*in cases where both parties feel that their personal integrity is being violated, it would have been appropriate if such issues had been reflected in the preparatory work*" (2018).⁴² Potential areas of conflict discussed by Halvorsen include access to toilets and changing rooms, prisons, hospital wards, archived records, gender quotas (including those used to access some educational programmes) and sport.
- 9.5 In Ireland, the Gender Recognition Bill passed in seven months, with an amendment to remove the medical evidence requirement accepted in the final weeks, thereby limiting the time available for scrutiny. The practical implications of the amended Bill are now surfacing, with the placement of a sex offender with a GRC in a female prison. In 2019 Chair of the

³⁴ MurrayBlackburnMackenzie (9 February 2019) [Scottish GRA reform proposals: UK-wide effects](#)

³⁵ Information provided by Fair Play for Women.

³⁶ Dentons (2019) [Only Adults? Good Practices in Legal Gender Recognition for Youth](#)

³⁷ L 182. Annex 1 [Consultation note and response from the Minister of Finance and the Interior](#) (2014)

³⁸ Gender Recognition Advisory Group (2011) Report of the Gender Recognition Advisory Group.

³⁹ Government of Malta (2015) [Gender Identity, Gender Expression & Sex Characteristics Act: Submissions](#).

⁴⁰ Folketinget (2014) L 182 [Proposal for a law amending the Central Person Register Act. Time schedule](#)

⁴¹ Folketinget Equality Committee (2014) [Report by the Equality Committee on 28 May 2014](#).

⁴² Halvorsen, M. (2019) [About the law on change of legal gender](#) Law and Justice vol. 57: 457-473

Law Society Criminal Law Committee Robert Purcell stated the law had not envisaged such a situation.⁴³

9.6 A review of the Gender Recognition Act 2015, which reported in June 2018, did not consider whether there was any evidence of impacts on women, or whether any additional evidence gathering or monitoring of those was desirable. It highlighted that some submissions to it “*related to issues that are outside the scope of the Act and therefore of the review. These include... fears of violence against women*”.⁴⁴ There is no evidence of the review engaging with women’s groups.⁴⁵

9.7 The consultation suggests that the absence of evidence of any problems in those jurisdictions which have introduced self-declaration demonstrates that there are no issues legislators should be concerned about. We discuss the issue of evidence from other jurisdictions in more detail below (see paragraph 10.22 onward). In sum, our analysis suggests that the Scottish Government has failed to take account of how relatively recently introduced such self-declaration regimes are, relies complacently and mistakenly on absence of evidence being evidence of absence, and ignores where there is emerging evidence of unwanted consequences.

Yogyakarta Principles and Resolution 2048

9.8 The consultation draws on the Yogyakarta Principles (YP) and Resolution 2048 of the Parliamentary Assembly of the Council of Europe in its appeal to international principles. Both instruments assert the existence of an inner gender identity that takes precedence over sex, while neither discusses the policy implications for any other protected characteristics.

9.9 CoE Resolution 2048 is symbolic in status and creates no obligations on member states. The YP have not been adopted in any treaty, create no obligations on governments, nor have been relied on in any rulings in this area by the European Court of Human Rights.

9.10 Campaigners have nonetheless used these soft law instruments to secure normative change. A paper by Thoreson describes how “within a matter of two years, the Principles [were] widely cited by state and non-state actors alike, despite the fact that they were formulated privately by a cadre of experts and not by any official or quasi-representative body” - which Thoreson ascribes in part to the “strategic, inventive ways that activists have framed and deployed them from multiple points of entry in the global system” (2009; 326, 324).⁴⁶

10. Poorly evidenced assessment of impacts on women

10.1 The draft EQIA for sex fails to understand and also misrepresents the potential negative impacts on women of the proposals. The government appears to believe that simply because GRCs are already available to a much smaller and more tightly defined group, and the Equality Act is not being amended, its proposal to liberalise access to GRCs cannot have any new impacts. We think this is not a defensible position.

10.2 For contexts where self-declaration has been introduced, the Scottish Government takes absence of evidence at face value to mean evidence of absence. It does not acknowledge that in almost all settings data is not gathered in a way which would allow the issues it raises to be examined (for example, police recording practices).

10.3 The draft EQIA fails to recognise that a large amount of the academic literature has been produced from within a school of thought which supports self-declaration in principle, while

⁴³ Law Society Gazette Ireland (18 Oct 2019) [Male-bodied transgender inmate housed with women](#)

⁴⁴ [Review of the Gender Recognition Act 2015](#) June 2018

⁴⁵ MurrayBalckburnMackenzie (25 February 2020) [From medical assessment to affirmation: legal gender self-declaration in Ireland](#)

⁴⁶ Thoreson, R.R. (2009) Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name, *Journal of Human Rights*, 8(4) 323-339

the resources and opportunity for researchers to obtain funding for and publish work from other perspectives have been more limited. It does not acknowledge or discuss how this may affect the available evidence base and specifically relies substantially and uncritically in the draft EQIA on secondary assessment and analysis of the evidence from authors who clearly come from a theoretical perspective strongly disposed to support its position.

