

MBM factcheck on claims made about women's sex-based rights and gender recognition reform during the 2021 Holyrood election campaign

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Over the course of the election campaign, in hustings and interviews, prospective parliamentary candidates have made various claims about women's sex-based rights and proposals to reform the 2004 Gender Recognition Act (GRA).

This factcheck briefing examines claims made by candidates from different political parties at four hustings events (Engender, Scotsman, STUC and Scottish Women's Convention [SWC]), interviews (Sky News, New Statesman interview), and on BBC Radio 4's Any Questions,¹ grouped under ten headings.

Many of the claims appear to reflect the widespread confusion about how the Equality Act 2010 (EA) provides protections for women based on their sex, as well as the interaction between the EA and the GRA. There also appears to be a lack of curiosity as to how self-declaration laws operates in other countries, and a lack of awareness as to some of the problems now arising as a result of legal reform. While few candidates accept the existence of any scope for an actual 'conflict of rights', some still recognise the concerns raised by many women as a legitimate element of political debate and have emphasised the need for respectful debate. In an interview for the New Statesman with journalist Chris Deerin, the First Minister stated that "*I recognise a responsibility to work through these concerns and to address these concerns*". Others, notably some Scottish Green Party candidates, have flatly dismissed any concerns raised and questioned the motives of anyone raising them.

It is clear that if MSPs in the new parliament wish make changes in this area that are well-grounded in consensus they will need to address common misunderstandings and mischaracterisations of law, policy and its effects in this area. As Scottish Ministers were advised by their civil servants on 26 February 2019:²

"there are areas, across Ministerial portfolios, where there are potential conflicts between rights. These areas require careful consideration."

¹ [Engender hustings, 1 April 2021](#); [Scotsman hustings, 6 April 2021](#); [STUC hustings, 6 April 2021](#); [Scottish Women's Convention, 27 April 2021](#); [Sky News \(Patrick Harvie\), 29 April 2021](#); New Statesman/Chris Deerin (Nicola Sturgeon) [Interview comments posted on Twitter, 2 May 2021](#)

² [Extract from briefing for Ministers](#), 26 February 2019

1. The Gender Recognition Certificate application process is “too bureaucratic” and “damages people”

“it is an overly medicalised process that actually damages people” (Jackie Baillie, Labour, BBC R4 Any Questions)

“the current process of changing gender legally is too complex and too bureaucratic.” (Murdo Fraser, Conservative, BBC R4 Any Questions)

“The proposals are about trying to remove some of the trauma and bureaucracy and associated stigma around that.” (Nicola Sturgeon, SNP, Deerin interview)

“At the moment the transition process is time-consuming, expensive, and many trans people say quite humiliating.” (Patrick Harvie, Scottish Green Party, Sky News)

The characterisation of the application process in these terms is unavoidably subjective. In the five plus years over which this has been an issue of political interest no systematic research appears ever to have been commissioned seeking the views of those who have actually been through the process. There is some evidence that views about whether the process is humiliating are at least mixed.³

There is, however, good evidence to suggest that the application process is misunderstood. A large-scale survey by the UK Government Equalities Office (GEO) reported that 43% of trans people who did not have a GRC incorrectly thought the process involved an interview, and 15% wrongly thought that surgery was required.⁴

An analysis undertaken by the organisation Sex Matters, based on detailed examination of the minutes from the Gender Reassignment Panel (GRP) User Group, suggests that descriptions of the current process in highly negative terms are ‘overblown’.⁵ They describe the application process in the following terms:

“applicants are required to fill in a form and submit specific documentation by post. The original documents are then copied and returned immediately. The panel assesses most applications on paper, not via an oral session (two panel members, one medical and one legal, meet and typically discuss 14 applications in one sitting). Overall the success rate for applicants for a GRC is around 95%. The GRP key performance indicator is for 75% of applications to be completed within 20 weeks of receipt. The administrators consistently report that this target is met (with many completed in 8 or 11 weeks).”

