



Gender recognition reform (Scotland) Bill: Stage 1 supplementary note

12 July 2022

Following the conclusion of the Committee's oral evidence sessions, we are writing to provide supplementary material we hope will be helpful to the Committee in considering its Stage 1 conclusions. The letter is in three parts.

- Part 1 follows the discussion at committee attended on our behalf by Lucy Hunter Blackburn on 31 May, to clarify and emphasise points made in oral evidence. We have already forwarded separately to the Committee details of two articles mentioned at the hearing, on Denmark and Norway.
- Part 2 highlights other areas of concern, either not considered by the Committee or only partially considered during the oral evidence sessions.
- Part 3 addresses further points made in evidence by other witnesses.

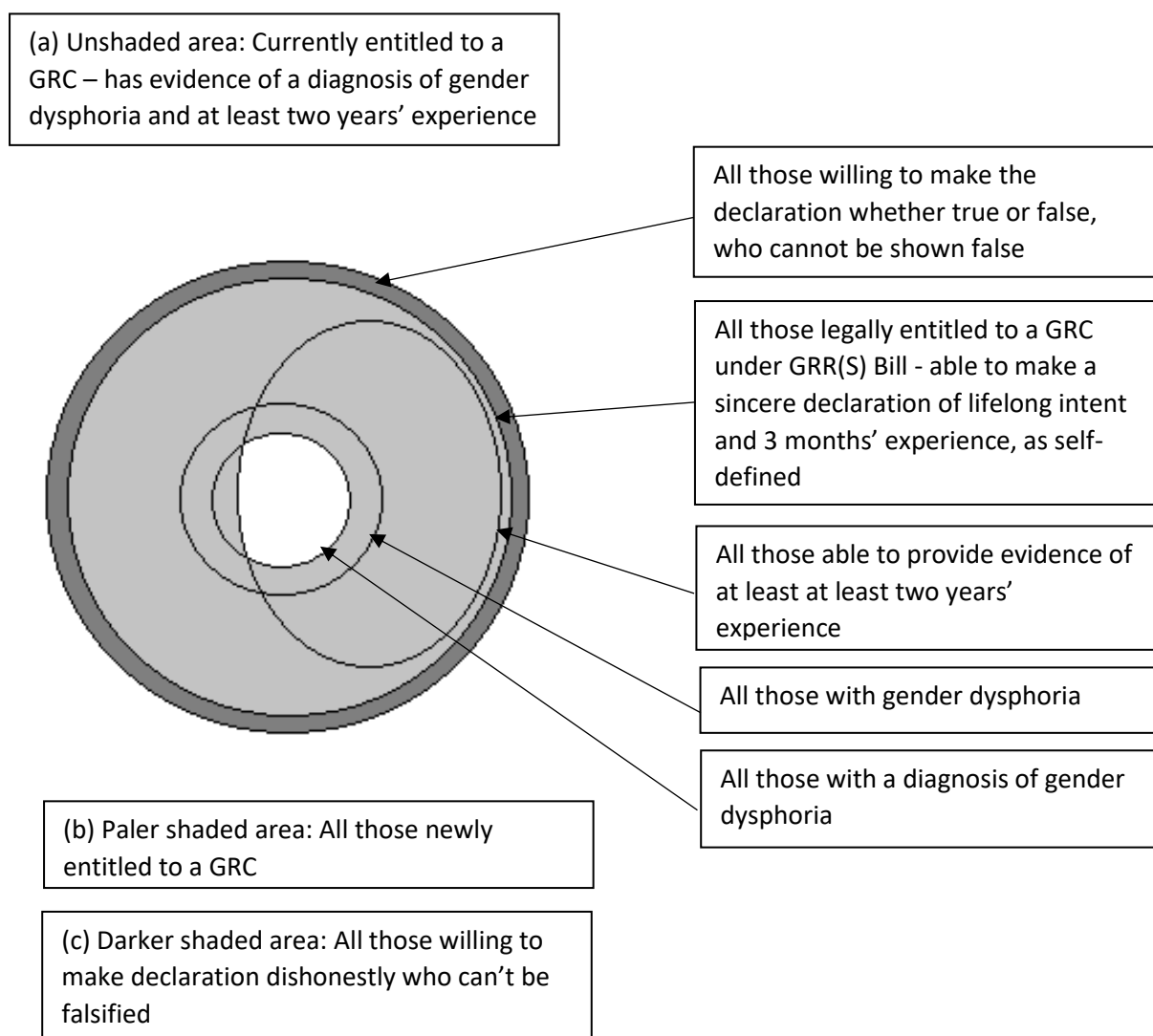
For reasons of space, this supplementary note does not engage with the full range of issues raised in oral and written evidence to the Committee. Notably we do not engage with lowering of the age of eligibility for a GRC to sixteen. Our ongoing concerns about this proposal are set out in our written submission to the Committee. Any other issues raised in our written evidence that are not noted here still stand.

We apologise for the length of this letter. We wanted to be sure that certain points are at least on the record, even where they are not capable of influencing the outcome.

Part 1: Points discussed at committee

The changing nature of the GRC population

- 1.1. Maggie Chapman MSP asked why we had said that the GRC holding population was going to become more diverse. This is because first, it will include for the first time 16- and 17-year-olds, with implications for schools and other settings catering for this group, at minimum in relation to s22 of the GRA.
- 1.2. Secondly, the diversity of the population can be expected to increase most obviously because the law will fundamentally change who GRCs are for.
- 1.3. The figure below shows how. The central unshaded area (a) shows those currently entitled to a GRC. Paler shading (b) shows those who will become newly entitled, and darker shading (c) shows there will be a group who are not legally entitled but whose application in practice will be impossible to falsify. **The area of circles is not to scale, as the size of each group relative to the others is unknown.**



