



**MurrayBlackburnMackenzie**

Policy Analysis Collective

Neil Rennick  
Director of Justice  
Scottish Government  
St Andrew's House  
Regent Road  
Edinburgh EH1 3DG

11 March 2020

Dear Neil,

Thank-you to you and to [REDACTED] for meeting us on Monday to discuss the Scottish Government proposals to reform the Gender Recognition Act 2004.

#### **Scottish Government understanding of counter-arguments**

We began by asking what the Scottish Government understood the main objection to its proposals for self-declaration to be. We noted that we intend to use our response to set out in detail why we believe the proposed changes would introduce substantial new difficulties for the operation of single sex services, spaces and occupations, compared to the current situation, due to the way in which they can be expected to change the size and nature of the GRC-holding population.

#### **Lack of clarity on legal rights**

We remain concerned that even at this late stage in the consultation process, the Scottish Government is still unable to state with any clarity, whether a person who acquires a Gender Recognition Certificate is afforded any new legal rights which have potential impacts on other people.

We discussed the question of the legal rights afforded by a GRC both in general, and in relation to the placement of prisoners. In relation to prisoners, we referred to Ministry of Justice policy whereby the discretion available to the prison authorities is fettered in situations where a person has a GRC, and noted that this is based on case law (see: (R (on the application of AB) v Secretary of State for Justice and another [2009] EWHC 2220 (Admin), [2009] All ER (D) 28 (Sep)). In response, [REDACTED] stated that the Scottish Government "has taken a different view" to the MoJ. This difference in interpretation was not explained, although it was noted that the underpinning case law was English and therefore, it appeared, thought not applicable to Scotland. Have we understood correctly that the Scottish Government regards the location in England as material? Given that the case ruled that the decision not to transfer a pre-operative transgender woman to a female prison constituted a breach of rights under Article 8 of the European Convention on Human Rights, we would suggest that any assumption that the same effects on discretion would not be applicable in Scotland would need to be exceptionally well-founded. [REDACTED] mentioned a criticism of the MoJ position by Professor Alex Sharpe: again, would it be correct to state that the Scottish Government position has been influenced by Sharpe's arguments? We would be grateful for a reference to the specific piece considered.

We discussed whether in the Scottish Government's view people who have always had a male birth certificate but are covered by s7 of the Equality Act 2010 are legally distinct from people who have a

GRC that designates them legally female, for the purposes of Schedule 7 paragraphs 26 and 27 of the Equality Act. We noted the recent article by Julius Komorowski in the Journal of the Law Society Scotland, which argued that the protected characteristic of “gender reassignment” could not be read as conferring a change of sex in the context of the Equality Act: [REDACTED] noted that the Scottish Government was aware of this piece. He also noted he had a comment and a question on the recent paper produced by Rebecca Bull. We would be pleased to have those. We noted [REDACTED] as stating that the issue of the status of non-GRC holders in relation to single sex provision was a “complicated question which would require some thought” and that he was “reluctant to say yes or no without giving it further thought”.

Given this, we concluded that on the date we met, that the Scottish Government was unable to give a clear assurance that obtaining a GRC makes no difference to a person’s legal rights to access single sex provision under the Equality Act. Would you regard that as a fair statement?

### **Definition of “trans people”**

[REDACTED] clarified that by “trans people” in the consultation paper the Scottish Government meant “a person whose gender doesn’t correspond to their birth sex”. When asked, he clarified that by “gender” was meant a person’s “lived identity”. We would be grateful for any further explanation you are able to provide of what the Scottish Government takes “lived identity” to mean. We wonder, among other things, whether this definition would exclude some people who would be covered by the protected characteristic of gender reassignment but who have yet to make much or any change to how they live from day to day outside their own home. We should in any case note here that this definition appears to go much wider than the group of people entitled at present to apply for a GRC, and that the consultation paper is therefore misleading in stating without qualification that “trans people” have had the right to change their sex in law since 2004.