Failure to explore potential impacts

10.4 Specifically, the draft EQIA fails to explore the potential impacts below, which flow from two key assumptions that the Government has so far been reluctant to acknowledge, but we regard as the most plausible interpretation of the combined effect of current law and of the proposals. These are: (a) that **a GRC enhances a person's legal rights of access to single sex provision** and (b) that liberalising access to GRCs will mean **an increase not only in the number but also in the range of people who have one**, both with and without authentic intent to transition. In that case, the proposals will mean the following:

- That **a larger and more diverse group of people born male will acquire new legal rights via a GRC to access spaces and services designated for women**, and will feel more confident seeking that access. They will also be covered by the stringent privacy protections in law for GRC holders. Compared to now, more of the GRC holding group are more likely to be readily recognisable as having been born male, and to have done less to alter their presentation.
- **Reduced discretion for providers (such as the prison service) over whether to refuse admission to a person born male to services for women**, once that person has a GRC, meaning that experience based on current voluntary schemes of self-declaration are a limited guide to the effect of liberalising access to GRCs.
- A further group of **people born male who identify as women who have not yet applied or may never apply for a GRC, but who will now feel more confident seeking access to women's spaces** on the grounds they believe they would be entitled to a GRC if they took the necessary action, and will therefore argue that it is illogical to keep them out.
- As a result, **a substantial breaking down of the social conventions by which recognisably male people have historically expected to face some challenge on entering women's services and spaces**, whether these conventions are purely socially managed or have some limited official gatekeeping, as people become reluctant to challenge someone who may say they have a GRC or who may act assertively about their more general entitlement to be present. There is already evidence of how vulnerable to breakdown these conventions are, ahead of legal change. The Glasgow Evening Times recently reported that two men who do not identify as transgender complained to the management of a large department store, after women objected to their using the changing area designated for bra fitting: they said that they would have found comments they overheard upsetting, had they been transgender. The store reportedly apologised to them (13 March 2020).⁴⁷ Any historic low-key presence of a small number of substantially transitioned transwomen in some settings provides little precedent for this.⁴⁸
- With the wider availability of GRCs, **increased practical difficulties in using the single sex exemptions**. Once a person has changed their birth certificate there is no way for an organisation to separate those who are and are not born female, as there is no documentary difference, and they may feel worried about their right to ask if a person holds

⁴⁷ [Couple's shock over treatment in Glasgow M&S store changing room](#), Glasgow Evening Times 13 March 2020.

⁴⁸ The only evidence the Scottish Government appears to hold about the extent of access by transwomen to women-only services and spaces at present is some general comments by umbrella bodies for providers of services for violence against women and campaigners for self-declaration: [Fol response dated 3 March 2020](#).

a GRC, even when they strongly suspect this is so.⁴⁹ It is also not an offence for a person to make a misleading statement about their own GRC status.

- 10.5 Taking into account that it is well-evidenced that men pose a much higher risk to women than other women,⁵⁰ and that many women have had negative experiences with men in public and private spaces, we think the following negative impacts on women should be expected.
- **An increase in how often women are accurately aware of evidently male-born people being present in spaces reserved for women**, with negative implications for their sense of dignity, privacy and safety.
 - **An increase in the number of occasions where male-born people accessing women's spaces physically harm women, intimidate or humiliate them, act voyeuristically or generally act in ways which make them feel uncomfortable.** This might be by someone purposefully abusing either the GRC process or the general breakdown in social conventions round these spaces, making admission to them easier. However it might also be because there is no evidence (see below) on which to base an assumption that offending patterns in the male-born population vary by identity. This is not to make the claim that transwomen are a specifically high-risk demographic (as the argument is often misrepresented), only that as a group their offending patterns appear from any available evidence more likely to resemble those of people born male than people born female. The sole counter argument to this appears to be the assertion of the belief that transwomen, however defined, are women.
 - Regardless of the single sex exemptions in the Equality Act, the enshrining in law of male/female status as an issue of self-declared identity will exacerbate an environment in which providers are already under pressure not to use these exemptions. This risks the further erosion of the availability of spaces or roles where, when needed, women can be absolutely confident that there are no male born people present, whether it be for reasons of privacy, dignity or safety.
 - As a result, **an increase in the number of women and girls self-excluding from contexts where they previously felt relatively safe and otherwise no threat to their privacy or dignity** and therefore a greater restriction on women's access to range of day-to-day and specialist activities and services normally differentiated by sex.
 - There is also emerging evidence that public bodies are responding to rising numbers of individuals declaring transgender identities by removing sex-separated provision entirely, whether for reasons of cost or fear of legal challenge. Given evidence (see below) that such spaces carry more risk for women when vulnerable, the government and legislators need to consider how **liberalising access to GRCs might add to pressure for getting rid of sex-separated spaces altogether.** As noted by Rebecca Bull, women are already at a legal disadvantage in objecting to this, as they have to pursue claims based on indirect discrimination in the absence of single sex provision, whereas those with a GRC will have the protected characteristic of gender reassignment and so can threaten to bring direct discrimination cases where they feel they are unfairly excluded.

⁴⁹ This is already accepted as a difficulty by the Commons Select Committee on Women and Equalities [in a report dated 30 July 2019](#). The issue here is not that these difficulties would be entirely new but that the liberalising of access to GRCs would make them worse.