- 1.4. GRCs will move from being a legal instrument deliberately limited in 2004 to a small group with a medical diagnosis and evidence of at least two years' living in their 'acquired gender', to a group that no-one disputes will be much larger. This will consist of anyone feeling able to make a solemn declaration that they intend at that moment to live in their 'acquired gender' for the rest of their life, and to declare that they have three months' experience of doing so.
- 1.5. The Cabinet Secretary's claim to the Committee that the Bill "*does not change or expand trans people's rights*" is demonstrably wrong, unless the government view is that none of the people in the shaded area above are trans. **As a point of plain legal fact, the Bill proposes a substantial change to the qualifying population.** Statute law consists of what is written, not what is imagined about it by its promoters.
- 1.6. Ms Chapman herself referred in later hearings to people without gender dysphoria now being able to benefit from obtaining a GRC. This group is currently excluded from the NHS's treatment pathway for physical and other treatments. By definition therefore, GRCs are being opened up, for the first time, to people the NHS deems ineligible for assistance with physical transition.
- 1.7. GRCs will also be available to those who have a less established history of living in a new persona, and can self-define what it means to do that. This larger GRC population can therefore be reasonably expected to contain more people who have made fewer changes (if any) to how they present, compared to current GRC holders, and who hold a wider range of views about what it means to live in their acquired gender.
- 1.8. This is evident in submissions made to the Committee. The summary of written evidence prepared for the Committee referred to a submission arguing that the three-month prior period living in the 'acquired gender' would be a barrier to people who find it unsafe to be 'out.' This indicates that some people at least are looking at a GRC as a validation to obtain before making any changes to how they present, if they ever do. **The Committee was told by several witnesses that people were only likely to apply for a GRC once they had undergone a long process of thought and change. However, no-one is entitled to assert that, and the Committee should not assume it. The law as proposed will not require it. People will be entitled to use the law as it is written; the only responsible way to legislate is on the assumption that they will.**
- 1.9. Evidence to the Committee also showed conflicting views on how potential applicants might think about gender identity in relation to the bill. The Equality Network's supplementary note re-stresses its support for basing GRCs on lifelong commitment to living in a particular acquired gender. Some pro-reform witnesses however challenged the concept of acquired gender (however it was phrased) as too normative, while others questioned having any requirement to commit to living in it for life. Drawing on qualitative research in Scotland with relevant individuals, Professor Sharon Cowan's written evidence highlights increased interest in ideas of gender fluidity: she argues this means some applicants who would feel entitled to a GRC as a validation of identity may not want to commit to lifelong change or will want to change their legal status more than once. Other witnesses mentioned those

who do not identify as either a man or a woman but who might want to obtain a GRC as they identify more closely with the opposite sex than the one they were born, but could not honestly say they will live as a woman or a man. Even among those who are committed to making a permanent change, ideas about what that means are developing. We have been told reliably of at least one case where a person has preferred to keep their original name, closely associated with being male, despite otherwise identifying as a woman. The Cabinet Secretary indeed told the Committee that the government would not require name changes.

- 1.10. The Committee needs to consider how expectations and understandings are changing here and are likely to continue to do so, and what that means for how this legislation might be used.
- 1.11. **To assume that opening up GRCs to self-declaration will still mean GRCs continue to be used as now only by people who are likely to have made extensive, long-standing changes to how they appear, name themselves and so on, with permanent intent, would ignore the evidence in front of the Committee, as well as the letter of the law, as proposed.**

Operation of the Equality Act 2010

- 1.12. As Lucy Hunter Blackburn noted on 31 May, the issue here is the lack of a clear, fully settled position in the relationship between the GRA and the 2010 Act.
- 1.13. We draw to the Committee's attention to the briefing note sent to all MSPs by a range of groups on 20 May which showed that various organisations, including the Scottish Government and Equality Network, have argued that GRCs are relevant to the definition of sex under the Equality Act. It also set out why extending the size and diversity of the GRC holding group in the way proposed is likely to make organisations more anxious about using the powers they have to operate single sex services (see [here](#)).
- 1.14. We note that oral evidence to the Committee has reinforced that this is an area where the legal position would benefit from being explicitly clarified. On the legal panel on 14 June, barristers who specialise in discrimination law disagreed on the legal position and confirmed that their own views had changed over time.
- 1.15. We note their views tended to be different again from that of the Cabinet Secretary, who in response to being asked if she believes that a GRC changes a person's sex for the purposes of section 11 of the Equality Act 2010, said "*People have been able to change their sex through the 2004 Act since it came in*". That is consistent with the position the Scottish Government has taken in its reissued guidance on the Gender Representation on Public Boards (Scotland) Act. However, it is inconsistent with Cabinet Secretary's assertion that the Bill "*does not redefine what a man or a woman is*" given the Bill, by definition, will expand and diversify who is entitled to a GRC.
- 1.16. We note that neither the government nor the SHRC appeared to understand that what sex a person is under the Equality Act will matter for the operation of that Act, due to the material difference between being able to bring a claim under the Equality Act 2010 by direct rather than indirect discrimination. Their failure to understand the EHRC's concerns appears to be related to this.

