

Labour Women's Declaration Steering Group

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?

Yes

If yes, please outline these comments.:

We do not support this proposal.

The proposal is framed by the view that a) the legal fiction of sex change remains necessary, b) that it should be available on the basis of self-declaration alone, and c) that it should be available to a larger and more diverse group than was originally intended. We address each of these in turn. The final part of our response to this question contains our views about the underlying principle of d) enshrining in law the primacy of gender identity over sex.

a. Does the legal fiction of sex change remain necessary?

Sex is biological and immutable, and it is the basis of women's and girls' oppression.

Whilst it is possible for individuals to make physical changes to more closely resemble members of the opposite sex, no medical, psychological or legal process will actually change an individual's sex. The Scottish Government is proposing to retain and extend the provision for individuals to change their legal sex: such a change has always been, and will remain, a legal fiction.

When the original Gender Recognition Act was debated and became law, it was intended to address anomalies experienced by the small group of people (estimated at the time as around 5,000 across the UK) who needed to transition because of diagnosed gender dysphoria. At the time, same-sex marriage was not possible, and the state pension age was different between women and men.

Providing a route for a small number of individuals to change their legal sex was a pragmatic solution to these very specific difficulties. It was also intended to protect the privacy and dignity of transsexual individuals.

Since the original GRA became law, same-sex marriage has been legalised and state pension age has been equalised. The Equality Act 2010 has been passed and now protects individuals on the basis of gender reassignment. We support these rights and protections. But in view of these changes, it is not clear why the Scottish Government wishes to retain, much less extend, the ability for individuals to change their legal sex. We think this should be the subject for much wider debate than has been the case so far, based on evidence that the Scottish Government should assemble and discuss.

b. Should self-declaration be sufficient to obtain a legal change of sex?

The current system requires a diagnosis of gender dysphoria. This is important for two reasons. First, it protects individuals who wish to obtain a GRC. The

requirement to present verifiable evidence from at least two medical practitioners means that an individual going through the major upheaval of transition, with all the physical and psychological stresses that involves, is obliged to seek medical support. We know that waiting lists for gender-related healthcare are far too long:

we believe this is a reason to address and properly resource specialist clinics, especially in more remote parts of Scotland, rather than abandon the requirement for medical evidence. Should the proposals be accepted, there is very real concern that vulnerable people will seek a legal change of sex, and obtain drugs in unregulated form over the internet, without talking through the underlying issues with a practitioner. We think that the Scottish Government should make

healthcare for people experiencing difficulties with their gender more accessible, and retain the requirement for diagnosis.

The second reason that the need for diagnosis and objective evidence must be retained is for the protection of others in society, especially women and girls. If the Scottish Government wishes to retain the legal fiction of sex change it must continue to require evidence of its necessity.

We further suggest that additional gatekeeping measures are introduced for male-bodied people who wish to live as women. The requirement to “live in their acquired gender” is nonsensical as well as insufficient and unenforceable. There is no such thing as living in a gender. Men and women live in all kinds of ways. As feminists, we have long argued that stereotypes of appearance and behaviour should be challenged, and should not prescribe nor constrain the opportunities open to individuals nor the lives they should lead. The notion that it is possible to “live in” a gender (acquired or otherwise) is regressive and we do not think it is something the Scottish Government should require of its citizens. Recent years have seen a relaxing (in some places) of gendered stereotypes, and we believe it would be a backwards step to base any form of legislation on gendered expectations.

It is also impossible to know what “living in their acquired gender” would actually entail and therefore how the only gatekeeping measure in the Bill, that of a penalty for making a false declaration, would ever be proven. Unlike biological sex which is carefully defined in law and can be objectively assessed, “living in their acquired gender” is subjective and unverifiable. We believe very strongly that male-bodied people should not be able to legally change their sex to female and therefore acquire the rights and protections that pertain to women, on the basis of something that cannot be objectively assessed in any way. We think that not only should the requirement for medical diagnosis be retained, in order to provide that objective evidence, but also that male-bodied individuals should be required to demonstrate over a period of time that they would not present a threat to women and girls. This might require a process over a longer period of time than the current two years.

c. Should a GRC be available to a larger and more diverse group than originally intended?

We think the Scottish Government has not been sufficiently candid about the change in purpose that the proposed changes represent. The Bill, if passed into law, would change the fundamental purpose of the GRA from a pragmatic solution to the anomalies experienced by a small group of severely dysphoric people, to an administrative process enabling the entitlement of all citizens to change their legal sex for a number of different reasons. This is not fully explored in the consultation papers and we think it should be the focus of more, and wider, discussion.

Enabling a much larger and more diverse group of people to legally change their sex increases the risks to women and girls. In part, this risk would arise from predatory men misusing the GRC process if there were not sufficient checks in place, as already discussed. Risk would also arise simply by the fact that larger numbers of male-bodied people, some of whom would be visually indistinguishable from men, would have the right to access single-sex facilities and spaces under current proposals. The larger numbers would make it more common for obviously male-bodied people to enter women’s facilities and spaces, with staff and

other (women) service users unable to challenge them because there would be no way to know whether or not they were in possession of a GRC. Over time this would mean that such facilities and spaces, which have been designated as single-sex in order to protect women's safety, comfort and privacy, would become de facto mixed-sex and open to any man who says he is entitled to use them. This is not to argue that transgender women are themselves a threat, but that eroding women's rights to enforce their boundaries by making it impossible to challenge male-bodied people in women's spaces compromises women's safety, privacy and comfort.

