Forwomen.Scot
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Gender Recognition Reform (Scotland) Bill: A Consultation

https://consult.gov.scot/family-law/gender-recognition-reform-scotland-bill/

Question 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?
Yes ✓
No ☐
If yes, please outline these comments.

There is no clear definition in the consultation paper as to what living in an acquired gender means and the draft Bill removes the current requirement to provide evidence that this criteria has been met. The Gender Recognition Act 2004 defines the "acquired gender" as the gender in which the person is living, which, without a definition of "gender", is both circular and meaningless. If the law is to be reformed it is essential that this term is clarified, particularly if an applicant is expected to declare under oath, subject to a potential criminal offence, that they meet this requirement.

We note that Annex C, Section 4(3) has slightly amended the definition to say "the gender in which the person is living when the application is made" so the Scottish Government is not opposed to updating the definition; it should go further and provide a simple and clear definition. This is not unreasonable since if it is proposed to remove all other safeguards from the legislation (including a medical diagnosis of gender dysphoria) this term becomes the key parameter.

According to the current Scottish Government's education guide on gender stereotypes[1], "Sex is determined at birth and is based on physiological differences...Gender refers to sets of learned behaviours. These are socially defined characteristics and expectations attributed to being male or female. Gender is fluid and can change. The challenge comes if we confuse sex and gender and start to view gender as innate."

We suspect that since gender relies on regressive stereotypes which Scotland has a responsibility to eliminate under Article 5 of CEDAW[2], then the draft Bill has recognised the futility of defining "living in an acquired gender" in any meaningful way that could be objectively tested and lead to a reassignment of a person's sex.

Cabinet Secretary, Fiona Hyslop, talked about sex and gender identity when giving evidence to the CTEEA Committee on the Census (Amendment) (Scotland) Bill[3], saying: "if the bill is

perceived to conflate those issues that does not help us. As I said, we need to have clarity in what we are doing, so I would rather that things were quite straightforward and simple."

We agree with Ms Hyslop that sex and gender are very different and it is not helpful if they are conflated in this draft Bill either.

It is our understanding that the female sex class is not a category that men can self-identify into. The GRA 2004 was an accommodation to meet the needs of those with extreme gender dysphoria and should not be reformed in this manner.

The proposed reduction from 2 years to 3 months does not allow sufficient time for doctors to rule out other causes of distress and make a diagnosis of gender dysphoria. The NHS[4] states: "A diagnosis of gender dysphoria can usually be made after an in-depth assessment carried out by two or more specialists. This may require several sessions, carried out a few months apart."

The NHS Gender Reassignment Protocol[5] advises a further 12 month experience to ensure patients are stabilised in their reassignment before taking any long-term decisions on surgery. This should equally apply to major legal changes which go hand-in-hand with medical treatment, and which will affect a person for the rest of their life.

For the wellbeing of applicants and to retain the GRC for the small, objectively identifiable group of people for whom it was intended it is important the current provisions are retained. Self-declaration of sex is not a principle that should be embedded in law and the Bill should be rejected in full.

References:

[1] https://education.gov.scot/improvement/Documents/gender-stereotyping-intro.pdf
[2] https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm
[3] http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11864&c=2141207
[4] https://www.nhs.uk/conditions/gender-dysphoria/
[5] https://www.sehd.scot.nhs.uk/mels/CEL2012_26.pdf

Question 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?
Yes ✓
No ☐
If yes, please outline these comments.

The fact that a reflection period is proposed acknowledges that some applicants will change their mind. However, without any balanced external input from a medical practitioner or therapist, this is effectively a waiting period only and many applicants may proceed with a permanent legal change that may not be right for them.

The current NHS medical advice[1] is that it takes considerably longer than 3 months to assess a patient presenting with distress regarding gender and make any diagnosis, and even longer to complete treatment, so for the wellbeing of the applicant this proposed period is too short.

We do not agree that the female sex class is a category that men can self-identify into. The GRA 2004 was an accommodation to meet the needs of those with extreme gender dysphoria and should not be reformed in this manner; we believe the Bill should be rejected in full.

References:
[1] https://www.nhs.uk/conditions/gender-dysphoria/

Question 3
Should the minimum age at which a person can apply for legal gender recognition be reduced from 18 to 16?
Yes ☐
No ✓
Don't know ☐
If you wish, please give reasons for your view.