- 1.17. The Committee may be aware that although it was reassured by witnesses about powers in s195 of the Act about sport, a range of sporting bodies were recently [reported](#) as telling the UK Culture Secretary that they were reluctant to use this provision for fear of facing legal action. Section 195 is the clearest provision allowing a single sex approach. If sporting bodies are concerned about the risk of litigation in this area, Committee members should not be complacent about any move with potential to increase the fear of litigation against single sex spaces more generally.
- 1.18. The Cabinet Secretary claimed that *“The bill will not change the protections that are set out in the Equality Act 2010. It will not change the exceptions in that act that allow single-sex services to exclude trans people where that is a proportionate means of achieving a legitimate aim, including where those trans people hold a GRC. The bill will not change or remove women’s rights. It will not make changes to how toilets and changing rooms operate.”* **All these assertions rest on denying any adverse effect as a result of existing unresolved confusion over the relationship between the Acts being made worse by providers’ fears of an increased risk of direct discrimination claims.**
- 1.19. We note that JustRights Scotland, which is part funded by the Scottish Government, told the Committee it acts to provide legal support and advice based on gender identity. Its recently [published litigation strategy](#) explicitly states that it is seeking test cases in the area of trans rights, and specifically in the area of access to single sex spaces and services. As far as we can ascertain, it has no parallel strategy to seek potential test cases to strengthen women’s rights of access to single sex spaces and services.
- 1.20. We are concerned that over the course of the sessions, the value of single-sex provisions to women in specific contexts, and therefore the detriment to them of any change that makes those less likely to be provided, has not been clearly acknowledged.
- 1.21. Our letter of 8 June noted that Isabelle Kerr would be a witness able to speak publicly on the specific issue of why single sex services matter to many women who have experienced sexual abuse or violence. She is also able to do so without concern of repercussions in her professional life: Ms Kerr retired last year after 15 years running Glasgow Rape Crisis, the largest rape crisis service in Scotland, and has been closely involved in VAWG services in Scotland and elsewhere for 40 years. She provides advice on this topic internationally and has been honoured for her work in this field. More background on Ms Kerr is available [here](#).
- 1.22. Following comments made by Reverend Karen Hendry representing the Church of Scotland, we told the Committee that we had been made aware of a number of women who would appreciate the opportunity to meet the Committee in private to discuss their interest in the Bill. We are very disappointed that there has still been no clear response to this offer, made on 9 June, despite explaining several times why this group should not be left longer than necessary without knowing if their offer would be accepted. We think this has failed to treat these women with the courtesy and understanding they deserve and reflects poorly on the Committee.

- 1.23. A number of witnesses, including the Cabinet Secretary, emphasised that the Equality Act permits providers to exclude those with the characteristic of gender reassignment under certain conditions. We place on the record that the Equality Network and Stonewall have in the past both lobbied to remove that ability from providers. We regret that the Committee did not ask them whether they would do so again.
- 1.24. We formed an impression from the hearings that not all Committee members are supportive of these exemptions existing. In some circles, it has become common to draw parallels between women setting boundaries based on sex for reasons of privacy, dignity, or safety, as the law permits, and racial discrimination. **We would ask that if the Committee does not agree with those parallels, and agrees that boundaries based on sex are not just lawful in certain circumstances under the Equality Act but reasonable in principle, it uses the Stage 1 report to play its part in providing political leadership here, by saying so.** It would be useful at minimum if the Stage 1 report could be honest about whether the Committee supports these provisions in the Equality Act, given this will have been relevant to how seriously risks to the erosion of such provision have been taken in weighing the evidence.

Prisons

- 1.25. The Committee should consider with particular care the potential impact of the Bill in the criminal justice system. It is currently impossible for someone with no history of declaring transgender identity to obtain a GRC early on entry into that system: third party input acts as a further check.
- 1.26. The issue of prisons was discussed at length on 31 May and at later sessions. We think that there are a variety of reasons people accused or convicted of offences might choose to take advantage of self-declaration, including, but by no means limited to, hoping for increased access to women as potential victims while held in prison. It will be more or less impossible to distinguish between different motives and lawfully to refuse such cases under the Bill as drafted. This means the GRC holding population is therefore likely in future to include more people accused and convicted of offences than now.
- 1.27. The Cabinet Secretary's comment at Committee that *"any prisoners we are talking about have already done that through the 2004 Act, because this bill is not in place. If any of the people whom we are talking about have a GRC, they will have one through the existing 2004 legislation"* fails to grasp the central point that it will become very much easier for people in prison to obtain a GRC. The SPS confirmed to you on 22 June that they are not aware that under the current arrangements for GRCs, they have had ever had prisoner with one. They also confirmed that prisoners can make statutory declarations while in custody.
- 1.28. We note that Senator Doherty referred to two cases in Ireland where, as she put it, it was not possible to assess the *"journey"* a person had taken. Both cases have been reported in the media and involved identification after becoming known to the criminal justice system: see reports [here](#) and [here](#). Lucy Hunter Blackburn mentioned the disproportionate number of male prisoners claiming a transgender identification in the English prison population (equivalent figures are not available

for Scotland): we refer you to supplementary evidence on this submitted to the Committee by Kate Coleman of Keep Prisons Single Sex.

- 1.29. In stressing that the current policy in Scotland ignores GRCs, other witnesses, including the government, the SPS and the SHRC, troublingly failed to recognise that the issue here is **whether this approach would withstand legal challenge and the increased risk of such a challenge being brought, if there are more GRC holders**. This should be considered in the Stage 1 Report. We wrote to the SPS about this point (see Annex A).
- 1.30. The Cabinet Secretary's promise that the Bill "*will not change the way that Scottish prisons accommodate the people in their care*" is not in her gift. **In the event of a legal challenge by a prisoner (the SPS witness confirmed to you this is a litigious group) it will be for the courts to decide this point, in the absence of a clearer position in statute.**
- 1.31. We note the SHRC misdescribed to the Committee prison policy in England, stating that in that system "*a gender recognition certificate plays some role but it is never determinative of the placement of a prisoner*". As explained by Ms Coleman, **GRCs do determine how prisoners are placed in England, in an identical way to sex**. Holders of a female GRC are treated with a default assumption of placement based on acquired gender and are only placed in male accommodation if, in identical circumstances, a woman prisoner would be. Relevant extracts from the policy are included in the briefing note [here](#).
- 1.32. Dr Peter Dunne appeared to suggest that there was already some form of specific statutory "*carve-out*" (in his words) for GRCs in prisons (and it appeared, sports and single sex spaces). We are not sure what he had in mind, as nothing like that exists in any of these settings, although we note he spoke approvingly of such an approach.

Section 22

- 1.33. Our written evidence notes that the Scottish Government has previously suggested it might tighten the s22 provisions. The 2019 consultation stated:

'... the Scottish Government will consider before any Bill to reform the GRA is introduced to Parliament if:

Further exceptions to section 22 should be made, by way of a further Order under section 22(6);

Scottish Government guidance on section 22 should be issued.