⁵⁰ We have observed recent attempts on social media to popularise arguments challenging this understanding, which is well-evidenced from criminal justice statistics and survey data. and widely accepted across public policy. These arguments appear to be based on no new evidence and sometimes specifically and reprehensibly, arguing that "other" lesbians pose a risk to other women, based solely on their sexual orientation. We would strongly urge government to reject any arguments denying that men as a group present a particular risk to women.

Narrow framing of key concerns

- 10.6 The draft EQIA does not recognise the substantial set of risks outlined above. Instead it frames the perceived concerns around the proposals in several problematic and overly limited ways, as described below:
- It suggests that there are concerns about the general rate of offending across all people who identify as transgender, compared to those who do not. This fails to recognise that this is not a general belief or relevant concern here, and that the concern relates to the risks associated with males as a sex-class, however they identify;
 - It raises that there is no literature on the likely rates of sexual assault by transwomen compared to women in women-only spaces. This frames the evidence requirement so narrowly that it cannot be met, given that no-one anywhere seems to record the relevant data. In doing so, it excludes the broader clearly relevant findings on comparable offending patterns (Dhejne et al. 2011) and other more proxy sources discussed below.
 - It wrongly suggests that concern about potential assault characterises transwomen as being “*deviant or predatory*”, rather than simply starting from a position that there is no evidence that as a general group their offending patterns should be assumed to be statistically different from those of other people born male.
 - It argues that there is a concern that “non trans men” will falsely claim a trans identity to access women’s space and commit sexual violence, for which it says there is no evidence. This is already a disputable statement. However, again this frames the problem narrowly in an already data-light environment. It assumes that in the known cases where people presenting as transwomen have acted abusively in women’s spaces we can distinguish clearly between cases where the identity claim is false and where it is not. However self-declaration precludes any such judgement, as long as the person concerned does not confess to being dishonest. This framing also excludes from interest all negative effects, other than direct experience of sexual violence, of allowing male people into women only spaces discussed above.

Omission of relevant evidence

- 10.7 The draft EQIA fails to identify relevant research on the risk of offending in female-only spaces or to consider the risks of self-exclusion. Males have much higher levels of violent and sexual offending, including against women. However, on the basis of partial evidence, the EQIA effectively concludes that this does not apply to a particular subset of males simply because they describe themselves as having a particular identity.
- 10.8 A FOI response shows that when preparing the draft EQIA officials used a narrow set of search terms in its literature search,⁵¹ notably the search did not include references to terms such as ‘offending’, ‘safety’ or ‘privacy’. The FOI also notes that a decision was taken not to publish the literature review, as the evidence located in the literature search did not answer the question as to whether there is a legitimate basis on which transwomen might be excluded from female single-sex spaces. Internal minuting released also includes the observation that some comments from one source heavily relied on the draft EQIA “*are really policy arguments rather than evidence*”.⁵²
- 10.9 The draft EQIA does not acknowledge relevant high-profile convictions for sexual offending by transwomen. A parliamentary question also appears to have put such evidence beyond discussion. When asked by MSP Joan McAlpine “*whether ministers are aware of the conviction of Katie Dolatowski⁵³ and Karen White⁵⁴ and their relevance to the consultation, Cabinet Secretary Shirley-Anne Somerville stated that “It would not be appropriate for the*

⁵¹ Scottish Government Freedom of Information [ref. FOI/202000011201](#) (31 Jan 2020). See: [Document 3](#).

⁵² See note **Error! Bookmark not defined.** [Document 1](#).

⁵³ [Courier](#) (1 February 2019) [Mum of supermarket toilet sex assault victim warns freed attacker could strike again](#)

⁵⁴ [BBC](#) (11 October 2018) [Trans inmate jailed for Wakefield prison sex offences](#)

Scottish Government to comment on individual case".⁵⁵ We are concerned that the Scottish Government may be rejecting any individual cases as relevant to its analysis, in a context where official decisions in many jurisdictions including Scotland to conflate sex and self-declared identity in the justice system mean that there are very few possible sources for anonymised statistical data.

- 10.10 The EQIA cites a paper by Gottschalk (2009)⁵⁶ to support the assertion that there is little evidence to justify applying a blanket exclusion, and therefore having a service or role limited to one biological sex. However, Gottschalk argues for *retaining* single-sex spaces, concluding that "*Trans-inclusion then is one of the greatest threats faced by women*". Additional relevant sources are detailed below.