In Scottish law a 16 year old is not permitted to buy alcohol or cigarettes, possess fireworks, get a tattoo, or use a sunbed - for the very good reason that we recognise young people are often impulsive and do not think about the long term effects. Yet this proposal suggests that adolescents are mature enough to make a statutory declaration that they "intend to continue to live in their acquired gender permanently". This is not just a paper exercise but is intrinsically linked to the medical pathways adopted by Scotland's NHS gender service for young people. Sixteen is the age at which cross-sex hormones may be given and the

consequences of these are serious and life-long, with many of the effects on the body irreversible.

Our recent Freedom of Information request[1] revealed that referrals for Scottish children to the Sandyford Young People's Gender Service have risen by an unprecedented 705% since 2013, in comparison to a rise of 438% for the rest of the UK. It should be gravely concerning that referrals for 15-16 year olds increased by 35% in the single year from 2017 to 2018. In any other area of medicine these figures would prompt an urgent investigation, not a push to implement a legal affirmation of the situation. The Scottish Government should be mirroring Westminster's review of NHS procedures on the use of hormone treatments for young people who want to undergo gender reassignment.[2] It should also be asking the question why, when many other countries are concerned about the disproportionate number of girls questioning their gender identity (74% of referrals are girls in rUK[3]), Sandyford has failed to even collect sex-disaggregated data.[1]

Many clinicians from across the world are expressing concern about the move from "watchful waiting" to medically affirming children who present with gender identity concerns.[4] As a consequence, 35 staff resigned from London's Tavistock clinic over a three year period citing concern over experimental treatment with no long-term studies to show positive outcomes[5], pressure from trans lobbying groups and even instances of young people identifying as transgender due to family not accepting them as gay.[6]

Alongside these concerns there are also a growing number of "detransitioners" coming forward to speak on their regrets about medical treatment, many of them young women who have come to realise they are lesbians, often after irreversible hormone treatment and breast removal.[7] We should listen to the stark warnings about the dangers of not exploring a child's identity in full and taking the time to consider other issues and solutions. It is not in a young person's best interests to lock them into a permanent reassignment of gender when the Tavistock's own research suggests over 90% will be happy with their birth sex once fully passed through puberty.[8]

The Scottish Government has an important role to play in protecting children and should not be encouraging young people to cement their beliefs about their identity at an age when identity is still being explored and developed, particularly when their beliefs may lead to lifelong medicalisation with physical and psychological effects they are not equipped to fully understand.

The recent report from the University of Edinburgh for the Scottish Sentencing Council[9] provides evidence of the neurobiological changes which contribute to "the poor problem solving, poor information processing, poor decision making and risk-taking behaviours often considered to typify adolescence" and specifies that cognitive maturation does not occur until 25 years of age.

While the Children and young People (Scotland) Act 2014 highlights the need to involve children (defined as those under 18) in matters affecting them, it also stresses that "Each child has the right to protection from all forms of abuse, neglect or exploitation" and "any

intervention by a public authority in the life of a child must be properly justified and should be supported by services from all relevant agencies".

In light of the reports emerging from the Tavistock and the current judicial review taking place in England about the administration of puberty blockers, we do not think the Scottish Government have reasonable grounds to conclude that there is evidence to suggest drastic interventions, which have far-reaching implications for the physical and mental health of the child, have been properly evidenced or justified. The low levels of mental health support, the exclusive focus on affirmation, and the lack of proper assessment - especially as there is ample evidence that children usually present with co-morbidities - lead us to conclude that the support from relevant agencies is also lacking.

We would also draw attention to the Government's obligation under the Convention on the Rights of the Child. A Freedom of Information response[10] revealed that ministers considered the discredited guidance for schools to be probably illegal as it risked breaching the human rights of girls. UNCRC commits governments to ensure that children are not discriminated against on the grounds of sex: if, as an upshot of young males self-identifying as girls, biological girls are excluded from sport and spaces reserved for them, the Scottish Government risks being complicit in sex-based discrimination.

We should also highlight that the Bill has no provision for detransitions - an exponentially growing group. By possibly criminalising those who change their mind, the Bill would see those who are still legally children trapped in their acquired gender.

