

## Woman's Place UK

### Questions

**1 Do you have any comments on the proposal that applicants must live in their acquired gender for at least 3 months before applying for a GRC?**

Not Answered

**If yes, please outline these comments.:**

**2 Do you have any comments on the proposal that applicants must go through a period of reflection for at least 3 months before obtaining a GRC?**

Not Answered

**If yes, please outline these comments.:**

**3 Should the minimum age at which a person can apply for legal gender recognition be reduced from 18 to 16?**

No

**If you wish, please give reasons for your view.:**

**4 Do you have any other comments on the provisions of the draft Bill?**

Not Answered

**If yes, please outline these comments.:**

WPUK SUBMISSION TO SCOTTISH GOVERNMENT CONSULTATION ON GRA REFORM

Woman's Place UK (WPUK) welcomes the opportunity to respond to the Scottish Government's consultation on reform of the Gender Recognition Act (GRA) 2004.

### Summary

We do not support the proposal to shift to a system of self-declaration for those seeking to change their legal sex. Nor do we support the proposal to allow 16 and 17 year olds to change legal sex. The Scottish Government has failed to clarify what they see as the legal effects of holding a Gender Recognition Certificate (GRC). As a consequence of this failure, it is our view that no-one responding to this consultation can be expected to make a reasonable assessment of what the impact of these proposals will be on women-only spaces, services and occupations as provided for under Equality Act (EA) 2010.

Interaction between the GRA 2004 and the EA 2010

WPUK responded to the Scottish Government's 2017 consultation on GRA reform and nothing that has happened in the intervening period has given us any confidence that the Government has a clearer understanding of the interaction between the GRA and the EA. It is unacceptable to us that the Scottish Government should propose reforms to the GRA that will substantially increase the number and range of people who will be able to change their legal sex without stating its view of the legal effects of holding a GRC. Without an answer to this central question, the Minister's assurances that the Scottish Government supports the single sex exceptions under the EA 2010 ring hollow.

As a matter of urgency, and well before draft legislation is introduced to the Scottish Parliament, the Government must state what its view is of the legal effects of a holding a GRC, with reference to the statute or case law which supports that view. The Government appears to adopt a very narrow interpretation of the circumstances in which a service provider can invoke the single sex exceptions under the EA 2010. It suggests that these can only be invoked at the level of an individual service user, rather than at the level of a service provider. This narrow reading of the Act is contested by some lawyers who specialise in discrimination law.

Speaking at an event in the Scottish Parliament in January this year, Karen Ingala Smith, chief executive of Nia, who has worked in the violence against women and girls (VAWG) sector for almost thirty years, was clear about why operationalising the exceptions at the level of individuals was unworkable for domestic violence refugees.

Former governor of Scotland's women's prison [REDACTED] has also stated that it is "always an issue to have transwomen in with female prisoners" due to the high incidence of trauma amongst the female prison population.

We note that the Cabinet Secretary frequently cites the Equality and Human Rights Commission's 2011 Statutory Code of Practice. Again, the interpretation of the EA exceptions in the Code has been criticised by some specialist discrimination lawyers.

The Code is intended to provide day to day help for service providers, but says in terms that it does not have the status of an authoritative interpretation of the law. The Scottish Government is not a service provider, it is a policy making body with its own large legal team. The Scottish Government's understanding of the legal effects of a GRC should be based on having taken its own legal advice on the effect of statute, taking into account relevant case law.

The consultation paper does not consider the potential impact of enabling a much larger number of individuals to change their legal sex than do so at present on comparators in sex discrimination cases. For instance, it is our understanding that a woman loses the ability to take an equal pay claim if her comparator is a man who has changed their legal sex to female. Again, the failure of the Scottish Government to clarify what legal status a GRC confers shows a woeful disregard for women who may wish to demonstrate that they have suffered discrimination on the ground of their sex.

Profound shift in rationale

The Scottish Government continues to characterise these proposals as nothing more than a straightforward administrative fix. This is disingenuous. The original GRA was conceived as a response to the distress experienced by what was thought to be a small number of individuals suffering from gender dysphoria.