We can already see examples of this as institutions and organisations run ahead of the law, sometimes because they believe they are obliged to do so. For instance, the Youth Hostels Association (YHA) recently changed its policies so that guests can use dormitory accommodation appropriate to their gender (as self-declared) rather than their sex. This sounds progressive and trans-inclusive. But it presents two big problems for women. First, there is no way that staff and women guests can ascertain whether an obviously male-bodied person in a women's dormitory is a harmless transgender woman who simply wants to get a night's sleep, or a predatory man. Neither can be challenged, meaning that both can consider themselves entitled to use the women's dormitory. Second, women may feel uncomfortable and compromised sharing sleeping accommodation with male-bodied people, including those who mean them no harm. Women survivors of male violence are likely to be re-traumatised by the experience. Whilst the YHA has said that if women survivors of male violence book well in advance they will try to accommodate them in single-sex dormitories, this puts the onus on vulnerable women to disclose trauma, and puts untrained staff in the impossible position of trying to assess individuals and make alternative arrangements. This well-meant policy change, which anticipates the law, has meant in practice that women self-exclude from youth hostels (we are aware of many women who have done so). Women living in poverty who are unable to afford more expensive accommodation are particularly affected, and may find themselves unable to take holidays at all if more hostelling organisations follow suit.

We think a better pragmatic solution to the growing numbers of people who wish to identify as the other gender is third spaces. To take our example of the YHA, most hostels have several dormitories, so it would be possible to have some single-sex accommodation some mixed accommodation. Under the current proposals, however, third spaces would be unlikely to work, as male-bodied people who had changed their legal sex would still be entitled to access female accommodation. We think the Scottish Government should institute wider discussion about the feasibility and practicality of third spaces as an alternative way to provide the protection and dignity that transgender people need without compromising women's rights and protections.

d. Should the primacy of gender identity over sex be enshrined in law?

Part 3 of the accompanying documentation refers to the Yogyakarta Principles and states that they are part of the rationale for the proposed reforms. The documentation does not make clear to readers that the Yogyakarta Principles are essentially a lobbying document produced by groups who wish to assert that gender identity should supersede biological sex as a means to categorise individuals.

We understand "gender identity" to refer to an individual's innate sense of maleness or femaleness (or both or neither) as stated by that individual. This is a

relatively new idea, associated with queer theory which is currently very influential in some elite university departments. It is essentially a metaphysical proposition, entirely subjective and unverifiable, and its existence is unproven and unprovable. The Yogyakarta Principles are underpinned by the belief that gender identity can and should be the only way that an individual should be categorised as a man or woman or member of another gender.

We do not accept that gender identity should take precedence over sex in law and we are deeply concerned about the implications for women's rights should the Scottish Government proceed in this direction.

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?

Yes

If yes, please outline these comments.:

We do not support this proposal.

This proposal is framed by the same commitment to self-declaration of gender identity, and the same under-discussed change in the purpose of the GRA as the previous proposal, and thus much of our answer to Question 1 is equally relevant here.

We think a period of reflection is a good idea. We think it should be much longer than three months, and should be supported by at least two medical practitioners for the reasons explained in our answer 1)b, namely to better support the individual going through transition, and to provide appropriate assurances to the wider public that anyone obtaining a legal sex change has objectively verifiable reasons for needing to do so. We suggest that if the Scottish Government establishes that the legal fiction of sex change continues to be necessary, it considers a two-stage or multiple-stage process of screening, reflection, and (for male-bodied people) evidence-gathering, before a GRC can be issued.

We do not think the proposed penalty for a false declaration is appropriate or workable. Nowhere in the documentation is it explained what would constitute a false declaration. We do not think it would be enforceable since an individual's stated motivation is impossible to assess or verify with any objectivity. It would only be after an individual had misused their GRC, for example for the purposes of using access to women's services to harm women, that any intentional falsification of the statutory declaration would become evident. The penalty is therefore not likely to be an effective deterrent from making a false declaration. It would also have the perverse effect, already discussed, of further embedding stereotypical expectations of what it means to "live in the acquired gender" which would be regressive.

A means to prevent false declarations from leading to a successful application for a GRC is therefore essential. If the current Gender Recognition Panel (GRP) is felt to be overly intrusive and stressful, then this can and should be addressed. We can, however, find no evidence that the Scottish Government has considered reviewing the GRP. We think a body such as the GRP should continue to play a gatekeeping role: there needs to be an arms-length organisation that can objectively review the medical and other evidence and decide on that basis whether a legal change of sex is necessary. There should be full consultation so that the GRP or its successor body operates in ways that are transparent, straightforward and humane.