References:

[1] https://forwomen.scot/28/12/2019/sandyford/
[2] https://www.england.nhs.uk/2020/01/update-on-gender-identity-development-service-for-children-and-young-people/
[3] https://www.transgendertrend.com/surge-referral-rates-girls-tavistock-continues-rise/
[4] https://www.theguardian.com/society/2020/feb/22/ssweden-teenage-transgender-row-dysphoria-diagnoses-soar
[5] https://www.telegraph.co.uk/news/2019/12/12/childrens-transgender-clinic-hit-35-resignations-three-years/
[6] https://www.thetimes.co.uk/article/it-feels-like-conversion-therapy-for-gay-children-say-clinicians-pvsckdvq2
[7] https://www.thetimes.co.uk/article/sharp-rise-in-child-cases-at-gender-clinic-lvlqnzk5q
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[9] https://www.scottishsentencingcouncil.org.uk/media/2044/20200219-ssc-cognitive-maturity-literature-review.pdf
[10] https://www.gov.scot/publications/foi-201900003278/

Question 4
Do you have any other comments on the provisions of the draft Bill?
Yes ✓
No ☐
If yes, please outline these comments.

International Best Practice and the Case for Reform

Section 2.13 of the consultation paper states that as the case-law stands at the moment, the current system in Scotland is compliant with the ECHR and there is no obligation to introduce a system based on self-declaration. Given these facts, we are at a loss as to why the Scottish Government is proposing to amend the Gender Recognition Act (GRA) at all, never mind taking the drastic step of removing the requirement for a medical diagnosis of gender dysphoria - after all this is the only objective criteria on which to identify the small number of people for whom the GRA was designed. No justification has been given of why anyone without this rare condition should need to change the sex on their birth certificate.

Section 2.12 refers to the most recent relevant case in the ECHR, AP Garçon and Nicot v France (2017) which not only confirms that a diagnosis of gender dysphoria is not a violation of Article 8, but goes further by stating (para 141-144) that this requirement "struck a fair balance between the competing rights at stake". They also said that the medical diagnosis was for the benefit of the applicant, so that they did not "embark unadvisedly on the process of legally changing their identity". Any introduction of a system based on self-declaration of sex actually goes against the decision of the ECHR and against the best interests of the applicant. This ruling supersedes the concerns expressed in Resolution 2048, dating from 2015.

The Scottish Government states in Section 2.14 that the GRA needs to continue to be in line with international best practice, without defining what this is. Arguably the points above demonstrate that Scotland is already following the best practice as outlined by the ECHR.

Section 3.38 mentions the Yogyakarta Principles as being a development since the GRA was enacted. We are glad that these are now recognised as non-binding and wish to emphasise that the principles, particularly number 31 which demands sex be removed from all identity documents are counter to the interests of women as detailed in Article 1 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[1], which states the recognition of women on the basis of sex should not be impaired. This convention was ratified by the UK in 1986 yet the Scottish Government has failed to take its provisions into account in either the drafting of the Bill or the Equality Impact Assessments.

We also note that one of the co-authors of the Yogyakarta Principles[2] said as recently as 2016 that "The Gender Recognition Act 2004 has become the model for new forms of legal recognition of the transsexual person in Europe's states."

Only a few countries have moved away from this model GRA to a system based on self-declaration of sex. These are very recent developments and the Faculty of Advocates[3] have warned that it may not yet be easy to assess how they are operating in practice. In Section 3.43 the Scottish Government says it is not aware of any problems arising in the Republic of Ireland as a result of the introduction of a system based around statutory declarations. However, while Ireland was thought to have brought in tight restrictions, more so than the proposals for Scotland, they were unable to stop the move of a violent male sex-offender, who self-declared as a woman and obtained a GRC, into the female prison estate. The chair of the Law Society Criminal Law Committee[4] said: “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.”

A review of Ireland’s Gender Recognition Act[5] was published at the end of 2019 and we note its failure to consult with any women’s groups or assess the effects on women’s sex based rights.

The consultation paper is not clear on which countries currently represent international best practice, but we would be astonished if the Scottish Government are unaware of the myriad of problems reported from those which have introduced self-declaration - from defunding of women-only refuges in Canada, to a female prisoner impregnated by a transwoman prisoner in Argentina, and even numerous men claiming to be women in order to take women’s political positions in Mexico. Nor is any detail given about how self-declaration operates in conjunction with equality or women’s sex-based legislation in other jurisdictions, or any evaluation of its impact.