The Government envisages a ten-fold increase in the number of people who will seek to change legal sex under a self-declaration system. The removal of medical gatekeeping – whereby an individual requires a diagnosis of gender dysphoria and to have ‘lived in their acquired gender’ for two years – will enable a far more diverse group of people to change legal sex. This represents a profound shift in the underlying rationale for a system for legal sex change. Our experience of holding 27 public events over the past two and a half years has demonstrated the real concern that women have about the potential impact of these proposals.

We note with concern the difficulty experienced by women’s groups who share these concerns to access officials and Ministers prior to publication of the consultation.

#### Impetus for reform

The Scottish Government’s rationale for these reforms relies heavily on the perceived need to bring Scotland into line with ‘international best practice’. However, the consultation paper itself states: “As the case law stands at the moment, the current system in Scotland is compliant with the ECHR; and...there is no ECHR obligation on Scotland to introduce a system for obtaining gender recognition based on an applicant’s statutory declaration.”

It does not appear that the Government has undertaken any detailed analysis of its own of how self-declaratory systems for legal sex change operate in other jurisdictions: how the requirements differ and what the effects of the legislation have been. As noted in the submission from the Faculty of Advocates to the 2017 consultation, these systems have only been in place in most of these jurisdictions for a short period of time, so it is unlikely that their effects have been properly evaluated.

It is untrue to say that no problems have emerged since the introduction of self-declaration laws in other jurisdictions.

Commenting on the transfer of a transwoman to a female only prison [REDACTED], [REDACTED] the Irish Law Society’s Criminal Law Committee said in October 2019: “The law that was enacted in 2015 did not envisage this situation, and it puts the Prison Service and the courts in a difficult position because, obviously, if somebody is self-declaring that they have to be recognised, then they have to be dealt with on that basis, even though physically, they have not made the [physical] transformation.

“I don’t think the legislation envisaged the ability of transgender people to be able to self-declare; and it didn’t foresee the problems it would cause if a transgender, self-declared person was held in a mixed prison.”

#### Evidence base for reform

In general, the Scottish Government has failed to produce any evidence to support its view that a shift to a self-declaration system of legal sex change will not negatively impact on women and women-only spaces and services. The onus is on the Scottish Government to prove that these proposals will not lead to a weakening of existing protections in law that underpin the basis for all services and activities currently segregated on the basis of sex.

We note that the current application round for the Scottish Government's Delivering Equally Safe Fund 2020-23 continues to demand that all organisations seeking funding have in place a trans inclusion policy. Despite the Government's assurances, it is not clear to us how this does not fetter the discretion of recipient VAWG organisations to invoke the single sex exceptions under the EA 2010.

It is concerning that the Scottish Government fails to cite what we understand to be one of the only longitudinal studies that compares the offending rates of transwomen with the offending rates of men. An absence of evidence does not constitute evidence of absence.

Nor does the consultation consider the psychological harm perpetrated on women by the presence of someone who is male-bodied. The Equality Impact Assessment cites an academic paper that compares women's objections to sharing spaces with male-bodied people with objections to sharing spaces with a woman who has undergone a double mastectomy following cancer treatment. Another paper compares the exclusion of transwomen from women-only spaces with racial segregation policies for school bathrooms in 1950s America. Both analogies are deeply offensive and it beggars belief that the Scottish Government should use either as a basis for arguing that women's potential objections to sharing spaces with transwomen are invalid, let alone that they should be the main pieces of research it quotes to support its position.

On the other hand, the consultation overlooks evidence from Fair Play For Women (FPFW) and Women and Girls Scotland (WGS). FPFW published a report in September 2018 which highlighted the concerns of survivors of male sexual violence and frontline workers working in the VAWG sector. WGS published a report in June 2019 based on a self-selecting survey of 2,000 women across the UK which charted the potential for women's self-exclusion from specialist and mainstream women-only spaces and services should they include transwomen.

This is not just an issue of women's physical (and psychological) safety, it is also about guaranteeing their privacy and dignity. It is immensely disappointing to WPUK that so many public authorities, including Government, fail to acknowledge this.