Cohort evidence on long-term offending

- 10.11 This Swedish cohort study by Dhejne et al. (2011)⁵⁷ followed the whole identifiable population of individuals who had undergone both surgical and legal sex reassignment between 1973 and 2003 (324 in total) and compared them to a control group drawn from the remaining population, matched on a number of relevant characteristics. Among other things, it compared the likelihood of a person having one or more criminal convictions in general, and convictions for violent crime in particular, after transition. Violent crime was defined as "*homicide and attempted homicide, aggravated assault and assault, robbery, threatening behaviour, harassment, arson, or any sexual offense*". The researchers state: "*male-to-females ... retained a male pattern regarding criminality. The same was true regarding violent crime.*" The full results for conviction data are shown at Appendix 2.
- 10.12 The study was not included in the Government's Literature Review for the EQIA as related to sex. Some on-line discussion of this piece outside the academic literature describes its findings on offending as discredited: this appears to be based solely on brief statements made by the lead author in an interview some years later about how the data had been interpreted.⁵⁸ From our discussions with officials, we are concerned that the Scottish Government appears to have taken the online discussion of these comments at face value. To the extent the author disputes that the data shows "male pattern" offending among M-to-F transitioners, her interview answers cannot be reconciled with the published data (see again Appendix 2) and provide no basis to reject the published findings on offending rates.
- 10.13 The researchers reported that levels of violent crime are comparable in Sweden to other EU nations. The main relevant difference for the purposes of the Scottish Government proposals is that the group examined were those who committed to surgery as well as legal change, and so were more tightly defined than a population based solely on self-declaration. The study provides strong evidence that policy makers cannot safely assume (a) that transwomen's offending patterns, including violent offending, will be significantly different than those of the general male population or (b) that they will be similar to those of the general female population.
- 10.14 We have so far been unable to find any academic rebuttal of these specific findings, or any equivalent study which shows the opposite effect to Dhejne et al's results: none is cited in the Literature Review. The published article therefore remains a source the Government should treat as relevant, being an apparently unique, methodologically robust, peer-reviewed, large scale comparative source on offending rates.

⁵⁵ [Question S5W-26954](#) Joan McAlpine. Lodged: 16/01/2020

⁵⁶ 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

⁵⁷ Dhejne C, Lichtenstein P, Boman M, Johansson ALV, Långström N, Landén M (2011) [Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden](#). PLoS ONE 6(2): e16885.

⁵⁸ Transadvocate (online) [Fact check: study shows transition makes trans people suicidal](#)

Prison population evidence

- 10.15 The proportion of men to women in the Scottish prison estate is around 20:1. If imprisonment rates in the transgender population followed identity rather than sex, a similar ratio would be expected of transmen to transwomen (or even higher, as transmen appear to be on average younger and the prison population is also younger than average). However, there is instead currently one transman to ten transwomen, and earlier releases of information show transwomen substantially outnumbering transmen in Scottish prisons.⁵⁹ There appear likely to be specific issues affecting the incidence of transgender identities in the prison system, such as greater economic vulnerability in the trans population and incentives to seek moves out of the male estate. However, these figures at minimum lend no support to the argument that for trans people rates of serious offending are predicted by identity better than by sex at birth: they are more consistent with Dhejne et al's (2011) findings.
- 10.16 Similarly, in 2019 HM Chief Inspector of Prisons for England and Wales reported that the Ministry of Justice reported that '2% of prisoners in adult male prisons identified themselves as transgender or transsexual' (2019: 31)⁶⁰, an incidence higher than the most commonly assumed 1% of transgender identities in the general population. Osbourne and Lawrence (2016) found that the prevalence to male-to-female (MtF) transsexualism among male prison inmates in the US appeared significantly higher than the estimated prevalence among the general population in Western countries. Estimates among male inmates ranged from around 1 in 350 to 1 in 500, compared to estimates of between 1 in 10,000 and 1 in 12,000 in the general population.⁶¹ Again, even allowing for some potential specific issues affecting offending and prisons, these figures again offer no support for the assumption that transwomen have a much lower offending rate than the general male population.
- 10.17 The impact of placing trans prisoners in the female prison estate has been highlighted in the media by former Scottish prison governor Rhona Hotchkiss. Hotchkiss criticises the existing Scottish Prison Service policy, which is based on self-identification, and argues that GRA reform would expose female inmates to a higher risk of physical or sexual assault from transgender women, as well as undermine female inmates' privacy. In a BBC interview, Hotchkiss stated that that in her experience, it is "*always an issue to have trans women in with female prisoners*" and that "*the very fact of the presence of a male-bodied person in among vulnerable women causes them distress and consternation*".⁶²

Offending in mixed sex/gender neutral facilities

- 10.18 In 2018 the Sunday Times⁶³ reported that almost 90% of reported sexual assaults, harassment and voyeurism in swimming pool and sports-centre changing rooms occur in unisex facilities. The investigation, based on Freedom of Information requests to councils in England and Wales, found that out of 134 complaints, 120 took place in unisex facilities. From this the evidence would suggest that making access to spaces where women undress easier for obvious males increases the risks to women: there is no reason to suppose this effect will be restricted to fully mixed sex facilities and will not also apply to those still badged as single sex but made more mixed sex in practice.

⁵⁹ Date taken from a series of parliamentary answers in January 2020, analysed [here](#).

⁶⁰ HM Chief Inspector of Prisons for England and Wales (2019) [Annual Report 2018-19](#).

⁶¹ Osbourne, C. and Lawrence, A. (2016) [Male Prison Inmates with Gender Dysphoria: When Is Sex Reassignment Surgery Appropriate?](#) *Arch Sex Behav* **45**, 1649–1663

⁶² BBC Scotland news (10 February 2020) [Ex prison chief expresses concern about trans women in female jails](#)

⁶³ Sunday Times (2 September 2018) [Unisex changing rooms put women in danger](#)

Gender reassignment: characteristics of referrals

- 10.19 An evaluation by Saunders and Bass (2011)⁶⁴ of the characteristics of 54 individuals in Oxfordshire seeking gender reassignment surgery (70% male, 30% female) reported that “*paedophilia was a rare but concerning finding*” and that among this small group (n=2, 4%), gender reassignment surgery was viewed as a means by which to increase their intimate contact with children, which they viewed to be more socially acceptable in a female role’ (Saunders and Bass, 2011; 1). We suggest this is taken seriously as evidence that there are likely to be individuals who will be attracted to using a pure self-declaration system, or simply the greater breakdown in existing conventions likely to accompany it, to increase their ability to access spaces where women and children (who are somewhat more likely to be in such spaces with mothers) are vulnerable.