As a case study[6], it has been found that applications for a GRC increased 575% in Belgium after the introduction of a self-declaration model. Almost a third of these applications came from young females at a rate of more than twice those from males, the weighting of which likely mirrors the worrying trends seen in Tavistock, and is statistically significant to skew data collection depending on whether sex or self-identified gender is reported. We see no evidence in the consultation paper that these issues have been considered and when the estimates for application numbers in Scotland have been reduced to 250 per year from an initial estimate of 400 without any explanation it seems the Scottish Government has little idea of the outcome of their proposed law change either.

Despite anticipating at least a ten-fold increase in applicants the Scottish Government has failed to spell out what legal rights acquisition of a GRC confers and what implications a larger proportion of GRC holders will have on, for example, access to single-sex services, data collection, crime statistics, and sex discrimination or equal pay cases.

Section 3.20 states that the current procedures are “demeaning, intrusive, distressing and stressful” when referring to obtaining a medical diagnosis and submitting documentation to the Gender Recognition Panel. The Scottish Government has reached this conclusion without fully researching the issue when analysis[7] of the minutes of the GRP user group

and statistics from the tribunals service actually shows the current process is “adequately, efficiently and professionally serving the population it was designed for”. We are also concerned about the suggestion that discussing personal problems with a GP or other professional is “demeaning” - the Government is undermining its mental healthcare providers with language that perpetuates a stigma of humiliation.

Improvement to the application process to remove any unnecessary complications or expense is always welcome but this should not mean eliminating the majority of the process. Medical evidence, the panel, proof of living in the new role have all been removed, and the timescales much reduced. Such wholesale sweeping changes are not the only solution and there has been a failure in balancing the rights of different protected groups by not considering any other options.[8]

We echo the words from the CTEEA Committee[9] who considered that “the lack of early engagement with a range of groups and individuals, including a broad range of women’s groups, to be a serious deficiency in the process of consultation” and, had this advice been followed, it may well have resulted in very different proposals.

Draft Legislation: Annex C

We realise that, should the draft legislation in Annex C proceed through Parliament, it is likely to be amended considerably. The lack of clear definitions and the removal of key requirements has already been covered, but the following points should also be considered:

- Transsexuals have been written out of the law. Many are concerned to see legislation that was written to accommodate their circumstances now no longer even mention them, and decouple necessary medical routes.

- The consultation paper claims the purpose of this reform is to simplify the process for transgender applicants. However, the draft legislation has no mention at all of this group of people and makes no attempt to either define their unique characteristic or limit applications to only this group. Applications are open to any “person” for any reason at all and it is a significant failing that no consideration has been given to who else may obtain a GRC, their reasons for doing so, or the consequences that may result.

  Warnings were given to the Women’s and Equality Committee in 2015[10] that it would be inevitable prisoners would take advantage of self-declaration: “It has been rather naively 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.” Since UK Prison Services have adopted self-declaration of sex, one in 50 male offenders in prison now identify as transgender, at least four times the rate in the general population.[11] A former Scottish prison governor has criticised the gender reforms[12]

saying they “expose female inmates to a higher risk of physical or sexual assault from transgender women”.

We strongly suggest that it would be equally naive of the Scottish Government to think that some men outwith the prison system will not utilise the proposed lax legislation for their own predatory purposes.

- The Bill does not define what is meant by making a fraudulent declaration or how it could be proven to be so given the lack of any objective criteria, although it attaches severe penalties. In interviews, the Cabinet Secretary has suggested to women that this is the basis of safeguarding. However, as the Scottish Government now classes crimes (including sexual assault) by self-identified gender, there is no precedence for assuming that abuse/harassment would constitute fraud. Rather, it has been suggested that the penalties may relate to those who seek to employ a new identity for financially fraudulent purposes. Furthermore, there is no veto in the Bill to prevent anyone previously convicted of a crime from seeking to change gender nor any process to examine motivation. As such, we do not consider this to be an adequate safeguard. We remain concerned, however, that young, vulnerable people may fall foul of this, simply because they have made an error of judgement.

- Despite the rise of young people who feel they were mistaken when seeking to change their gender (and often also their bodies), and despite the worrying rise in the number of referrals of young vulnerable people to the Sandyford (the cohort most likely to feel conflicted in their identity), the Scottish Government has made no provision in the Bill for the likely increase in detranstioners. As it stands, those who feel they made a mistake in committing to a change in legal sex have no route back and will be trapped in their acquired gender permanently, and may well be vulnerable to allegations of fraud. It should be recognised that any amendment to the Bill to accommodate a process of annulment for detransitioners will have the consequential effect of creating a loophole for any other suspected fraudulent GRC holders to exploit.