The analysis also indicates that the panel, which aims to assist applicants, rarely refuses applications, and almost none are rejected on first application. Applicants are also given several opportunities to provide the required evidence. In May 2021 the UK government reduced the fee for a GRC application from £140 to £5. The UK government has also stated that the application process will be brought online.⁶

³ <https://twitter.com/allanastrain/status/1238478469853519873?s=20>

⁴ Government Equalities Office (2018) [National LGBT Survey Research Report](#)

⁵ [Evidence from Sex Matters to the Women and Equality Committee Inquiry on Reform of the Gender Recognition Act, 2020](#)

⁶ BBC (4 May 2021) [Gender recognition certificate cost cut to £5](#)

2. There is no conflict between trans rights and women's rights.

"I need to continue to make the argument that the tension between women's rights and trans rights is an artificial one - you can be both pro women's rights and pro trans rights, and the two do not need to be seen as in conflict with each other."
(Nicola Sturgeon, SNP, Deerin interview)

"Absolutely no conflict between women's rights and trans rights. Trans women are women. Trans men are men." (Lorna Slater, Scottish Green Party, BBC Any Questions)

"I'm a lifelong feminist, and a lifelong LGBT activist, and I see no conflict between women's rights and trans rights." (Caron Lindsay, Scottish Liberal Democrats, BBC Any Questions)

Adam Boulton: *"So a transwoman is a woman in your view, even if they have male genitalia for example?"*

Patrick Harvie: *"Well it's not just my view, it's the law."* (Scottish Green Party, Sky News)

This claim suggests a fundamental misunderstanding of the law in this area. Responding to the First Minister's comment, one legal academic stated: 'An odd answer to give when the Equality Act is structured in a way to acknowledge and seek resolution of conflicts between protected characteristics.'⁷

The tension between women's and trans rights can only be described as 'artificial' by rejecting the current content of the law as having any reasonable grounds: the Equality Act 2010 explicitly allows for a person having the characteristic of gender reassignment to be taken into account in deciding who may be involved in activities, services and occupations which are legitimately demarcated by sex (Section 195; Schedule 3, paragraph 28; Schedule 9, paragraph 1), while exceptions under the GRA (for example in relation to peerages, or sport) apply to those with a GRC. Having the protected characteristic of gender reassignment under the Equality Act does not of itself confer a change of sex in law. The net effect of these provisions is that under UK law, *some* transwomen are women, for *some* legal purposes.

The Scottish Government itself recognises this conflict of rights. A recently published briefing for Ministers dated 26 February 2019⁸ noted:

"The Scottish Government's starting position is one of equality and non-discrimination. However there are areas, across Ministerial portfolios, where there are potential conflicts between rights. These areas require careful consideration."

⁷ https://twitter.com/Scott_Wortley/status/1388880816734883844?s=20

⁸ [Extract from briefing for Ministers](#), 26 February 2019

3. Single sex services and the Gender Recognition Act

“the GRA is about supporting trans people to change the legal sex on their birth certificate, it has absolutely no impact on toilets, or changing rooms, or access to spaces, or access to services whatsoever” (Kim Long, Scottish Green Party, SWC hustings)

“one of the.. misconceptions at the heart of this is that simplifying the process of gender recognition takes away the protections and the safeguards women have under the equalities act - for example, access to single sex spaces. That is not the case.” (Nicola Sturgeon, SNP, Deerin interview)

“there will be times when there will be a need for the single sex exceptions in the EA,.. but it’s an exception, it’s not considered to be the norm.” (Kyle Thornton, Conservative, Scotsman hustings)

There are two points here: what the law allows and what providers already do in practice. As acknowledged by the Women and Equalities Select Committee at Westminster (WESC),⁹ there is a great deal of confusion about the first of these and it has affected the second.

The Equality Act sets out a range of situations where it is lawful to provide single or separate sex spaces and services such as changing rooms, hostel and refuge accommodation, intimate care, hospital wards and so on. No special procedure is needed to activate these ‘exemptions’, which provide women and girls with dignity and privacy on an everyday basis and allow for more specialist services for vulnerable women. They are what permit the existence of separate changing areas for women and men, for example.

Where objectively justified, the Equality Act allows service providers to exclude all male people from certain places, including transwomen with a GRC. In the case of GRC holders, the situation is compounded by strict privacy protections afforded by the law (s22, GRA) to prevent their transgender status and previous identity from being asked about or shared in many situations. For example, a Freedom of Information response from NHS Lothian showed that they felt unable to guarantee either women-only wards or treatment by a female health care practitioner due to the GRC privacy protections. In its 2019 consultation on gender recognition reform the Scottish Government stated that before introducing any Bill that it will consider if further exceptions to section 22 should be made, and if guidance should be issued.¹⁰

In practice, many organisations now provide services based on self-defined gender identity, including transwomen regardless of whether they have a GRC, having been encouraged to take this approach by advocacy groups. The Scottish government also expects services for women that it funds to take this approach. Other organisations include Police Scotland, hospitals, and leisure service providers. Although such policies

⁹ House of Commons Women and Equalities Committee (2019) [Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission](#)

¹⁰ Scottish Government (2019) [Gender Recognition Reform \(Scotland\) Bill: A consultation by the Scottish Government](#)

are widespread, the legal basis for using identity rather than sex (whether at birth or as changed using a GRC) remains contested and unclear.¹¹

A recommendation¹² by the WESC in 2019 that clearer guidance on the law should be provided for providers of services for victims of domestic and sexual abuse was not taken forward. The Scottish Government has not clearly stated how it believes that the single-sex exemptions should operate.