Women and Girls Scotland survey (2019)

- 10.20 A survey undertaken by campaign group Women and Girls Scotland⁶⁵ based on a UK-wide self-selected sample of 2,000 women, found 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.

Fair Play for Women report (2018)

- 10.21 This report⁶⁶ found that some professionals working in 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, and that this called into question how reliable evidence from VAW umbrella bodies of there being no concerns about the impact of self-identification policies on these services. While this report was identified in the Scottish Government literature review, it was not included in the draft EQIA.⁶⁷

Evidence from other jurisdictions

- 10.22 As noted in part nine, alignment with ‘international best practice’ is cited as part of the rationale for reform. However, there is a marked lack of systematic evidence from other jurisdictions to support this, including evidence on self-exclusion. It is also difficult comparing across jurisdictions, given differences in legal frameworks. The Cabinet Secretary noted in a PQ response on 24 January 2020 that “*The review of current evidence we carried out when preparing the draft Equality Impact Assessment did not find any relevant research from these jurisdictions in relation to [statements about impacts on women]*”⁶⁸.
- 10.23 The expansion of gender self-declaration laws in Europe is relatively recent, albeit rapid. Following the introduction of self-declaration in Denmark in 2014, a further seven European countries passed versions of such laws. In its submission to the 2017 consultation the Faculty of Advocates stated “*changes to the regime in Ireland were only made in 2015. We are also conscious that self-identification laws in the other jurisdictions referred to are all relatively new and their operation in practice may not yet be easily assessed*”.⁶⁹

⁶⁴ Saunders, K. and Bass, C. (2011) [Gender reassignment: 5 years of referrals in Oxfordshire](#). The Psychiatrist 35: 325-327.

⁶⁵ Women and Girls in Scotland (3 June 2019) [Female Only Provision: A Women and Girls in Scotland Report](#)

⁶⁶ Fair Play for Women (2018) [Supporting Women in Domestic and Sexual Violence Services. Giving a voice to silenced women: evidence from professionals and survivors](#)

⁶⁷ Fair Play for Women (13 March 2020) [Why did evidence of women’s concerns get missed off the Scottish Government’s impact assessment for the Gender Recognition Reform Bill?](#)

⁶⁸ Response to Joan McAlpine MSP [Question S5W-26950](#)

⁶⁹ Faculty of Advocates (28 February 2018) [Response from the Faculty of Advocates to the Review of the Gender Recognition Act 2004](#).

- 10.24 Problems in other jurisdictions are now coming to light, which in both Denmark and Ireland have been attributed to legislative processes that failed to fully unpack and address the underlying conflict between rights based on gender identity, and rights based on sex. These include the placement of a transwoman convicting of sexual offending in a female prison in Ireland (see paragraph 9.5).
- 10.25 In Canada, the impact of legal self-identification is well documented, principally in relation to the court cases brought about by a transwoman under the British Columbia Human Rights Code, who was refused a Brazilian wax services by female beauticians.⁷⁰
- 10.26 In another Canadian case, two residents in a homeless shelter for women raised their concerns about sharing sleeping accommodation with transwomen who remained clearly identifiably male.⁷¹ In a statement to the media, the organisation running the shelter stated that *“It is against the law to discriminate against transgender individuals. NOW Canada and other shelters in Kelowna welcome people without regard to age, race, religion and gender identity”*. The organisation also noted that its shelters did not have enough space to allow transgender clients to have their own room.
- 10.27 As noted above, in Denmark a transwoman who had made no physical changes to appearance attempted to use female changing rooms at a local swimming pool, prompting a group of women to complain about her presence. This gained national media attention, with discussion focusing on the legal rights of access conferred by self-identification.⁷²
- 10.28 As noted above there is concern in Norway that the government did not assess potential impacts prior to enacting self-declaration legislation and that more attention is now needed to evaluate the impact, especially on vulnerable women.
- 10.29 A substantial number of reports are emerging from parts of the US and Canada of individuals with records of violent and sexual crime seeking successfully to be placed in women’s prisons using gender self-declaration systems, and causing harm to women inmates. We think the Scottish Government needs to familiarise itself with such cases and be absolutely satisfied that its proposals will not leave prison authorities with cases where it unable to refuse transfers in such cases.
- 10.30 Ireland, most often quoted by the Scottish Government, appears to have undertaken no prior impact assessment for women, and put in place no systematic monitoring or evaluation systems. As noted above, a prison case which appears to have been unanticipated has arisen in Ireland.
- 10.31 As a general point we note that the self-exclusion of women from activities and places they would previously have used is very difficult to measure, and we are not aware of any examples where there has been any attempt by governments or academics to gauge how far this is an effect of introducing self-declaration. Similarly it is difficult to measure how far women’s levels of discomfort or distress in particular settings have increased with the introduction of such policies and we are not aware of any jurisdiction where an attempt has been made to monitor this.
- 10.32 Some of the academic literature on which the Scottish Government relies most heavily in the draft EQIA dismisses women’s experience of discomfort or distress around any male people in certain situations as analogous to prejudice based on race (for example, Eckes (2015)). We believe the Scottish Government now needs to make clear that it rejects that analogy as false and offensive⁷³.