- Spousal consent has been misrepresented as a means to prevent an applicant acquiring a GRC. In reality, it is a much needed temporary pause for the spouse of a transitioner to have a marriage annuled or dissolved before their partner changes their legal sex. The spouse cannot prevent the transition but they are able to exit a marriage before the legal terms change. For many - especially those from ethnic or religious minority groups - they might otherwise find themselves unwilling partners in a same-sex marriage. In response to the consultation in 2018, the Faculty of Advocates[13] wrote: “We consider that a balance must be struck between the rights of the transgender person to seek official recognition of their acquired gender and the rights of their spouse to decide whether they want to remain in the marriage.”

  It is somewhat concerning that Section 5, 8D(3) only provides for the applicant to submit a statement at the point when the statutory declaration is made, but not the spouse, if they do not wish the marriage/civil partnership to continue. We do not see

any provision within the Bill to inform the spouse that either an application has been made, or an interim GRC granted, unless they have made a statement that they wish the marriage to continue. It seems entirely possible that the spouse may not be made aware that an interim GRC has been granted unless the applicant proceeds within the following six months to make an application to the sheriff for a full GRC under Section 7, 8H(4).

Without the provision to dissolve the marriage, we are concerned that spouses of transitioners will have to either wait for a no-fault divorce or prove that the behaviour of the transitioner is unreasonable. The traumatic effects of living with a transitioning partner or parent, as detailed by groups like Transwidows, are often ignored or underplayed.

- Section 2, 8A(1) states “A person of either gender may apply”. This should state sex rather than gender.

- Section 2, 8A(2)(b) contains the condition that the applicant is ordinarily resident in Scotland without reference to what this entails. If there is no requirement to evidence a significant period of residence it is possible there may be a notable rise in applications from those who would usually be viewed as residents of the rest of the UK.

Interaction with the Equality Act 2010

We are concerned by the Scottish Government’s representation of the Equality Act and the provision of single-sex services and spaces as defined in the Act. Confusion around the definition of “case by case” exceptions and proportionality was highlighted in the report referenced in Section 5.54 of the consultation paper. We very much agree that guidance by the UK Government could be helpful and welcome the commitment given by Cabinet Secretary, Shirley-Anne Somerville, to our group on 25 February 2020, that the Scottish Government will also shortly publish its own guidance. Delaying any gender recognition reform until clarity is obtained seems sensible, and will go some way to answering the question as to what access to women’s single-sex services is gained with the granting of a GRC.

At the moment, both in the consultation paper and in practice, the Scottish Government do not appear to accept that services might offer blanket single-sex services as described in the recommendation quoted in Section 5.55: “This Code must set out clearly, with worked examples and guidance, (a) how the Act allows separate services for men and women, or provision of services to only men or only women in certain circumstances, and b) how and under what circumstances it allows those providing such services to choose how and if to provide them to a person who has the protected characteristic of gender reassignment.”

Section 5.17 only considers the possibility of excluding an individual trans person after conducting individual risk assessment. However, in the UK Government’s explanatory notes

on implementing the Equality Act[14], they give the following example: “A group counselling session is provided for female victims of sexual assault. The organisers do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. This would be lawful.”

Scottish Government funding requirements, however, means that a service would be unable to offer exclusive services of this nature to female victims of assault. The Equally Safe Fund for eradicating violence against women and girls specifies that, to be eligible for funding, applicants must “ensure your service is inclusive to transwomen”. Scottish Government maintains that services can still employ the exception but make no attempt to explain how this can be achieved.[15]

In a presentation to Scottish Parliament, Karen Ingla Smith[16] - who gave evidence at the Westminster Women and Equalities Committee - highlighted that individual risks are not something that overstretched and underfunded shelters in the VAW sector can undertake. The Westminster report also drew attention to the fact that women’s services lack the necessary resources to fix failures by public bodies in enforcing public service equality duty and that the lack of clarity and concerns about what constituted proportionality were having a “chilling effect” on the operation of single-sex provision and public sector monitoring.

Smaller organisations and festivals have, in the last year, been targeted for using the Equality Act exceptions, while public bodies have failed to monitor risk. An account of examples in the same week of such effects - from suppression of free-speech and freedom to gather to exposing women to harm - is on our website.[17]

This “chilling effect”, which prevents the use of exceptions in Scotland, was also noted by Employment solicitor Rebecca Bull in a briefing note[18] prepared for a meeting at Scottish Parliament, which, in her view, was “putting local authorities at risk of breaching women’s human rights”.