We will outline our approach in this area when any Bill is introduced into Parliament.'

(2019: 34)
- 1.34. Evidence of this work is lacking. Instead, the Bill widens the effect of s22, to cover more people, including any from overseas. Contrary to Colin Gilchrist's statement that "*No substantive change is made to section 22*" the Bill extends the application s22 privacy protections for two years from application, whether or not the application proceeds, or is successful. [Written evidence](#) from the organisation Sex Matters states: 'The provision of secrecy about a person's sex is not something that should be given out indiscriminately. The implications of these secrecy provisions

should be seriously considered for areas such as safeguarding and single-sex services.’

- 1.35. We note a question to the Minister on plans to take forward earlier commitments to clarify s22 from Pam Duncan-Glancy MSP did not receive a response (the answer given appeared to assume a different question). A question about s22 for overseas cases from Maggie Chapman MSP similarly did not receive a response.
- 1.36. Pressed further by Ms Chapman about s22 and public safety concerns, the Minister referred to the exception for the purposes of ‘preventing or investigating crime’. We would suggest this is a far too narrow formulation to cover broader preventative approaches associated with safeguarding policies, for example, or the legitimate operation of the single sex provisions in the Equality Act.
- 1.37. We are concerned that the Head of the GRU said that *“it is probably true that we are generally open to conversations about whether additional exceptions are needed in section 22. However, our view is that this bill would probably not be the best way to do that, given that it is focused on the process for obtaining a GRC, not on the effect of a GRC.”* This contradicts the position set out in 2019, noted above.
- 1.38. **We would argue that the point of substantially expanding and diversifying the GRC population is the one at which, in good law-making, the detail of the effect of GRCs, not least s22, should also be reviewed.** We are concerned that this has not yet happened, despite an earlier commitment, and that it appears now to be being deferred to another unspecified opportunity. Nor does the Scottish Government appear to be keeping pace with updating undertaken at Westminster, notably an amendment made for the purposes of the ‘management of offenders’ in autumn 2021.

Relationship with medical treatment

- 1.39. At our panel on 31 May the relationship between legal change and medical treatment was raised.
- 1.40. In our letter of 8 June we strongly urged the Committee to take evidence from clinicians who are concerned that legal reform is being pursued with too little attention to its potential impact in clinical settings. To this end we suggested you contact [CAN-SG](#), a newly formed interdisciplinary network of clinicians, with members in Scotland. It describes itself as ‘a coalition of clinicians to campaign for clearer dialogue, better data collection, rigorous science and improved treatment options for gender dysphoria.’ We also suggested [Genspect](#), which describes itself as ‘an international alliance of professional groups, parents, trans people, detransitioners, and others who advocate for a better model of care than the current “affirmative” approach’, has membership in the UK, including Scotland, would also be worth approaching. We are not clear if the Committee has sought any evidence from these groups. We understand the Committee has taken evidence privately from parents of young people and at least one detransitioner, but we would urge more range in the sources of advice from medical practitioners.
- 1.41. We note that subsequent public witnesses have been keen to reassure the Committee that there is no risk of legal change leaking across into medical practice;

but that the only front-line medical practitioner to provide oral evidence is the nurse co-ordinator of the NHS Gender Identity Clinical Network, who is also a member of WPATH, a body which advocates for self-declaration. The Committee may be aware that the NHSGICN website was taken down last month, due to links to inappropriate and graphic content (see [here](#)) found in a WPATH document posted on the site. NHSGICN have described this as ‘an adverse event regarding a link to a third-party site’ which is now the subject of an investigation.

- 1.42. We note the [supplementary evidence](#) from NHSGGC states it:

‘...is concerned that there is the potential for the reverse effect of increasing expectation where people who have legally transitioned may expect the immediate right to clinical services with the purpose of affirming their transition. This would likely cause problems if the clinical judgement is contrary to what the patient expects.’

- 1.43. It adds ‘There is the potential that patient expectations change in relation to what the service is there to do. This is potentially the case also for primary care services.’ We note that asked whether it expects self-declaration for a GRC to reduce or increase demand for the service, NHSGGC referred Committee back to the answer above, stressing the demands on the service and that it is ‘vulnerable.’

- 1.44. The [RCGP](#) informed the Committee that:

‘There is an urgent need to increase the capacity of gender identity specialists and clinics and expand the understanding of gender variance issues across the entire health system, including more definitive knowledge about the causes of rapidly increasing referrals and the outcomes of interventions or ‘wait and see’ policies. Furthermore, a major issue facing this area of healthcare is the significant lack of robust, comprehensive evidence around the outcomes, side effects and long-term consequences of such treatments for people with gender dysphoria, particularly children and young people. GPs are also facing increasing difficulties addressing patient requests for “bridging” prescriptions, particularly for those patients who have self-started medication, including medication which they have procured over the internet.’

- 1.45. Concerns about gender identity services being over-subscribed reinforce the need for MSPs to satisfy themselves that the more ready availability of GRCs will not increase demand.
- 1.46. This response appears to contrast with comments from others asserting no risk of legal status change leading to increased expectation of medical treatment. The Cabinet Secretary’s comment that *“the bill will not change the way that gender identity healthcare is provided or make changes to public policy, including national health service patient care”* is a further example of the government confusing an absence of direct legal provisions with absence of potential for unintended consequences.