⁷⁰ Telegraph (23 October 2019) [Canadian transgender woman loses case against beauticians who refused Brazilian wax](#)

⁷¹ Global News (9 March 2017) [Concerns over transgender client at Okanagan shelter](#)

⁷² TV2 (6 May 2015) [Ibi-Pippi after gender change: That's why I don't want to look like a woman](#)

⁷³ At least one public body in Scotland has also embedded this comparison in its policies, which is now being reviewed: see [Staff guidance on trans patients in women’s wards is under review](#) The Times 5 March 2020.

Public opinion

- 10.33 The unpublished Literature Review refers to the 2016 British Social Attitudes (BSA) Survey finding that 72% of women were 'very' or 'quite' comfortable with a trans woman using a women's toilet. We assume these findings may be influencing the Scottish Government's position. The definition of a transgender person used with participants was broad and included, though was not limited to, those who had undergone surgery.
- 10.34 We note there is only one piece of polling undertaken of which we are aware which explicitly sought views about pre-operative transwomen (the questions asked about "*a person born male and who has male genitalia but who identifies as a woman*"), conducted by Populus in 2018.⁷⁴ Asked about this group having access to female-only changing rooms where women and girls are undressing or showering, 55% of women (76% of those expressing a view) thought such a person not be allowed access to such spaces. Looking by age, even among the youngest group (18-24) the majority of those expressing a view (55%; 33% of the total sample) did not agree with allowing access to such spaces in such cases; an absolute majority of respondents took this view in every age group 35 or higher. In Scotland, 52% of respondents (73% of those expressing a view) took this position.
- 10.35 We believe that the BSA polling will not be a reliable guide to women's levels of concern over sharing spaces where they feel particularly vulnerable with transwomen, particularly those who have not undergone genital surgery, or who remain generally visibly male, and the Scottish Government should not rely on it for that purpose.

⁷⁴ Available on the [Fair Play for Women site](#)

Appendix 1.

MurrayBlackburnMackenzie responses to consultation by question number

- 1. Do you have any comments on the proposal that applicants must live in their acquired gender for at least 3 months before applying for a GRC?**

As explained in part 1 (lack of legal clarity) and part 2 (lack of clarity on the operation of the single-sex exemptions), without further clarity from the Scottish Government, it is not possible to answer this question. See also part 3, on the lack of key definitions, including 'acquired gender'.

- 2. Do you have any comments on the proposal that applicants must go through a period of reflection for at least 3 months before obtaining a GRC?**

See above.

- 3. Should the minimum age at which a person can apply for legal gender recognition be reduced from 18 to 16?**

No. See part 6 (No provision for possible de-transition) and part 7 (Too little consideration of the risk of lowering the minimum age).

- 4. Do you have any other comments on the provisions of the draft Bill?**

Yes. See introduction and parts 1 to 9.

- 5. Do you have any comments on the draft Impact Assessments?**

Yes. See part 10 (Poorly evidence impact of assessments on women).

Appendix 2. Dhejne et al. (2011)⁷⁵ data tables and analysis of later comments

The relevant findings from this study, which compares the likelihoods of events occurring by direction of transition (MtF or FtM) with (a) people with the same sex at birth who have not transitioned and (b) people with the same “final sex”, who have not transitioned, are shown in Tables S1 and S2 below.

Reading the numbers

The ‘hazard ratio’ measures how likely something is to be found in the trans group, compared to the comparator group. The ‘adjusted hazard ratio’ is intended to control for differences between the groups that might be due to other factors: different histories of ‘severe psychiatric morbidity’ and immigrant status. The crude and adjusted sets of results are, however, similar.

A score of 1 would mean that the incidence is lower in the transitioned group than the comparator group. A lower score <1 means it is less common; a score >1 means it is more common.

The bracketed figures are the confidence intervals: these are also important. These indicate the range within which the ‘true’ result can be predicted to lie with 95% confidence. This allows for the possibility that a different sample of comparator non-trans people might give a different result. The confidence interval is very wide in some cases, where the event being examined is rare in all groups (such as violent offending). Where the confidence interval has a range which includes the value of 1, the difference between the two groups is deemed not to be “statistically significant”: that is, it could just have occurred by chance.

Results

MtF transitioners were:

- 6.6 (CI 4.1-10.8) times more likely to be convicted of an offence than female comparators (Table S2).
- 18.1 (CI 5.4-61.2) times more likely to be convicted of a violent offence than female comparators (Table S2).
- 0.8 (CI 0.5-1.2) times more likely to be convicted of an offence than male comparators (Table S1).
- 0.8 (CI 0.3-2.1) times more likely to be convicted of a violent offence than male comparators (Table S1).