Confusion over the single sex exemptions, when these can be used, and how they should be applied, can therefore be attributed to inadequate official guidance, advice and training from certain advocacy groups, and funding conditions. To state that GRC reform has no bearing on access to single sex services is to ignore the extent to which the existing law is contested, ignored and misunderstood, and has failed to be clarified, even after two consultations in Scotland, one by the UK government and a recommendation by a Westminster Committee.

4. Equal pay is not affected by changing the qualification for changing sex in law

“The right to vote? Your right to divorce? Your right to equal pay? Your right to education? None of those things are under threat from trans rights.” (Lorna Slater, Scottish Green Party, BBC R4 Any Questions)

This assertion misunderstands how changing legal sex impacts on the potential to bring forward equal pay claims. When a woman brings forward such a claim, her pay is compared to a man who is carrying out similar or equivalent work and is being paid more (a ‘comparator’). A woman can bring forward a claim where the comparator is a male who self-identifies as a woman; but only if the comparator does not have a gender recognition certificate (GRC). Once a GRC is obtained, a claim cannot be brought forward, because her comparator is no longer legally the opposite sex.

Applying this to gender recognition reform, it follows that enabling a larger and more diverse range of people to change their legal sex has the potential to reduce the number of previously available comparators for equal pay claims.¹³ The Scottish Government’s recent consultation on its draft Gender Recognition Reform Bill estimated that there would be a ten-fold increase in the number of people applying for GRCs under a self-declaration regime.

¹¹ See for example Komorowski (2019) [Sex and the Equality Act](#). The Head of Legal Services at EHRC Scotland was asked at a seminar on the EA held by Engender on 6 November 2020 whether having the characteristic of gender reassignment changed a person’s sex, and confirmed that in her view it did not.

¹² WESC (2019), paragraph 190.

¹³ Rebecca Bull (2020) [Briefing Note: Impact of Gender Recognition Reform on Sex Based Rights](#)

5. Prisons: The Gender Recognition Act is “irrelevant” to prisons

“[prisons] they are an exception under the Equality Act. They are not affected by the reform to the GRA.” (Lorna Slater, Scottish Green Party, BBC Radio 4 Any Questions)

This claim was also made by Justice Secretary, who in January 2020 stated that “acquiring a gender recognition certificate does not and will not give a prisoner any new legal rights”.¹⁴

The Scottish Prison Service (SPS) policy already operates based on gender self-identification, allowing prisoners to be accommodated in the prison estate of their acquired gender, subject to risk assessment. However current statute and case law¹⁵ strongly suggests that statutory gender self-identification would significantly limit the discretion currently available to prison authorities.¹⁶ This is reflected in Ministry of Justice policy in England and Wales which states: “transgender women prisoners with GRCs must be treated in the same way as biological women for all purposes. Transgender women with GRCs must be placed in the women’s estate/AP unless there are exceptional circumstances, as would be the case for biological women.”¹⁷

In 2020, former prisoner governor Rhona Hotchkiss stated that there were 22 males who identified as women in Scottish prisons when she stepped down in 2019, either in the women’s estate or looking to transfer.¹⁸

The British Association of Gender Identity Specialists has described it as naïve to believe that “that nobody would seek to pretend transsexual status in prison” for the purposes of being moved to the female estate.¹⁹

During the most recent consultation on GRA reform, we sought an explanation from the Scottish government for why, contrary to the UK government, it does not believe the discretion of the authorities would be affected by a person acquiring a GRC, but it declined to provide this.

¹⁴ See: [Scottish Parliament, 16 January 2020](#)

¹⁵ R (on the application of AB) v Secretary of State for Justice and another [2009] EWHC 2220 (Admin), [2009] All ER (D) 28 (Sep). For an overview see: <https://www.newlawjournal.co.uk/content/law-reports-106>

¹⁶ See: <https://murrayblackburnmackenzie.org/2020/01/17/the-placement-of-trans-prisoners/>

¹⁷ Ministry of Justice [Care and Management of Individuals who are Transgender](#), updated January 2020, paragraph 4.64.