The nature of gender dysphoria

- 1.47. We repeat the point made in Lucy Hunter Blackburn's letter to the Convener of 25 May, that the Stage 1 Report should avoid (re)normalising the idea that having a mental health condition is stigmatising and the Committee should be alert to how that language used here will sound to those who are experiencing or have experienced mental health issues, in drafting its Stage 1 report.
- 1.48. Lucy Hunter Blackburn noted that the Act requires (in s2 and s3) a diagnosis of 'gender dysphoria' but nowhere describes this as a psychiatric or mental health condition. Section 25 of the Act (the general definitions section) does however describe 'gender dysphoria' as 'the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism'. Following a recent case in the Northern Irish (NI) High Court, the reference to 'disorder' is due to be amended.
- 1.49. We wish to draw to your attention that the SHRC's written evidence to you includes a serious error in describing the outcome of the NI Higher Court case. The SHRC asserted to the Committee:

'the High Court found that the requirement under the Gender Recognition Act 2004 for an applicant to prove they are suffering from gender dysphoria was a breach the applicant's right to private and family life (Article 8 of the European Convention on Human Rights). The court found that it failed to strike a fair balance between the interests of trans people and those of the community. However, the requirement of general medical reports were found to be within the permitted range of requirements that a State can impose.'

- 1.50. This is wrong. Had that been the outcome, the proposed remedy agreed with the Court would have been to remove the requirement for a diagnosis. It was not. As summarised in Scottish Legal news (see [here](#)):

'The court held that the 2004 Act struck a fair balance between the rights of the individual and the community as a whole... the court held that the applicant failed in her claim that a diagnosis was a breach of her Article 8 rights. However, the court held that the requirement to prove that she was suffering from a "disorder" was unnecessary, unjustified and incompatible with the ECHR.'

- 1.51. Amending the wording of s25 is therefore being taken forward as a sufficient remedy. In a response to the most recent Westminster inquiry on gender recognition reform, on 24 March (see [here](#)) the UK Government stated: 'Being transgender is not a mental illness and we will take steps to amend the specific reference to gender dysphoria as a "disorder" in the GRA via a remedial order in due course.'
- 1.52. **The Stage 1 Report should accurately reflect the wording of the Act.**

Evidence from overseas

- 1.53. The question of international evidence arose on 31 May and has arisen in many subsequent sessions. A line frequently taken by witnesses is that there is no evidence of any detrimental effects on women in other jurisdictions which have adopted self-declaration, and that the Committee should therefore not be concerned about any risks there. That 'absence of evidence equals evidence of absence' also characterises the position adopted by the Scottish Government.

- 1.54. This line of argumentation puts the burden of proof on those concerned about the Scottish Government's proposals to demonstrate evidence of harm to women in other countries which have done this. It is a superficially attractive line for the Committee to accept, but there are several reasons to reject it, as follows:

Lack of comparability

- 1.55. In countries that have introduced self-declaration, it matters what protections are in place for single sex services and the extent to which a GRC affects a person's access to those. The Scottish Government holds no information on that.

Too little concern for women

- 1.56. A number of nations which have introduced self-declaration have noticeably poor records on women's rights in law and in practice. We note for example, that the three countries ranked highest in the [IGLA Rainbow Map 2022](#) are Malta, Denmark, and Belgium respectively. As detailed [here](#), abortion remains illegal in Malta, even in cases of incest and rape, while contraception is neither free nor easily available. A recent interview in the [Observer](#) provided a highly critical assessment of the state of women's rights in Malta, 'women are treated like walking incubators'.
- 1.57. In 2014, the year self-declaration was brought in in Denmark, the European Agency for Fundamental Rights [ranked it](#) as the EU country with the highest occurrence of male physical violence and sexual assault against women, while having among the lowest rates of reporting to the police. A definition of rape based on absence of consent has only recently been introduced in Denmark. Leine, Mikkelsen and Sen (2019) [state](#):
- 'the invisibilisation of Danish male violence, as well as the projection of sexual aggression onto minority communities, produces a peculiar politics of denial and denialism in Denmark.'
- 1.58. Belgium was one of the last European countries to legalise abortion in 1990, with only Ireland and Northern Ireland legalising it later.

Lack of systematic monitoring of impacts

- 1.59. There appears to have been no form of systematic impact monitoring or in-depth evaluation of effects on women and girls in those countries that have introduced self-declaration. For example, no jurisdiction appears to have recorded the level of incidents of sexual or violent offending in women-only spaces, before and after changing the law.
- 1.60. Ireland reviewed its laws after two years, but submissions to that review raising impacts on women and girls were rejected as out of scope, as was not made clear in Senator Doherty's description of the review to the Committee: we provide further detail in the section on Ireland [here](#). From 2015, onwards, Denmark [saw a sharp rise in recorded rapes and sexual assaults](#), but without an appropriately detailed examination of the type of cases, it is impossible to know whether any of this increase might have been related to the introduction of self-declaration rather than, say, changes in how sexual offending was dealt with in the criminal justice system. We have not as yet found any evidence that these figures have prompted such an investigation.

Over-simplistic conceptualisations of impacts

- 1.61. The discussion in the EHRCJ Committee has implied that the *only* issue is evidence of abusive behaviour in women-only spaces. It has not considered the more wide-spread negative impacts on women. These are a loss of confidence that they will not meet anyone clearly male in a women-only space and/or discomfort at doing so.

Self-exclusion

- 1.62. For some women, this risks leading to self-exclusion for reasons of dignity, privacy, or safety, in some cases for particular personal reasons, including religious requirements. Self-exclusion means things like avoiding seeking help from VAWG services, ceasing to attend swimming pools and gyms, discharging early from hospital wards, dropping out of sporting activities, avoiding using loos while out, avoiding travelling far from home, taking clothes home to try or buying online, leaving groups doing any activity on women-only terms.

- 1.63. In September 2021 the CEO of Edinburgh Rape Crisis [stated](#):

“in Scotland, where you have large groups of survivors, some not using our services because they see us as trans inclusive.”

- 1.64. In December 2019, we wrote to Scottish Women’s Aid to ask whether they were aware of any work undertaken by any of the violence against women and girls organisations in Scotland that sought to quantify the scale of potential self-exclusion by women from both specialist and mainstream services should they admit male people who identify as women. We received no response to our email. This type of effect will be unmeasurable in any precise way in practice, and slowly cumulative.

