



Amending the Gender Recognition Reform Bill: how to clarify the relationship with the Equality Act 2010

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1 November 2022

In the Stage 1 debate on the Gender Recognition Reform (Scotland) Bill, which took place on 27 October, several MSPs raised the need to clarify the relationship between the Gender Recognition Act (GRA2004) and the Equality Act (EA2010). Scottish Labour MSPs in particular emphasised this as a key area requiring amendment. This blog looks at what can be done here, why it is needed, and related points.

Now that the Bill is in the Scottish Parliament, our approach is to focus on how its most obvious deficiencies might be reduced. This is based on an assumption that the Bill will be passed. **The amendment discussed below addresses only one area of serious concern and even if this and other amendments were taken up by MSPs, we are not confident that the Bill will be a sound piece of legislation.** Ideally (and if it were up to us), the Parliament would insist on being presented with a Bill that had undergone a rigorous development process. The suggestion here is based on the assumption that that option is off the table.

Sex under the Equality Act 2010

The background to why the EA2010 matters is in [this note](#), sent to all MSPs on 19 May 2022. In summary, there are two relevant dimensions.

The first relates to **anti-discrimination protections, such equal pay protection and measures actively combatting discrimination**. In these areas, the EA2010 **makes no specific provision** about people with the characteristic of gender reassignment. This dimension of the Act tends to be overlooked. It is not mentioned in the Scottish Government's response to the Stage 1 Committee report, nor in the Stage 1 briefings for MSPs by Engender, the Equality Network or Stonewall, where they discussed the EA2010. It was not mentioned in the Cabinet Secretary's speech in the Stage 1 debate, although the Scottish Government is in court on this issue next month (see below).

The other relates to **single sex services and spaces, jobs and sport**, where the EA2010 *does* allow for anyone biologically male, however they identify, to be excluded if certain conditions are met. There is however, a lot of disagreement about how and when the powers to exclude those who identify as women can be used. Nor has [new guidance](#) from the Equality and Human Rights Commission (EHRC) settled this matter. Providers are already confused and hesitant about using their existing powers to create provision where women can be sure they will not encounter anyone male. As a [report](#) prepared for Engender argued:

‘The exceptions can operate whether a trans person has a GRC or not. **However, there are some areas of uncertainty which arise due to the lack of clear guidance and decided case law... There has not been any case law in this area which means that the boundaries of what might be permissible in practice remain largely untested.**’ ([Busby 2020: 18](#) our emphasis)

Existing law in a dramatically altered context

The legal issues outlined above are not new. What will be new is the creation of a much larger, more diverse group of Gender Recognition Certificate (GRC) holders. Currently thought to number only around 600 in Scotland, the Scottish Government expects a ten-fold increase, although speaking in the [Stage 1 debate](#) the Cabinet Secretary seemed to suggest it could be more, saying “*the difficult and lengthy GRC process ... puts so many people off...of the estimated 500,000 trans people in the UK, only around 6,000 currently have a GRC, which says that there is a huge problem with the process*”. A [recent news report](#) suggested that the number might be boosted by people moving to Scotland to obtain a GRC.

This increase will occur in a context where people have been strongly encouraged to expect self-declaration to unlock treatment as a woman in every aspect of life. At the same time, expectations about what ‘transition’ requires have become more flexible. This is reflected in the proposed new criteria for GRCs. For the first time, a man without gender dysphoria will be entitled to obtain legal recognition as a woman, and to do so as soon as he feels ready to commit to living as one, defining that on whatever terms he chooses.

An unequal fight

If a GRC changes a person’s sex under the EA2010 from male to female, it simplifies any legal challenge to being excluded from women-only provision, by making it possible to argue that **direct discrimination** has occurred, based on gender reassignment (see endnote [here](#)). With a much larger population gaining an easier way to challenge any exclusion, the risk of threats of legal action and actual action increases substantially.

How such cases may turn out is unknown. The argument about what the law means here will remain unsettled until a provider is willing and able to defend, all the way to the Supreme Court, their ordinary ability to create spaces or services which provide a guarantee for women that no-one male will be present, when that can shown to be a ‘proportionate means of achieving a legitimate aim’.