The MtF group therefore had a statistically significant and substantially higher conviction rate than people born female who had not transitioned, particularly for violent crimes. The group had no statistically significant differences from male people who had not transitioned, for convictions in general or for violent offending.

The results for FtM transitioners also show no statically significant difference from the male comparator group (Table S2), and they showed a significantly higher likelihood of criminal conviction than the female group (Table S1). Their scale of difference from the female group was however smaller than that of the MtF group: 4.1 (CI 2.5-6.9) for all convictions, 7.2 (CI 2.1 -24.4) for violent offending.

⁷⁵ Full text available here as open access

<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0016885>

Table S1. Risk of various outcomes in sex-reassigned subjects in Sweden compared to population controls matched for birth year and *birthsex*.

Outcome	No. of events (male-to- female/female- to-male)	Crude hazard ratio (95% CI)			Adjusted* hazard ratio (95% CI)		
		All sex- reassignment persons (N=324)	Male-to- female only (N=191)	Female-to- male only (N=133)	All sex- reassignment persons (N=324)	Male-to- female only (N=191)	Female-to- male only (N=133)
Any death	27 (17/10)	2.9 (1.9-4.5)	2.6 (1.5-4.5)	3.7 (1.8-7.7)	2.8 (1.8-4.3)	2.4 (1.4-4.1)	3.8 (1.8-7.9)
Death by suicide	10 (6/4)	19.1 (6.5-55.9)	13.9 (3.9-49.6)	40.0 (4.5-357.9)	N/A	N/A	N/A
Death by cardiovascular disease	9 (6/3)	2.6 (1.2-5.4)	2.3 (0.9-5.7)	3.2 (0.9-11.9)	N/A	N/A	N/A
Death by neoplasm	8 (4/4)	2.1 (1.0-4.6)	1.7 (0.6-4.9)	2.8 (0.9-8.5)	N/A	N/A	N/A
Any psychiatric hospitalisation‡	64 (43/21)	4.2 (3.1-5.6)	4.7 (3.2-6.7)	3.4 (2.1-5.6)	2.8 (2.0-3.9)	3.2 (2.1-4.9)	2.2 (1.3-4.0)
Substance misuse	22 (14/8)	3.0 (1.9-4.9)	2.8 (1.6-5.1)	3.5 (1.6-7.8)	1.7 (1.0-3.1)	1.5 (0.7-3.1)	2.3 (0.9-5.8)
Suicide attempt	29 (22/7)	7.6 (4.7-12.4)	15.4 (7.9-30.2)	2.9 (1.3-6.8)	4.9 (2.9-8.5)	10.4 (4.9-22.1)	1.9 (0.7-4.8)
Any accident	32 (19/13)	1.6 (1.1-2.3)	1.4 (0.9-2.2)	1.9 (1.0-3.4)	1.4 (1.0-2.1)	1.2 (0.7-2.0)	1.8 (1.0-3.3)
Any crime	60 (33/27)	1.9 (1.4-2.5)	1.2 (0.8-1.7)	5.6 (3.5-9.1)	1.3 (1.0-1.8)	0.8 (0.5-1.2)	4.1 (2.5-6.9)
Violent crime	14 (8/6)	2.7 (1.5-4.9)	1.8 (0.8-3.7)	9.9 (3.2-30.7)	1.5 (0.8-3.0)	0.8 (0.3-2.1)	7.2 (2.1-24.4)

Notes: N/A Not applicable due to sparse data. *Adjusted for immigrant status and psychiatric morbidity up to baseline. ‡ Hospitalisations for gender identity disorder were excluded.

Table S2. Risk of various outcomes in sex-reassigned individuals in Sweden compared to controls matched for birth year and *finalsex*.

Outcome	No. of events (male-to- female/male-to- male)	Crude hazard ratio (95% CI)			Adjusted* hazard ratio (95% CI)		
		All sex- reassigned subjects (N=324)	Male-to- female only (N=191)	Female-to- male only (N=133)	All sex-reassigned subjects (N=324)	Male-to-female only (N=191)	Female-to-male only (N=133)
Any death	27 (17/10)	3.2 (2.1-5.0)	4.5 (2.5-8.0)	2.2 (1.1-4.3)	2.9 (1.8-4.6)	4.2 (2.3-7.7)	2.2 (1.1-4.6)
Death from suicide	10 (6/4)	12.1 (4.8-30.8)	60.0 (7.2-498.4)	5.4 (1.6-18.6)	N/A	N/A	N/A
Death from cardiovascular disease	9 (6/3)	3.8 (1.7-8.2)	6.8 (2.3-19.6)	2.0 (0.6-6.9)	N/A	N/A	N/A
Death from neoplasm	8 (4/4)	2.6 (1.2-5.6)	2.1 (0.7-6.3)	3.2 (1.0-10.1)	N/A	N/A	N/A
Any psychiatric hospitalisation‡	64 (43/21)	4.3 (3.2-5.8)	5.4 (3.7-7.8)	3.1 (1.9-5.1)	2.9 (2.1-4.2)	3.7 (2.4-5.6)	2.1 (1.1-3.8)
Substance misuse	22 (14/8)	4.3 (2.6-7.1)	6.3 (3.2-12.3)	2.7 (1.2-6.0)	2.3 (1.2-4.5)	2.8 (1.2-6.4)	2.1 (0.7-6.0)
Suicide attempt	29 (22/7)	8.4 (5.1-13.8)	10.9 (5.9-20.0)	4.9 (2.0-12.1)	7.7 (4.2-14.3)	9.3 (4.4-19.9)	6.8 (2.1-21.6)
Any accident	32 (19/13)	1.4 (1.0-2.1)	1.7 (1.1-2.8)	1.2 (0.6-2.1)	1.2 (0.8-1.8)	1.5 (0.9-2.6)	0.9 (0.5-1.8)
Any crime	60 (33/27)	2.1 (1.6-2.8)	7.4 (4.7-11.7)	1.1 (0.8-1.7)	1.6 (1.2-2.2)	6.6 (4.1-10.8)	0.7 (0.5-1.1)
Violent crime	14 (8/6)	2.3 (1.3-4.1)	20.0 (6.0-66.4)	1.1 (0.5-2.4)	1.7 (0.9-3.1)	18.1 (5.4-61.2)	0.6 (0.2-1.6)