The range of abusive behaviour

- 1.65. A large proportion of sexual offending is non-contact: most relevantly here, flashing and voyeurism. When male people are not allowed into women’s spaces, it is relatively straightforward to identify a male person either undressed or observing women, or both, in such a space as likely to be motivated by intention to commit a sexual offence. Once male people are normalised in these spaces, it becomes much more difficult to do so. An increase in this form of offending could easily go unreported; this is especially true when reporting concerns about the presence of males in women-only spaces can carry a high risk of social or formal penalties.
- 1.66. The [‘Wi Spa’ case](#) in Los Angeles in 2021 illustrates the problem here. Was this an example of someone abusing policies of self-ID? How would we decide? A woman complained about a male person with a semi-erect penis in a woman’s changing room in a spa setting where nudity was normal in the changing area. She was accused by bystanders of transphobia when she complained, as the person was understood to be trans. An international controversy followed in which the woman making the complaint was identified and widely vilified. The person she had complained about was [later charged](#) and reported to have a history of convictions for indecent exposure. There do not yet appear to be reports of later stages of the prosecution.

Under-reporting

- 1.67. The under-reporting of sexual offending is a global issue. Only a minority of cases are likely to be reported, and of those that are, some may not be for years. In some situations, such as intimate medical and care settings, we know that women can take a long time to process that contact they have experienced was abusive.
- 1.68. Fear of being accused of transphobia can be expected to add to the factors deterring women from raising a complaint. In Norway at least two women have been [pursued formally for hate crimes](#) after objecting the presence of a male in a changing room. [Robberstad and Halvorsen \(2022\)](#) describe the interaction of laws on self-declaration and hate crime as an 'unresolved legal issue' in Norway.

Lack of any or clear recording

- 1.69. Where women feel confident enough to raise a complaint, it requires someone to act on and record the complaint. This hits a problem with data collection. To answer the question properly, police and other services need to collect data on sex at birth and self-declared gender identity separately.
- 1.70. This is not generally the case. Instead, many countries, Scotland included, have seen the introduction of recording policies that conflate sex and gender identity in a single category. If data is collected based only on self-declared gender identity rather than sex, any incidents where women are victims of sexual harassment or assault by a male with a transgender identity will be recorded as female-on-female.
- 1.71. In Norway, statistics on offending use self-declared gender identity not sex. A large increase in rapes recorded as committed by women in the year after the self-declaration was introduced ([from 12 to 41](#)) appears to be due to a number of factors, including a redefinition of rape; it is impossible from the figures to identify if any incidents involved male individuals identifying as women.
- 1.72. Asking for evidence of people abusing self-declaration systems of legal sex change to cause harm to women in countries that have changed the law sets up a near-impossible task, for all the reasons above. If there has been any increase in these jurisdictions in voyeurism, flashing or more serious incidents, it is highly likely mostly to have been silently absorbed by women. If there has not, there is no way of securely demonstrating that either. If there has been an increase in self-exclusion, that would be near-impossible to show; similarly, if there has not.
- 1.73. Whether known cases involve bad-faith actors abusing the system is impossible to answer unless a person openly admits to doing so, because self-identification, by definition, does not allow for any obvious distinction between true and false declarations.
- 1.74. **The most useful question here is whether countries introducing self-declaration have put in place any robust monitoring arrangement of the effect on women and girls and, if so, how they designed that and what it has produced.** In the absence of that, a lack of systematic evidence says very little and MSPs are left to consider the relevance of any known individual cases that they are prepared to look at. We note that where witnesses have been asked about this, they have been persistently

unable to provide the Committee with examples of any systematic monitoring of impacts on women and girls of legislating for self-declaration.

- 1.75. Following claims made by the Children's Commissioner and the SHRC about assessments and analysis they have undertaken to support their views, we have submitted FoI requests to both these bodies and will share with you anything they are able to produce. **If legislation proceeds on the basis that absence of evidence from other jurisdictions means evidence of absence, then for all the reasons above it will be proceeding on a faulty assumption. What we know about experience overseas is only a limited guide. We hope MSPs will instead seek to legislate on more secure foundations.**

Part 2: Further issues

False declaration

- 2.1. We have all worked at some point in the area of criminal justice policy. The issue of false declaration was not raised with our panel on 31 May. We are concerned that the discussion of the deterrent effect of the false declaration with other witnesses has been detached from any established understanding of effective deterrence in the criminal justice system, leading to an over-optimistic assessment of deterrent effect of the punishment, and naivety about the psychology of offenders.
- 2.2. It is a well-established understanding that effective deterrence of a criminal penalty rests mainly on the certainty of being caught and convicted – not the severity of the penalty itself. We refer the Committee to '[What Works to Reduce Crime: A summary of the evidence](#)', prepared for Scottish Government in 2014 by Levy, Santhakumaran and Whitecross.
- 2.3. The Scottish Government continues to be unable to produce examples of falsifiability any stronger than when this issue was first raised several years ago. It is still relying on examples of direct admission of dishonesty.
- 2.4. As the false declaration refers to a subjective sense of identity, which may be expressed in any number of ways, we believe most potential offenders will accurately assess the risk of being caught and convicted of a false declaration as low. The fundamental principle of self-declaration is that a person is who they say they are.
- 2.5. In the absence of any form of objective evidential or third-party tests, we do not think it is possible to create an effective deterrent to any misuse.

Cross-border issues

- 2.6. We refer to the discussion of these in our written evidence. We are concerned that these have been only briefly discussed, aside from a discussion of potential cross-border effects in prisons on 31 May.
- 2.7. Several witnesses, including the Scottish Trans Alliance and SHRC, appeared to dismiss concern about the relative ease with which the ordinary residence might be

met as being a concern merely related to holiday visits or similar. We note however that the President-elect of the NUS appeared to confirm that students coming from other parts of the UK would be attracted to obtaining a GRC more easily in Scotland.