Until that point is reached, the proposed large expansion in the take-up of GRCs carries serious risk of firing up pressure on providers through assertions, threats, lawyer’s letters, and cases in the lower courts, where there are incentives to concede fast rather than defend. Smaller providers especially will worry about having to deal with any legal action, long before it ever gets to court. Further, the Parliament endorsing the message that being a woman can be a matter of self-declaration should be expected to have a wider impact on how providers feel they should behave. It would be naïve to expect otherwise.

The power to exclude anyone male, however they identify, has previously been lobbied against at Westminster by the [Scottish Trans Alliance/Equality Network and Stonewall](#), albeit unsuccessfully thus far. JustRight Scotland, a Scottish Government-supported law centre which works with the Scottish Trans Alliance, [states](#) it will ‘use the law as a tool for social change, focusing initially in the areas of disability justice and trans justice, to make the case in Scotland for greater strategic use of the law and legal remedies to reduce inequality and discrimination’. The centre is currently [actively seeking test cases](#) ‘for alleged trans discrimination, [where] the potential client has...unjustified discrimination within, or unjustified exclusion from, a single sex facility, service or job’. The JustRight Scotland briefing on the Stage 1 gender recognition reform debate was silent on its view on the Equality Act.

Women trying to persuade providers to create single sex provision, where they can be sure no-one male will be present, already face an uphill struggle by comparison. There is no publicly-funded law centre advertising its willingness to do this. In Brighton at the moment a rape survivor, whose argument has been for *some* counselling provision to be available at her local rape crisis centre based on biological sex, describes herself as [facing ‘a barrage of abuse’ and misinformation](#) and is reliant on crowd funding. The tests she faces, as a woman asking why such provision is *not* available from a particular organisation, are more complex than those faced by a person who by virtue of a GRC is female under the EA2010 asking a provider to justify their personal exclusion. That imbalance is a fundamental legal calculation providers face, before taking anything else into account.

Further, the much expanded group of GRC holders will be likely to include more people who have made more minimal changes to their external appearance (see for example, paras 1.8-1.9 [here](#)), and a powerful privacy protection (see [here](#)), originally designed for a small group expected largely to “pass”, will be granted to a much larger group, more of whom will not.

Taken together, this is a recipe firstly, for cementing in the loss of single sex spaces where that has already happened, and then losing even more. And second, for a more [general breakdown](#) in the confidence of providers and users to challenge the presence of *anyone* male in a supposedly women-only space.

The Equality Act: the amendment needed

The most effective way to contain the negative impact of expanding and diversifying the GRC-holding population on the operation of anti-discrimination measures for women, and on decisions about single sex provision, is to put beyond doubt, on the face of the Bill, **that a GRC issued under the new system in Scotland does not change someone’s sex for the purposes of the Equality Act**. That means, the holder of a female GRC remains male for the purpose of the Act and vice versa.

What would an effective amendment look like?

A Gender Recognition Certificate (GRC) changes a person's status in law as either a woman or a man 'for all purposes ... subject to provision made by this Act or any other enactment or any subordinate legislation' ([Section 9, GRA 2004](#)).

The GRA then includes, on the face of the Act, a series of exemptions from the effect of s9, covering areas such as inheritance (s15 GRA04) and peerages (s16 GRA04). **The simplest way to ensure a GRC does not change someone's sex under the EA2010 is to add a further exemption to this list.**

Sex is introduced as a protected characteristic in Section 11 of the EA2010, with 'woman' and 'man' defined further in Section 212(1) as meaning 'a female of any age' and 'a male of any age'. The exemption would state, in precise terms that obtaining a GRC has no effect on a person's sex under the Equality Act, referring to Section 11 and/or Section 212(1).

This would be clear in law and clear for providers. It would be easy for the National Records of Scotland (NRS) to explain to GRC applicants. It gives a straightforward response to an organisation operating any provision which excludes everyone male when faced with someone insisting on access because "the law says I'm a woman". The risk of direct discrimination cases from holders of a female GRC could be ruled out, when organisations are making decisions about how to offer and organise provision.

In areas like equal pay claims, it would not matter if a male colleague acquired a GRC. In areas where measures have been put in place to combat sex discrimination actively, getting a GRC would not give someone any greater right than before to take a place a woman could have occupied.

This approach makes a reality on the ground of claims that GRA reform, on the major scale envisaged by the Scottish Government, will have no impact on how well the Equality Act works for women.