### **Exploring alternatives to self-declaration**

It was confirmed that that the Scottish Government has not looked at any alternatives to self-declaration that retained medical gatekeeping, nor has the Scottish Government had any discussion with the Gender Recognition Panel, for example, to consider the type of scrutiny it undertakes. In relation to the panel, it was suggested that there would be no point in keeping this if the intention was to move away from a medical requirement. We would suggest that this argument skips over an important step in the policy-making process, which is detailed consideration of any safeguarding role undertaken by the panel, for applicants or the wider public.

It was also noted that the cost of setting up a Scottish tribunal/panel to oversee applications was regarded as being too expensive. We thought we heard £800,000 quoted as an estimate. We would be grateful for any information on how this estimate was reached.

We noted that the Scottish Government had found interesting, if unlikely to be universally welcomed, a proposal we had made in a recent blog, that section 3(3) of the GRA could be considered for repeal in order to simplify demands on applicants, but we are concerned that this appeared not to have been explored as an option earlier.

We would suggest that a failure to explore alternative ways of reforming the GRC application process is a significant contributory factor to the divisiveness around the current debate, and the ongoing failure to secure consensus.

### **De-transition**

We asked about the lack of any provision for de-transitioners in the draft Bill. It was stated that the expectation was that people would follow the same procedure in reverse. It was also noted that there

appeared to be very few cases of de-transitioners. We suggested that the current numbers are unreliable, that such cases are likely to increase, and that rarity is not a sufficient reason to not have a provision. We noted that we saw this as a weakness in the current GRA and although self-declaration made reversal simpler, it would be better to make a specific provision. [REDACTED] noted that there was some specific provision in the Irish legislation. We would be interested to know more about why the decision was taken not use the current Bill to follow that model.

### **Evidence on male-pattern offending**

We raised the Swedish cohort study by Dhejne et al. (2011)<sup>1</sup>, which is not referenced in the draft Equality Impact Assessment in considering impacts on sex as a protected characteristic. This study followed a cohort of 324 individuals who had undergone both surgical and legal sex reassignment between 1973 and 2003, and compared them to a control group drawn from the remaining population, matched on a number of relevant characteristics. Among other things, the study 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”. Transmen’s likelihood of having a criminal conviction was similar to that of the general male population. It was higher than for the general female population, but the difference with that group was less than for transwomen.

When we raised the study and its omission from the EQIA, a reference was made to comments by the lead author which had been taken to dispute that the data shows “male pattern” offending among M-to-F transitioners. We pointed out that these comments were made in an interview some years later<sup>2</sup> and cannot be reconciled with the published data, and therefore provide no basis on which to reject the clear and peer-reviewed published findings on offending rates.

We were surprised to be asked why we thought that the study was relevant to GRA reform. In response, we stated that if the Scottish Government wishes to change the law in a way that will weaken or remove existing safeguards and the basis for services and spaces currently segregated on the basis of sex, by substantially increasing the number of people born male who have a female legal sex, then the burden of proof falls on the Government to demonstrate that is not introducing new risks in so doing. These risks relate to the removal of medical gatekeeping, which opens the GRC application process to a larger and more diverse group of people born male (the consultation paper estimates a ten-fold increase in the total number of GRC applications) with potential new rights of access to women-only services. In this respect the study is relevant because it is a seemingly unique, methodologically robust, peer-reviewed, large scale comparative source on offending rates, which 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. We have been unable to find any equivalent study which shows the opposite effect to Dhejne et al’s results, nor is any such research cited in the Literature Review undertaken by the Scottish Government.

### **Alternative views from transitioners**

It was confirmed that the Scottish Government has not undertaken any specific work to ascertain the views of transgender people, particularly those who had gone through the current GRC application

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<sup>1</sup> 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](https://doi.org/10.1371/journal.pone.016885). PLoS ONE 6(2): e16885.