- 2.8. We note a tension between the statement from the representative of JustRights Scotland, Jen Ang, that ordinary residence is defined differently in different settings and requires a definition in the bill, and that of the Scottish Government, which argued it did not need further definition.
- 2.9. On 28 June the Cabinet Secretary stated, *“The bill will not change the policy or laws of England or any other country; it is for other Governments and Parliaments to decide how GRCs are recognised in their jurisdictions”*. This is the first explicit statement we are aware of that the Scottish Government does not expect GRCs issued under the Bill to have any effect in the rest of the UK, unless some additional action is taken by the UK Government to recognise these. It is not clear what form that action is expected to take. The Head of the Gender Recognition Unit referred to the use of powers available to the UK Government under s21 of the GRA 2004: this however refers explicitly to gender recognition outside the United Kingdom.
- 2.10. The Committee is therefore yet to establish why the Scottish Government understands action would be needed for cross-border recognition and what that action would be. A lack of cross-border recognition would appear to deal with any potential impact in the English prison or school system; but the practical implication of a person being one sex in Scotland for most legal purposes, and the other elsewhere in the UK deserves further exploration before Stage 1 is completed.
- 2.11. It appears the Scottish Government has only lately begun discussion with the UK Government about the need for a s104 Order. We assume one will be needed in order for anyone living in Scotland, but born in England or Wales, to use their GRC to obtain a new birth certificate. Many witnesses stressed that they saw being able to obtain a new birth certificate as the key benefit of a GRC. We note that around 12% of the UK-born Scottish population aged between 16 and 65 was born outside Scotland.
- 2.12. **We note that Scottish Government therefore appears to have prioritised pursuing a self-declaration model whose full benefits can only be guaranteed to people born in Scotland and only in Scotland.** It has not used the past years to establish with the UK Government whether there could be other ways to modernise the system which would enable everyone ordinarily resident in Scotland to benefit equally, wherever they were born in the UK. It has therefore introduced into the Parliament legislation for a scheme which could (appears likely to) have asymmetric effects by place of birth in the UK, having done nothing beforehand to explore with the UK Government any ways to avoid this.
- 2.13. We were surprised that the Head of the Gender Recognition Unit told the Committee that it is conventional for such discussions to commence later in the Bill process. The most recent available version of the Scottish Government’s Bill Handbook states:

‘Process for obtaining a Scotland Act Order

... The possible need for SAOs should be explored with SGLD [Scottish Government Legal Directorate] and PLU [Parliament and Legislation Unit] as early as possible in the development of the Bill project and throughout the journey of the SAO, which can take at least 12 months from initial agreement of the policy with UK Government to fruition.

Where SAOs have been requested - or are likely to be requested - this should be referenced in the Policy Memorandum for the Bill [MBM note: The Policy Memorandum does not do this]. Where SAOs deliver an important aspect of Bill policy it may be helpful to obtain UK Ministers’ “agreement in principle” to the Scotland Act Order ahead of the Stage 1 debate, failing which, in time for the Stage 3 debate. Bill teams should engage with Office of the Secretary of State for Scotland (OSSS) once a Bill is introduced for thoughts on potential reserved/cross-border matters’.

(Paragraph 9.11.2 emphasis in original)

- 2.14. The limited exploratory work that appears to have been done is difficult to understand, given the Bill has been in preparation for five years and a question about birth certificate change for those born elsewhere in the UK predictable.

Spousal consent

- 2.15. Our letter of 8 June highlighted that a large part of the Bill deals with spousal consent. This has not been discussed during the oral sessions.
- 2.16. The [TransWidows](#) group has shared material with us helpfully obtained for it by the Committee from the Scottish Government. This explained that during the passage of legislation on equal marriage in Scotland, the GRA 2004 was amended - for Scotland only - to introduce a mechanism in the sheriff court that bypassed the need to obtain spousal consent, for marriages and civil partnerships solemnised in Scotland. As far as we understand it, the Bill now extends this to all marriages, undertaken anywhere, and wherever the partners are or were living together, where a partner obtains a GRC from Registrar General by self-declaration.
- 2.17. This provision therefore appears relevant to people married or civil partnered to people born in Scotland, *wherever* the couple were married/civil partnered and now reside, and also to partners in any marriage/civil partnership *anywhere* in the UK, if a partner obtains a GRC and is already in or has relocated to Scotland. We think the Committee should further explore the implications of this point before concluding its Stage 1 consideration.

Overseas gender recognition

- 2.18. Other than a brief discussion with the Scottish Government in the final session, and some discussion about the position of refugees and asylum seekers with panel including JustRights Scotland, there has been no discussion of the radical proposals in the Bill to extend gender recognition to anyone who has obtained it overseas, with scope to do so in the absence of any evidence. We would draw the Committee’s attention to our written evidence on this point.

Part 3: Other comments made in oral evidence

Polling

- 3.1. On 17 May, Colin McFarlane of Stonewall Scotland gave the Committee an inaccurate account of [recent BBC polling](#). He said:

*“It is also important to point out that the majority of the public support trans equality **and the proposed changes**. The latest poll, which was published by BBC Scotland in February this year, showed that 57 per cent of people overall supported simplifying the process of obtaining a gender recognition certificate, with women being 63 per cent in favour.”* (Emphasis added).

- 3.2. The [full sentence](#) from the BBC report was:

*‘The poll indicated a majority of people (57%) would support making the process to acquire a gender recognition certificate easier **but that support dropped when asked specific proposals**.’* (Emphasis added).