Notes: N/A Not applicable due to sparse data. *Adjusted for immigrant status and psychiatric morbidity up to baseline. ‡ Hospitalisations for gender identity disorder were excluded.

Dhejne's later comments

The lead author's relevant comments in a later interview are reported in full below, with our notes:

"The individual in the image who is making claims about trans criminality, specifically rape likelihood, is misrepresenting the study findings."

MBM note: The interview considered a particular graphic in circulation at the time which purported to represent the study findings. The findings do not include specific results for any form of sexual assault. Any such offences would be included within the violent crime figure.

"The study as a whole covers the period between 1973 and 2003. If one divides the cohort into two groups, 1973 to 1988 and 1989 to 2003, one observes that for the latter group (1989 – 2003), differences in mortality, suicide attempts, and crime disappear."

MBM note: This is a finding for the whole transitioned population, considered together, regardless of direction of transition, split by time (not shown in the tables above). The comment accurately reports that in the later period 1989 to 2003, the transitioning group as a whole had no statistically significant difference from the population as whole for general criminal convictions, in contrast to the earlier period, when the transitioned group's conviction rates were slightly higher, with statistical significance. The research specifically notes that for violent crime it could not produce any statistically robust results separated by time period, so it provides no evidence on change over time for those. Over the entire period, although violent crime levels were higher than for the general population, the difference was not statistically significant.

"This means that for the 1989 to 2003 group, we did not find a male pattern of criminality."

MBM note: This is the central statement which has been taken to dismiss the findings in Tables S1 and S2 above. But it does not follow from the previous comment, which relates specifically to data which provides no information on sex-related comparisons. Further, the published sex-separated data do not separate the results for MtF and FtM cases by time period, so cannot be used separately to support Dhejne's statement. The published results therefore provide no basis for making claims about what pattern applied for MtF cases during 1989-2003 specifically.

Further, the substantial and statistically significant higher likelihood of conviction for the MtF group compared to the female population over the period as a whole, its closeness to the result for the male population across the whole period, the close resemblance of the transitioned population as a whole to the general population between 1989-2003, the larger number of MtF than FtM cases, and the clear inference in the data that MtF conviction rates were higher than FtM ones across the period, would mean that a hidden unpublished effect of MtF cases departing substantially from the male population over 1989-2003 would require implausibly extraordinary assumptions about the scale of offending for MtF cases between 1973 and 1988 and the fall between the two periods, and about the rise for FtM cases, between the two periods, for the maths to work. The authors do not at any point suggest in the original piece that they observed any such extraordinary effects, let alone had calculated but not published statistically robust analysis of such effects.

Dhejne's statement is therefore only true in the trivial sense that patterns of criminality were simply not examined separately by sex for each period and so no such finding could be made. It is however in contradiction with the clear finding for the only period studied for this purpose (the whole period), which is that MtF cases had a pattern of conviction insignificantly different from that for the male population, and substantially and significantly higher than that of the female population.

"As to the criminality metric itself, we were measuring and comparing the total number of convictions, not conviction type. We were not saying that cisgender males are convicted of crimes

associated with marginalization and poverty. We didn't control for that and we were certainly not saying that we found that trans women were a rape risk."

MBM note: The issue here appears to be whether the convictions were for similar crimes between the general male population and MtF (or all?) transitioners. The study does not examine that in detail, but the comment overlooks that the researchers did separate violent crimes as a separate category (but not, as Dhejne notes, rape).

"What we were saying was that for the 1973 to 1988 cohort group and the cisgender male group, both experienced similar rates of convictions. As I said, this pattern is *not* observed in the 1989 to 2003 cohort group."

MBM note: This comment is not entirely clear, but again this seems to be intended to convey that the MtF group ceased to have a male pattern of convictions in the later period. As discussed above, this is not what the published data show and it requires extraordinary (implausible) assumptions about the nature of any unpublished figures to infer this from what has been published. Meanwhile the article as published makes a clear, well-evidenced statement about the comparative findings for MtF transitioners over the period as a whole.

In the absence of any new peer-reviewed publication based on the original data which provides further results split both over time and by sex, the original published results remains the best available large scale quantitative comparative study of conviction rates by sex and transitioner type.