<sup>2</sup> [https://www.transadvocate.com/fact-check-study-shows-transition-makes-trans-people-suicidal\\_n\\_15483.htm](https://www.transadvocate.com/fact-check-study-shows-transition-makes-trans-people-suicidal_n_15483.htm)

process, who disagreed with self-declaration, such as face-to-face meetings. [REDACTED] noted that some consultation responses had been received in the previous round from this group. We have looked again at the consultation analysis report and note that it is not possible from that to identify those respondents as a group, and that individual responses were not published. As suggested in the meeting, we would encourage the Scottish Government to ensure that it has engaged actively with a wider range of views within the transgender community, and not just those represented by the mainstream LGBT organisations supporting self-declaration.

### **Approach to consultation responses**

We were pleased to hear that the Scottish Government will consider responses which engage with the principles of the draft Bill, and not just the detail of the Bill.

We also asked for clarity on whether the Scottish Government would redact and/or not publish consultation submissions that referred to cases with reported convictions, such as Karen White or Katie Dolatowski, or to campaigners such as Stonewall advisor Alex Drummond, who we were surprised was unfamiliar to both of you, as a well-known advocate of a particular school of thought about the relationship between gender identity and physical appearance.

We found the response to this question less helpful than we had hoped. For example, it was suggested that a news report in The Courier newspaper (which has reported widely on Dolatowski case) “might not be true”, but no suggestion was put forward as to what the Scottish Government would view as a reliable source to cite. We were told that government consultations “don’t refer to prisoners”, although we cited the Government’s ‘Transforming Parole in Scotland’ consultation, published in December 2018, which references by name the Worboys case. It was also suggested that naming individual cases in a submission would run counter to advice the Government had received from the Information Commissioner. You noted that there would be resource implications in applying specific redactions: we made the point that withholding entire responses risked raising issues of reasonableness and proportionality. We said that a refusal to publish particular responses in total, rather than redacting specific references if felt necessary, could carry a reputational implications for organisations and individuals, because of the risk that this would be cited as evidence of transphobia. It would also of course, make whole responses inaccessible to a wider audience.

We are generally concerned by the Scottish Government’s approach to building an evidence base around its proposals. As you are aware, police recording practices preclude the production of statistics on recorded offending by gender identity, so consultees cannot refer to data from published statistics. We noted that the Scottish Prison Service on principle does not keep records of whether or not any assaults have been committed by transwomen in the female estate. In addition, the Government has failed to recognise the relevance of the only piece of robust quantitative research in this area (Dhejne et al (2011)), while its position on whether it will publish consultation responses that reference relevant individual cases remains unclear.

In relation to the last of these, we think that the Scottish Government needs to publish a statement on how it intends to deal with redactions and publication, with clear examples of what will and will not be published. It is a weakness in the consultation process that it is necessary to clarify this point with only one week until it closes.

### **Later stages**

Finally, we noted that we expected there to be substantial parliamentary interest in any legislation brought forward and that, based on the growing levels of concern amongst backbench MSPs that we have gauged, it seems likely that chamber and committee debates will be more emotionally charged than usual.

We are trying as much as possible to maintain an 'open book' approach to our interactions with policymakers. We took a similar approach when we met recently with the Scottish Government's Chief Statistician. It is therefore our intention to publish the letter we sent to you prior to our meeting, setting out the questions we wished to raise with you, as well as this summary of the meeting, and your response to this letter when we receive it.

There were a number of points we raised in advance that there was not time to cover during our meeting. We will look again at those and come back to you about any we would find it helpful to pursue further, separately and in due course.

As agreed at our meeting, we are happy for you to indicate any sentences that you would like us to redact from the version we put on our website. We would like to publish these letters soon after the consultation closes, so would appreciate a response from you before Friday 20 March.

Yours sincerely

Dr Kath Murray  
Lucy Hunter Blackburn  
Lisa Mackenzie