- 3.3. Respondents were evenly split for and against removing the diagnosis (40 % vs 38%). This is a closer result than obtained in most polling, which tends to show clearly stronger support for retaining the diagnosis or some other form of medical oversight. Questions which focus on removing the diagnosis appear to obtain higher support than ones asking more generally about the removal of all medical oversight: it appears people may distinguish between these, and be more concerned about losing any medical involvement than about specifically retaining the diagnosis. As the BBC put it, their polling ‘suggests a general sympathy towards trans people accompanied by uncertainty and hesitation around the details of the changes.’
- 3.4. The same BBC poll also asked about reducing the time someone had to have been living in their acquired gender from two years for three months, with a further three-month ‘reflection period.’ More people opposed this than supported it. It asked also about reducing the minimum age a person can apply for legal gender recognition from 18 to 16: a majority of respondents opposed this.
- 3.5. Public opinion polling on this subject persistently shows a difference between *general attitudes* and *attitudes towards the basis on which a change of legal status should be available*.
- 3.6. Our own polling in November 2021 ([here](#)) found nearly two-thirds (64%) of Scottish adults agree that people should be able to freely express their transgender identity; only 13% disagree. **A high percentage of respondents agreeing that people should be free to express their transgender identity does not however translate into support for reforming the Gender Recognition Act based on self-declaration.**
- 3.7. The majority of people polled believed that a doctor’s approval should be needed for a person to change their sex in law (53% for, 27% against). This included a majority of those who agree the people should be freely able to express their transgender identity (51% to 35%). Support for retaining an element of medical approval was found across virtually every demographic break in the survey, including sex, education, income, geography and voting behaviour. The only exceptions to this were those aged between 18- and 24- years, and those who voted for ‘other parties’,

including the Green Party, in the 2019 General Election. However, the difference between being for or against within the two youngest age-groups (18- 24 years and 25-34 years) was not statistically significant, nor was the difference within the smaller parties in the 2019 General Election

Data

- 3.8. We were concerned that in discussing data, the Head of the Gender Recognition Unit chose to highlight comments by Dr Kevin Guyan which confused self-reporting data with self-declaration.
- 3.9. We draw to the Committee's attention Professor Alice Sullivan's comments about this point and about relevant professional expertise. The Cabinet Secretary's comment that GRA reform "*will not alter practices for collecting or processing data, including data relating to crimes*" once again ignores the potential impact of s22, both in actual legal effect but also on the confidence of those collecting data that they are entitled to ask for data on sex. We note that to support research as part of the Cass Review, the UK government is amending the GRA to ensure that it does not create a barrier to the anonymised longitudinal study of cases.

Operation of the current system

- 3.10. The Committee has had presented to it a variety of written and oral evidence about how the current system works in practice. As we said on 8 June, we would strongly urge the Committee to take evidence from the Gender Recognition Panel (GRP), to establish the accuracy of all the evidence before it on this point, and to understand what if any value the Panel feels it adds to the process. We think it is particularly important for the Parliament to be properly briefed on why some applications are declined at present.
- 3.11. We were advised in March 2020 that the Scottish Government had had no contact with the GRP in the course of developing its proposals. We have seen nothing since to suggest that this error of process has been addressed.
- 3.12. We are also aware that the Committee will have received representations from those currently entitled to a GRC who have used, or decided not to use, the system who are not supportive of reform as proposed. We understand the Scottish Government has had no engagement with that group over the past five years. Again, we believe this is an error of process, which we hope the Committee will address.

Approach to oral evidence

- 3.13. Lastly, we want to place on the record that we have significant concerns about the balance of witnesses taken by the Committee, the speed at which oral evidence has been taken, the lack of time for the Committee to process the exceptionally large volume of written submissions and the transparency and accessibility of proceedings. We have written about these issues [here](#).

Yours sincerely,

Lucy Hunter Blackburn

Lisa Mackenzie

Dr Kath Murray

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ANNEX A



Sue Brookes
Director of Strategy & Stakeholder Engagement
Scottish Prison Service

By email

24 May 2022

Dear Sue,

GENDER RECOGNITION ACT REFORM: IMPLICATIONS FOR SPS

We were pleased earlier this month to meet the team currently conducting a review of SPS policy on gender reassignment.

During the meeting we discussed the implications of gender recognition reform for the SPS and briefly touched on the 2011 Prison rules. On the basis of this, we would urge the SPS to have discussions with the Scottish Government about its plans for GRA reform, as a matter of priority.

We remain concerned that the SPS is not clear on what basis it assumes that it does not need to consider a Gender Recognition Certificate (GRC) as relevant when placing prisoners. As we noted in the meeting, the SPS position is counter to that of the Ministry of Justice (MoJ). In case it helpful to see as further explanation of the MoJ's approach, here is the EQIA prepared by the MoJ for E Wing at Downview: <https://fairplayforwomen.com/wp-content/uploads/2020/10/Equality-Analysis-Document-E-Wing-Version-16.0-for-publication.pdf> . This new part of the estate has been developed specifically because of the MoJ's view that GRC holders, unlike non-GRC holders, have a default right of transfer.

GRA reform as currently proposed in Scotland is expected to involve a very large increase in the number of GRC holders, as the process is made faster and more generally accessible. The removal of third-party medical input means that the GRC-holding population is likely to become more diverse. Critically, it appears that it will become much easier for anyone held in the prison system to obtain a GRC.

Again, we would strongly urge the SPS to also seek legal advice about the risks that following reform any policy that does not give additional weight to GRCs (as per MoJ policy) will become more likely to face challenge, and that a GRC holder could

therefore successfully override the individualised assessment the SPS would otherwise have followed. We are aware that at least one law centre in Scotland is actively looking at the scope to bring cases in the general area of transgender rights.

In relation to the Prison Rules 2011, we note that Section 13(a) states 'Female prisoners must not share the same accommodation as male prisoners' ('accommodation' is defined as the cells or rooms used to accommodate prisoners for living and sleeping purposes). The current Gender Identity and Reassignment policy does not discuss this rule, although we note that other prison rules are mentioned in the document. Again, we think this rule requires further legal consideration to ascertain firstly, whether the current policy (this states that accommodation 'should reflect the gender in which the person in custody is currently living') is in breach of the Prison Rules and how the rule should be interpreted in relation to GRC holders specifically, again considering a likely increase in the number of prisoners with GRCs following reform.

Copy goes to Neil Rennick, Scottish Government, and Jennifer Cameron, as SPS lead for the review.

Yours sincerely,

Dr Kath Murray

Lisa Mackenzie

Lucy Hunter Blackburn

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