#### False declarations

The Scottish Government evidently recognises the potential for individuals with malign intent to seek a legal sex change. The draft bill creates a new criminal offence – punishable by two years in prison - for a 'false declaration', whereby someone has failed to 'live in their acquired gender'. However, it fails to set out what evidence would be required to demonstrate what constitutes a 'false declaration'. It is therefore impossible to see how such a case might be prosecuted.

It is therefore also hard to see how a detransitioner (someone who has changed their legal sex but wishes to revert to their birth sex) will not be caught by the criminal offence of making a false declaration. More and more young people are coming forward saying they wish to 'detransition' and whilst numbers may be low just now, given the huge increases we have seen of young women presenting to gender identity clinics and being diagnosed with gender dysphoria, we cannot say with certainty that there will not be more detransitioners seeking access to a reversal of legal sex change in the future.

#### UK-wide effects

As drafted, the bill would allow anyone who was 'ordinarily resident' in Scotland to apply to change their legal sex. No definition of ordinary residence is provided and in other areas of public policy (such as the provision of healthcare under the NHS) the legal test rests on a statement of intent (to be ordinarily resident).

Therefore the draft proposals are relevant to all UK citizens. In our view, this should have been made explicit in the consultation paper. Women's groups have been working hard to raise awareness of these proposals outside Scotland, but given that most of these groups are volunteer-led with minimal resources, it's likely that many people throughout the UK are unaware of the potential implications of this proposed law change.

#### Failure to consider differing views in trans community

It is not at all clear whether the Scottish Government considered any alternatives to a self-declaration system of legal change. It would appear that they have uncritically accepted the views of a small number of lobby groups, who we believe do not represent the views of all trans people. It should be noted that many of these groups – Stonewall, Scottish Trans Alliance and Gendered Intelligence – wish to remove the single sex exceptions under the EA 2010 and therefore remove any ability at all for any services or occupations to exclude anyone male. So, for example, a woman would lose any right to ask for intimate care or medical examinations only to be carried out by someone who is female in more than law.

We think the Government is being naïve in the extreme if it believes that the thinking which drove the lobbying for this as recently as 2016 has simply vanished, and this pressure will not re-emerge, to be attempted again in a situation where access to the legal status of 'female' has been widened.

WPUK have platformed transwomen who oppose a self-declaration model. These individuals recently spoke at an event in the Scottish Parliament and we would encourage the Scottish Government to take their views into account and to actively seek out the views of those in the trans community who do not support self-declaration.

#### Conclusion

The message we have heard from the 5,000 women who have attended our public events since September 2017 is consistent and clear: women highly value their hard-won sex-based rights and protections as enshrined in UK law. These have already been eroded at the level of policy, ahead of any changes to the GRA 2004. These changes have taken place by a process of policy capture, whereby public policymaking has been skewed in favour of one interest group over and above others. A report prepared by international law firm Dentons in November 2019 noted that those seeking to embed principles of gender self-identification in law and policy had done so by minimising media coverage and pushing through reforms under the 'veil of protection' offered by other legislative change such as equal marriage, in defiance of the norms of democratic accountability.

This is an entirely unacceptable state of affairs. Globally, women remain the oppressed sex class. UN High Commissioner for Human Rights Michelle Bachelet recently warned that women's rights are being threatened and attacked on many fronts and that there has been a "backlash and the resurgence of gender inequality narratives based on age-old discrimination". Women seeking women-only spaces is an entirely legitimate response to their experience of living with the ever-present threat of male violence.

Before changing the law to open up the legal and political category of womanhood to anyone who declares themselves to be female, the Scottish Government must offer women a cast iron guarantee that these proposals will not negatively impact their existing rights and protections. Until they state clearly what they believe to be the legal effects of holding a GRC, this is not possible.

About Woman's Place UK

WPUK is a grassroots feminist campaign which was formed by a group of women in the labour and trade union movement to uphold women's sex-based rights and protections in the UK. Since September 2017, we have held 27 public meetings across the UK which have been attended by over 5,000 people, including a one day conference in conjunction with University College London Women's Liberation Special Interest Group in February 2020.

March 2020

A version of this submission containing clickable links can be found on the WPUK website.

## **5 Do you have any comments on the draft Impact Assessments?**

Not Answered

**If yes, please outline these comments.:**