The Scottish Government appears to rely on the EHRC’s Code of Practice which many lawyers find problematic and at odds with the Act. Bull comments “The EHRC Statutory Code therefore clashes not only with GRA 2004 but also with the Equality Act 2010 Explanatory Notes. If the Code is followed, then Paragraph 28 exceptions are almost impossible to apply.” This being the case, it is not reasonable that the consultation fails to address the implications of obtaining a GRC, especially as the group eligible to change legal sex would widen from those with a specific medical diagnosis to the population at large.

In Bull’s view: “the Code does not adequately reflect the Equality Act 2010 and it seems that it has been deliberately edited in order to take into account the views of only one stakeholder group (gender reassignment) over those of women. Indeed there is no record of women’s groups’ involvement in this particular aspect of the Code. In my view the Code is fundamentally flawed and has departed from statute.”

It is therefore concerning that the Scottish Government have chosen to rely on the code rather than statute in designing the consultation. The lack of consultation with women's groups in the Code compounds the bias in the Bill.

The definitions of sex, gender and the rights conferred by a GRC should be the minimum definitions contained in the Bill before the law is changed.[19]

Data Gathering

In advance of changes to the law, public bodies have already begun to collect data based on self-identified gender rather than sex. Despite representation from expert statisticians and the concerns of the CTEEA Committee, National Records of Scotland seem committed to replacing sex with self-identified gender in the 2021 census. As the gold standard for statistical gathering, other surveys will follow which will, inevitably, affect the monitoring of Public Sector Equality Duty.

One major area of concern is the monitoring of equal pay where comparator basis may be weakened.

The Gender Representation on Public Boards (Scotland) Act 2018 is supposed to improve the representation of women on the boards of Scotland's public bodies. However, the Act changed the definition of woman from that in the Equality Act of a "female of any age" to include those who have "taken the decision to undergo a process for the purpose of becoming female" which does "not require the person to dress, look or behave in any particular way". In fact, the Act is extremely vague and broad: "It would be expected there would be evidence that the person was living continuously as a woman - always using female pronouns, using a female name on official documents, describing themselves and being described by others using female language", and the appointing person is not required "to ask a candidate to prove whether they meet the definition of woman in the Act". The adoption of this Act seems to be a part of the systematic weakening of protections for biological women in Scotland as well as reflecting an inaccurate reading of the Equality Act (a Government spokesperson insisted the Act was fully compliant with definitions in the Equality Act).

Despite the well recorded differences in incidence of violent crime between the sexes, Police Scotland now record crime by self-id rather than sex. In answer to a Parliamentary Question[20], the Justice Secretary admitted that "Police Scotland requires no evidence or certification as proof of gender identity other than a person's self-declaration"

A Freedom of Information response[21] revealed that Police Scotland held no record of why or how this policy was adopted and, in answer to a question from Iain Gray[22], the Justice Secretary said that the Government had no plans to remedy this problem. Going forward, we do not believe the Government will be able to monitor the impact of the change in the GRC as they have destroyed the basis for recording crime on a sex-disaggregated basis. We

expect to see a disproportionate rise in "female" crime in the future leading to needlessly costly programmes or acquittals because programmes are not available.

Conclusion

Given that the GRA 2004 is fully compliant with European law the Scottish Government has not made a compelling case for reform. The current system, while like every process could be finessed, is adequately, efficiently and professionally serving the population it was designed for. There is no mandate for removing the requirement for medical evidence and introducing self-declaration of sex, and no justification for extending the legal fiction of the GRA beyond the small group for whom it was designed.

With no definitions or oversight, the wholesale removal of medical evidence and safeguards, and open to the whole population, the draft Bill is completely untenable and not fit for purpose. It should be withdrawn in its entirety.

There is an obvious conflict with sex-based rights which the Scottish Government seem determined not to acknowledge. Even before any law changes are made the impacts are clear, especially with regard to data collection and single-sex services. The rights conferred by a GRC should be clarified and women's rights under the Equality Act protected.

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[21] https://www.scotland.police.uk/access-to-information/freedom-of-information/disclosure-log/0/2019/april/19-0696
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Question 5
Do you have any comments on the draft Impact Assessments?
Yes ✓
No ☐
If yes, please outline these comments.