¹⁸ Times (20 January 2020) [Trans law ‘puts women in jail at risk’](#)

¹⁹ Dr James Barrett (20 August 2015) [Written evidence submitted by British Association of Gender Identity Specialists to the Transgender Equality Inquiry](#)

6. Offending patterns and safety

“There is not a threat to women from trans people. There’s no evidence base for that... it’s really, really dangerous rhetoric to conflate trans people and predators.” (Kim Long, Scottish Green Party, SWC husting)

“It’s hard to believe that in 2021 in Scotland that we’re hearing the trans community being described as predators.” (Shona Robison, SNP, SWC husting)

Several candidates have characterised concerns voiced by some women’s groups, as claims that transgender people or the trans community are “being described as predators” and asserted that there is no evidence of a threat from transwomen.

Certain spaces and services are lawfully segregated by sex because women wish to be away from men in certain circumstances due to a mixture of concerns about safety, bodily privacy and dignity, that is control over their boundaries in relation to men.

In this context, women’s concerns around safety are not at all about *transgender people as a group* but about the risks associated with *male people as a group*, no matter how they identify. In discussing data on offending rates, campaign group Fair Play for Women specifically states “This doesn’t mean that all transwomen are sex offenders. For the avoidance of doubt, and because this is a very sensitive topic, this data does not show that all or most transwomen in society are predatory males.”²⁰

This point has been substantially misunderstood and misdescribed during the election campaign.

There is no evidence that offending patterns among transwomen are statistically different from those of other males and resemble instead those of the female population. The only systematic study we know of on this is a Swedish cohort study showed that male-to-female transitioners were likely to retain the same risk of male-pattern criminality both in relation to crime generally, and to violent crime.²¹ The even stronger implication of some interventions that declaring a transgender identity renders a male person incapable of committing sexual or violent offences against women can be disproved from multiple sources.

It is true, as was claimed by Conservative candidate Ella McKay in the hustings held by the Scottish Women’s Convention, that women are also concerned that predatory men will claim a transgender identity *in order to* gain access to women-only spaces. This may explain why data from the English prison service suggests the incidence of sexual offending is relatively high among male prisoners declaring transgender identities.²² One substantial issue raised here is the absence of any objective basis for distinguishing between declarations of transgender identity made to the authorities for different reasons.

²⁰ Fair Play for Women (2020) [Transgender women exhibit a male-type pattern of criminality: Implications for legislators and policy makers](#).

²¹ Dhejne, C. and Others (2011) “Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden” PLoS ONE 6(2): e16885 <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0016885>.: We recently considered some misunderstandings widely shared about this research [here](#).

²² Fair Play for Women (2020).

As well physical safety, privacy and dignity, there are also issues of psychological vulnerability in mixed sex environments. At an event in the Scottish Parliament in January 2020, Karen Ingala Smith²³ - feminist campaigner and chief executive of Nia, a charity offering services for women who have experienced men's violence - spoke powerfully about the impact of the presence of someone who is male on women who have been subjected to men's violence. At the same event, former prison governor Rhona Hotchkiss spoke about the psychological impact she had witnessed on vulnerable women, especially those with a history as victims of abuse, of housing a male prisoner in the female estate, even in cases where the male prisoner committed no violent or sexual offences directly against female prisoners.

7. Hate Crime: There has been a “huge spike” in hate crimes against transwomen

“the misinformation, the demonization they face on a daily basis, that isn't consequence free, it has a huge impact on their well-being and mental health. And it's led to a huge spike in hate crimes against transwomen.” (Caron Lindsay, Scottish Liberal Democrats, SWC Hustings)