What won't work

Less clear alternatives, such as saying the Gender Recognition Reform (Scotland) Act has no effect on the Equality Act, are no use here. The same is true of general statements that state nothing in the GRR(S) Act changes the Equality Act. Any amendment that raises further questions about what it actually means in any practical context only introduces more vague statements into an area already dogged by a lack of clarity and contested readings.

General declamations about the Equality Act will not give providers the clarity they need to be confident in making policy and communicating it to front line staff, or to frontline staff applying it.

Loose ends

Organisations operating single sex provision excluding all males may still be faced with someone with a female GRC who insists they are biologically female. This burden is most likely to fall on often low paid frontline staff (for example, at leisure centres, refuges, hostels). To address this, a further provision would make it an offence for a GRC holder to misrepresent their sex under the EA2010, including presenting a new birth certificate as if it was an original one, in any context where sex under that Act is material.

Under the 2004 Act, 'protected information' is information about a person's sex as recorded on their original birth certificate, or information about their application for a GRC. Section 22 then creates a criminal offence of disclosing this information if acquired in an official capacity (for example, by an employer). This has already created issues for providers. It means that there is no cover given for sharing knowledge within an organisation of someone's GRC status where that is needed to operate single sex provision properly. **Unless s22 is also addressed, this could undermine how helpful the amendment above is in practice. (The Employment Lawyers Association has previously called for its repeal.)**

The wider argument about what the law means

There is a separate argument about exactly what, if any, general rights of access a person has to women-only spaces, service and jobs, based simply on identifying as a woman. Related to that, what is required to exclude anyone male who identifies as a woman is also contested, as noted in the Engender/Busby paper quoted above. These arguments will undoubtedly continue. This amendment would simply make sure that GRC reform was taken out of them.

Retaining protections based on perception

The EA2010's protections from direct discrimination deal with the treatment a person receives based on how they are perceived, even if that perception is wrong (Explanatory Notes to EA2010, Section 24). The example given is:

'If an employer rejects a job application form from a white man who he wrongly thinks is black, because the applicant has an African-sounding name, this would constitute direct race discrimination based on the employer's mistaken perception.' [Equality Act Explanatory Notes to Section 13](#)

So a person already does not need to be female or to have a GRC to be protected from sex discrimination as a woman, as long as they are perceived to be female. This provision does not however *confer* the perceived protected characteristic on a person in other contexts.

No existing rights are lost

It appears from the Bill's drafting that GRCs under the UK system would remain available to those in Scotland. This indeed remains only certain route for someone living in Scotland but born elsewhere in the UK to obtain a changed birth certificate, or for anyone in Scotland or born here to obtain a GRC that is guaranteed to be fully recognised across the UK, as the UK government is not obliged to recognise Scottish GRCs for any purpose.

So this amendment by definition does not remove existing rights, but only delimits more clearly the extension of new ones.

Would an amendment clarifying the relationship with the EA2010 be admissible?

Any amendments to a Bill must meet 'admissibility' tests set by the Scottish Parliament (see from 4.9 of the guidance, [here](#)). These state:

Application of the admissibility criteria in practice can be complex. In any case of dispute about the admissibility of an amendment, the decision rests with the convener at Stage 2 or the Presiding Officer at Stage 3 (Rule 9.10.4). [Guidance on Public Bills, Scottish Parliament, Part 4](#), para 4.29

Whether an amendment clarifying that a GRC issued in Scotland is not relevant for the purposes of the EA2010 could take a Bill outside the Scottish Parliament's legislative competence is not technically an admissibility issue. It is hard to see a problem here, in any case, as the amendment would be explicitly ruling out any impact on the operation of the (reserved) Equality Act.

Of the tests amendments must meet, 'relevance' and 'consistency with general principles' appear to be the key ones here.

On relevance, the guidance says:

An amendment is inadmissible if it is not relevant to the Bill. This is sometimes referred to as an amendment being outwith the scope of the Bill – though this is not always easy to determine.

[Guidance on Public Bills, Scottish Parliament, Part 4: para. 4.14](#)

Relevance wouldn't be an obvious objection here. It is not "off topic" to put beyond dispute what a GRC does *not* do. Although the long title refers specifically only to reform of who can obtain a GRC and how, and not the effect of a GRC, the rules go on to say:

It is sometimes wrongly imagined that the long title alone can be used to determine the "scope" of the Bill. The long title is intended to provide a concise description of the main purposes of the Bill and so is a useful guide to the scope of what the Bill covers, but it is not definitive. The reason why amendments to the long title are permitted (and are taken last) is to allow it to be adjusted to take account of amendments made elsewhere in the Bill – amendments that had to be within the scope of the Bill to be admissible, but were not consistent with the long title as it stands.