The draft Equality Impact Assessments fail to assess the impact on women who require single-sex or sex-segregated services and those who require care and support from workers who are female. Neither does it address the fact the women will self-exclude from services. The Scottish Government overlooked evidence from grassroots groups that researched these issues, for example, the “Female Only Provision: A Women and Girls in Scotland Report”[1] which outlined the fears of women who have experienced domestic and sexual violence at the hands of men about sharing space with transwomen, and the conclusion that most of the 2,000 women who completed a survey said they would self-exclude from services if they could not be guaranteed single-sex provision.

The consultation paper also does not refer to research undertaken by Fair Play for Women[2] 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”.

A Freedom of Information response[3] revealed that on 21st August 2019 the Scottish Government library was asked to perform a literature search to identify the evidence to inform the EQIA for the Scottish Government’s Gender Recognition Reform Bill. They were

asked to find “Evidence on legitimate basis on which trans women might need to be excluded from some women-only services, locations, or provisions, or on which their presence might put non-trans women at a disadvantage”. Research by Fair Play for Women was included in the list of Key Results highlighting that "the following results may be particularly relevant". The omission of this evidence from FPFW in the consultation paper, and indeed that of any advocacy group for sex-based rights, means that a full and comprehensive search for evidence was not considered by the Scottish government consultation team and this casts serious doubt over the validity of the EQIA.

Having ignored this relevant research, the Scottish Government chose to rely on an absence of evidence as evidence of absence. This is not reasonable; the burden of proof is on the Scottish Government to produce robust evidence that the draft bill will not reduce safety, dignity and privacy for women and girls.

The draft EQIA references two academic papers: The first paper (Dunne, 2017) argues that single-sex spaces and services should be dismantled. It contains the following highly offensive comment:

“It would be unthinkable that general discomfort could prevent a cisgender woman from using segregated showering facilities after she had a double mastectomy. In reality, UK law tolerates a considerable amount of bodily diversity when cisgender and intersex persons use single-gender spaces. Why are trans persons treated differently? … If cisgender and intersex persons can use women-only and men-only services, even when they have non-normative bodies, concerns about bodily diversity do not justify the current legal position under the 2010 Act”.

The second paper (Eckes, 2017) is a legal case analysis that examines school toilet policies in the United States, and is also offensive. 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.

Scottish Government references The Gottschalk paper to show “lack of evidence around the actual experienced impacts of trans inclusion”. However, the paper draws the opposite conclusion to the one the Scottish Government cites 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 below:

"*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."

As well as problems with the evidence provided in the EQIA, the overall limited evidence base the Scottish Government is drawing on in asserting there are no implications for women is clear from a recent Freedom of Information response.[4]

The Scottish Government failed to reference anywhere in the draft bill the one long term study[5] undertaken that shows transwomen follow the same pattern of criminality as males, and not women. It shows transwomen are 6 times more likely to commit a crime and 18 times more likely to commit a violent crime compared to female controls. But transwomen commit crime, including violent crime, at a similar rate as any other males in the general population.

Another piece of evidence omitted from EQIAs was the FOVAS report[6], in which survivors of domestic abuse and workers in the sector detailed how they believed Stonewall had manipulated testimony and evidence in order to claim that there was no issue in supporting transwomen within the women's domestic abuse sector and to press the claim that reform of the GRA would not damage women. The report found that Stonewall "chose to deliberately leave out responses about concerns over women's physical and mental safety with having trans identifying males in places like women's refuges...Stonewall have 'cherry picked' from the response they gave and have purposefully chosen to leave out any quotes expressing concerns about women's safety...Their decision to deliberately and systematically exclude responses from women's services who disclosed problems with allowing trans identifying males ensured a biased and false report."

The EQIAs do not follow the Scottish Government's own standards at looking at the possible consequences of any law or policy change, and incorrectly state the Bill will have no adverse impact on women. They are not comprehensive or evidence-based and are deeply flawed to the extent that no reform of the GRA should be based on their conclusions.

References:

[1] https://wgscotland.org.uk/reports/
[2] https://fairplayforwomen.com/wp-content/uploads/2018/09/FPFW_report_19SEPT2018.pdf
[3] https://www.whatdotheyknow.com/request/632143/response/1513545/attach/html/6/Document%204%20Literature%20Search%20Results.pdf.html
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[6] https://fovas.wordpress.com/response-to-stonewall-2/