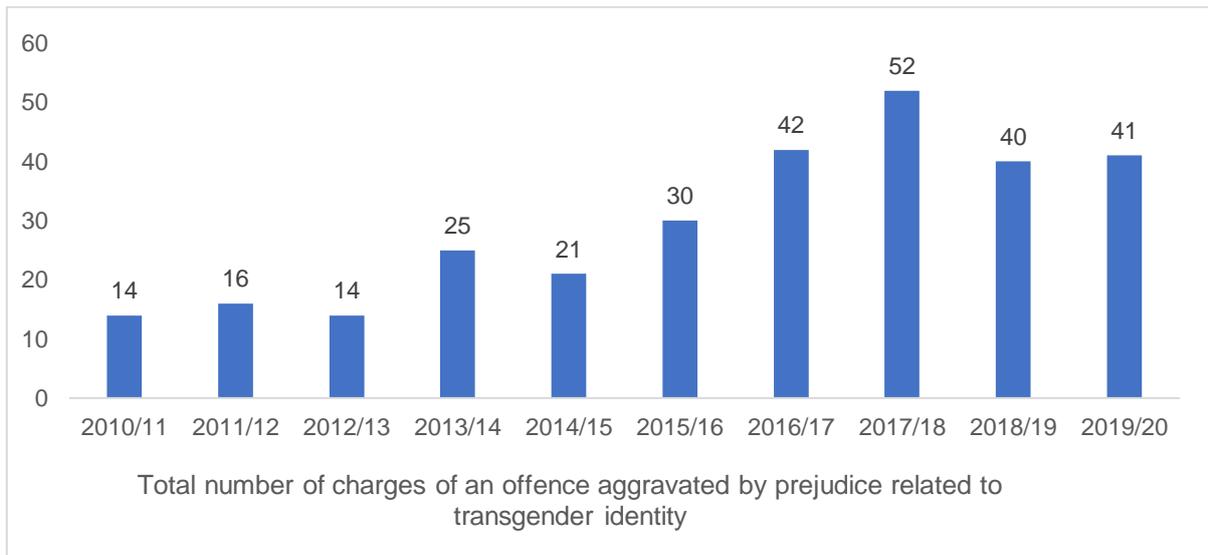
Prior to the introduction of the Hate Crime and Public Order (Scotland) Act 2021, there were statutory aggravations: race, religion, disability, sexual orientation and transgender identity. Legislation for the newer categories of hate crime (disability, sexual orientation and transgender identity) came into force on 24 March 2010

Figures from COPFS²⁴ show that the vast majority of charges reported in 2019/20 were for crimes motivated by racial hatred. In total, 3,038 charges relating to race crime were reported last year. Table 1 shows an uneven upward trend for charges aggravated by transgender identity between 2010/11 and 2017/18, from 14 to 52 cases, followed by a drop. There were 41 charges reported in 2019-20 with an aggravation of transgender identity, one more than in 2018-19. Court proceedings were commenced in respect of 33 of the 41 charges. These figures are not broken down by sex, so it is not possible to say what proportion of the charges reported related to hate crimes committed against transwomen.

²³ <https://kareningalasmith.com/2020/01/20/the-importance-of-women-only-spaces-and-services-for-women-and-girls-whove-been-subjected-to-mens-violence/>

²⁴ Crown Office and Procurator Fiscal Office (2020) [Hate Crime in Scotland 2019-20](#)

Table 1. Transgender identity aggravated crime: Charges reported, 2010-11 to 2019-20



Source: [Hate Crime in Scotland 2019-20](#)

8. International experience raises no concerns about moving to a model of self-declaration for a change of sex in law

“Scotland is behind many, many other countries who have already simplified the process for gender identification... Countries like, you know, the Republic of Ireland have already done it without as far as I am aware the furore or any of the concerns that have been expressed here materializing in any way shape or form”. (Nicola Sturgeon, SNP, Deirin interview)

“self-identification is best international practice and it’s in place in many countries like Ireland, like Belgium, like Australia with no evidence that it causes danger to women or puts women in danger at all” (Lorna Slater, Scottish Green Party, BBC Any Questions)

Several candidates describe self-identification as ‘international best practice’. However only a small number of countries provide for the legal recognition of gender based on self declaration. No party has presented detailed evidence or analysis on how the law operates in these jurisdictions, or what international best practice entails.

The pace of change has generally been rapid in countries going down this route and involved limited public engagement. Between 2014 and 2019 eight European countries adopted versions of laws based on self-declaration. A report produced for campaigners for change described strategies including keeping the issue ‘below the radar’ by latching campaigns on to more popular policies such as equal marriage, and avoiding media coverage.²⁵ In Denmark a closed consultation took place, with just nine responses (we were unable to find evidence of a public consultation),²⁶ while the Bill

²⁵ Dentons (2019) [Only Adults? Good Practices in Legal Gender Recognition for Youth](#)

²⁶ L 182. Annex 1 [Consultation note and response from the Minister of Finance and the Interior](#) (2014)

passed through Parliament in just 43 days.²⁷ Norway's gender recognition Bill was introduced in March 2015 and passed in June 2015. In Ireland, a pre-legislative public consultation in 2010 secured just 40 responses (2011; 13). The later Bill passed in seven months, with an amendment to remove the medical evidence requirement only accepted in the final weeks, limiting the time available for scrutiny.