[Guidance on Public Bills, Scottish Parliament, Part 4: para. 4.15](#)

A clarification of the effect (clarification seems fair here, given the courts have accepted the position is unclear enough to merit a full legal hearing next month) looks easily arguable as relevant. But some modification of the effect of a GRC anyway appears precedent in the Bill. The Bill provides (Section 8H) a de facto facility for a person married anywhere who obtains a Scottish GRC to place their spouse/civil partner without consent in a marriage/civil partnership with a person of the other sex than applied at the time of the marriage. As we understand, this ability is already unique to Scotland after an earlier amendment to the 2004 Act at Holyrood, and currently only applies to marriages solemnised in Scotland.

On consistency with general principles the rules say:

An amendment is not admissible if it is inconsistent with the general principles of the Bill as agreed by the Parliament. This criterion is intended to rule out so-called “wrecking amendments” – amendments that would reverse, substantially alter or render ineffective a principal purpose of the Bill. The rationale for this rule is that, by the time the Bill comes to be amendable, the Parliament has already voted at Stage 1 in favour of its general principles. This criterion is intended to stop members attempting, by amendment, to frustrate the general principles of the Bill already agreed to by the Parliament.

[Guidance on Public Bills, Scottish Parliament, Part 4: para. 4.22](#)

There is potential for argument over what the Bill’s ‘general principles’ are: something at the general level of reform, as in the long title, or more specific to the nature of reform proposed? In this case, one person’s ‘improvement’ could easily be another person’s ‘frustration’. This will be the Convenor’s decision at Stage 2.

Any objection here would have to be that a change of sex under the EA2010 was so central to the Government’s plans that not having it would ‘reverse, substantially alter or render ineffective a principal purpose of the Bill’. That would be hard to square with the majority of the Committee’s view that any concerns about effects related to impacts on the operation of the EA2010 are, in their words ‘beyond the scope of the provisions in the Bill’ (see para. 472 [here](#)).

Relevance of the forthcoming Gender Representation on Public Boards (Scotland) Act court case

The [court case](#) relating to the Gender Representation on Public Boards (Scotland) Act does not constrain the Parliament and it cannot substitute for the Parliament addressing this directly itself.

The court case is expected to result in a ruling on whether a GRC issued under the present UK arrangements changes someone’s sex under the EA2010. The outcome of that case may or may not be known before the Bill process is complete. Further, depending on how the judgment is framed, either loser may seek and be granted leave to appeal.

Even if the court quickly finds a GRC is not relevant to sex under the EA2010, and there is no appeal, this will not create a clear statement on the face of legislation, and further cases seeking to over-turn the judgment remain possible.

If the Parliament legislates clearly in this area, that will define the law for GRCs issued under the new Scottish rules, regardless of the court's ruling in the current case. The Parliament needs to take ownership of this.

Manifesto compatibility

This amendment is compatible with the SNP, Conservative and Labour manifestos. It does not conflict directly with the more detailed commitment to self-declaration in the Liberal Democrat and Scottish Green manifestos. However, if either of these parties see GRCs as valuable in the context of directly conferring rights related to sex under the Equality Act, they might see a conflict.

History of raising this with the Scottish Government and Parliament

The Government has had a lot of time to think about this.

The effect of a GRC on a person's rights under the Equality Act was the first question on a list we [published set out in October 2019](#), ahead of the last Scottish Government consultation. We raised the question of the full legal effect of a GRC, including under the Equality Act, with Scottish Government officials ahead of a meeting in March 2020, in our consultation response and in a letter following the meeting. That letter took two years to obtain a response which seemed to concede, obliquely, that there was some effect.

Solicitor Rebecca Bull [raised the issue](#) with pay comparators at a seminar held for MSPs in January 2020. We and others raised it in our response to the Committee consultation, in oral evidence and in follow up correspondence. It was raised in the briefing linked above sent to all MSPs on behalf of group of organisations in May this year. For Women Scotland wrote to the Committee in detail about the court case at the end of August.