Significant problems are now coming to light in Europe and North America, which can be attributed to a failure to recognise the conflict of rights between women and those claiming transgender identities. In particular, 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. Other examples include:

- Ireland: In 2019 a transwoman convicted of 10 counts of sexual assault and one count of cruelty against a child was placed in the women's prison estate. The Chair of Ireland's Law Society Criminal Law Committee has stated that "the law that was enacted in 2015 did not envisage this situation."²⁸
- Norway: A woman was reported to the police for having asked a male to leave the women's changing room in a gym, in case that lasted over two years. Between 2015 and 2017, the number of women reported for rape increased by over 300 per cent.²⁹
- Canada: A transwoman who was refused a Brazilian wax services by female beauticians brought about court cases under the British Columbia Human Rights Code.³⁰
- Canada: Two residents in a homeless shelter for women raised their concerns about sharing sleeping accommodation with transwomen who remained clearly identifiably male. 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.³¹
- 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 their presence.³²

²⁷ Folketinget (2014) [L 182 Proposal for a law amending the Central Person Register Act. Time schedule](#)

²⁸ <https://www.lawsociety.ie/gazette/top-stories/male-bodied-transgender-inmate-housed-with-women-prisoners/>

²⁹ See: <https://www.spectator.co.uk/article/does-the-snp-really-want-to-copy-norway-s-gender-revolution->

³⁰ Telegraph (23 October 2019) [Canadian transgender woman loses case against beauticians who refused Brazilian wax](#)

³¹ Global News (9 March 2017) <https://globalnews.ca/news/3300518/concerns-over-transgender-client-at-okanagan-shelter/>

³² TV2 (6 May 2015) [Ibi-Pippi after gender change: That's why I don't want to look like a woman](#)

9. Size of the transgender population

“[transgender people are] 0.1% of the population” (Shona Robison, SNP, Scottish Women’s Convention hustings)

There is no reliable data about the size of the population claiming a transgender identity. UK Government (2018)³³ estimates range from 0.35% to 1% of the UK population. There is persistent international evidence of sharp growth in the numbers identifying as transgender, particularly among younger age groups. A 2018 large-scale Swedish study, based on a population-representative sample, reported that 2.0% of males and 3.5% of females wanted to live or be treated as someone of a different sex. This proportion increased to 6.3% among the 22- to 29-year-old age-group (for both sexes).³⁴

Next year’s census in Scotland will, for the first time, ask a question about respondents’ trans status. The census will also carry the longstanding, mandatory sex question, with two possible responses: ‘female’ or ‘male’. However, the National Records of Scotland has developed guidance to accompany the question which advises respondents to answer based on their self-declared gender identity, meaning that it will not be possible to decipher which respondents are answering with their birth sex, and which with their trans status. Nor will it be possible to reverse-engineer the data by comparing it with responses to the trans status question, as this is a voluntary question.

Similar guidance developed by the Office for National Statistics for the recent census in England and Wales was successfully challenged in the High Court, meaning that the guidance had to be withdrawn after the census website had gone live and leading to a consent order in which ONS conceded that they had unlawfully redefined ‘sex’. It remains to be seen how the Scottish Government will take account of this ruling in the 2022 census in Scotland.

³³ Government Equalities Office (2018) [National LGBT Survey](#)

³⁴ MBM Policy (2020) [International evidence and the risks of reframing the sex question in the census](#)

10. Manifesto commitments: Promises were made by all five political parties to reform the GRA and recognise non-binary identities

“promises were made by all five political parties five years ago...all making these same promises from across the political spectrum for reform of the GRA and for recognition of non-binary people” (Patrick Harvie, Scottish Green Party, STUC Husting)

Both Nicola Sturgeon and Patrick Harvie have claimed that all five political parties represented in the last parliament committed to reform of the GRA during the 2016 election campaign. During the STUC hustings, Patrick Harvie further claimed that they had also committed to “recognise non-binary identities”.

Our [review](#) of the 2016 party manifesto commitments revealed that all five parties did indeed commit to reforming or reviewing the GRA. However, only Labour and the Liberal Democrats said that they would introduce legal recognition of those with non-binary identities. The Scottish Greens’ manifesto stated that they would “call for a government-led review of legislation and services to identify inequalities for LGBTI+ couples and people of all non-binary gender identities”.

No party explicitly committed to reform of the GRA that would enable individuals to change their legal sex on the basis of self-declaration (often termed ‘self-ID’).