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.:

Scotland, like the rest of the UK and other westernised countries, has since 2011 seen an exponential increase in the numbers of children and adolescent referrals to gender identity clinics, especially among girls. There are likely to be complex social, cultural and political as well as psychological reasons for the increase: as yet, the interplay of factors is poorly understood (see, for instance, Butler et al 2018, <https://adc.bmj.com/content/103/7/631>).

Longitudinal research has shown that childhood and adolescent feelings of gender dysphoria resolve with maturation in the vast majority of cases: such research, however, needs to be treated with caution because the context has changed. The 16- and 17-year-olds who would be the first to apply for a GRC should the proposals become law, will have been shaped by a number of new, overlapping factors which include a social media environment that affirms trans identities, educational curricula that increasingly tell children that sex is assigned at birth and it is possible to be born in the wrong body (see, for example, children's books such as *I Am Jazz*), and the disappearance of support for young lesbians. We do not yet understand the full impact of this environment on children's sense of who they are, or how it will impact upon their maturation through their late teens and into their 20s.

What we do know is that many of the young people currently in their early and mid-teens experiencing difficulties with their gender also experience a range of other social and emotional difficulties: in his talk at the Scottish Parliament on 05/03/2020, Dr David Bell described them as an especially complex group of young people. Many are also on the autism spectrum. Growing numbers of young women in the De-transition Advocacy Network have spoken about the wide-ranging problems they experienced as adolescents, and have also said that in an environment where same-sex female attraction is unsupported, they misrecognised their attraction to other girls as gender non-conformity.

We therefore think it is entirely premature to consider reducing the age at which adolescents could successfully obtain a GRC to 16. It would effectively turn the current cohort of young teenagers, whose needs are poorly understood, into an experimental group. This would be deeply unethical. We need much better information about how to support vulnerable young people (mostly girls), especially young lesbians, before reflecting back at them what could be a very mistaken view of who they are.

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

Yes

If yes, please outline these comments.:

Before answering this question, we would like to provide some contextual information about ourselves.

The Labour Women's Declaration was launched in November 2019. At the time of writing this response, it has been signed by 300 founding signatories (including several Labour councillors and three MSPs) and over 4,300 further signatories, mostly Labour Party members and supporters and trades unionists. We submit this response as the steering group responsible for the Declaration. Our group includes women living in Scotland, England and Wales. This response has been

led by our Scottish members, and further informed by the concerns and perspectives of our members living in other parts of the UK. The full text of our petition, and the list of signatories, is available here:

<https://www.ipetitions.com/petition/labour-womens-declaration>

Our response to this question is structured according to the points in our declaration.

1. Women and girls are subject to discrimination and oppression on the basis of their sex.

Women cannot identify out of sexism; that is not how oppression works. Women who suffer FGM, sexual harassment or rape cannot identify out of these attacks.

Women who live in poverty and who cannot access education or equal pay at work, cannot identify into wealth or equality.

The fight against sexism – discrimination and oppression on the basis of sex – has not yet been won. If we are to make progress, we need clear and precise language which is commonly shared and readily understood. We need to be able to measure accurately the extent of inequalities between the sexes. Where measures have been put in place to address inequalities we need to know unambiguously to whom those measures apply, and we need to be able to ascertain and calibrate their effects. Our battle for equality relies in part on accurate sex-disaggregated data on issues as diverse as pensions and pay or domestic violence, and we cannot afford ambiguities that make the data unreliable or impossible to decipher.

The proposed Bill would introduce a deep and fundamental flaw into Scottish law by eliding the objective, scientifically verifiable as well as readily understood category of biological sex with the subjective, unproven and unprovable category of gender identity. We believe that the original GRA, intended as a pragmatic solution for a small and well-defined group of people, introduced ambiguity into the law as it applies to women's sex-based rights. Extending the reach of legal sex change, and transforming it into an entitlement based on self-declaration, will further obfuscate the category of 'female' and risks redefining it to the point where it becomes meaningless. If we can no longer unproblematically define sex, and women cease to exist as a sex class, then we cannot organise against sexism.

2. Women have the right to freedom of belief, freedom of expression and freedom of assembly (Articles 18, 19 and 20 of the UN Declaration of Human Rights).

We think this consultation has been compromised by the threats we have seen to women's freedom of belief, expression and assembly. The Bill goes to the heart of definitions of what it means to be a woman or a man, and the social and cultural consequences of changing those definitions. Something so fundamental should have been the focus of respectful, evidence-based discussions throughout our Scottish institutions and communities.

Such dialogue has been obstructed throughout by aggressive attempts to prevent women from meeting and discussing the implications of gender recognition reform on our sex-based rights. For instance, masked protestors at a Woman's Place UK meeting in Edinburgh in 2018 attempted to stop people from entering, disrupted the meeting through banging pots and pans throughout, and targeted those present with unsubstantiated slurs and accusations of transphobia on social media afterwards: this page contains a link to a speech by a survivor of male violence at the meeting, with the sound of pots and pans clearly audible.

<https://womansplaceuk.org/a-record-of-womans-place-uk-meetings/>

At the University of Edinburgh in June, a public panel discussion of women's sex-based rights was subjected to a campaign of intimidation online beforehand,

went ahead amidst unprecedented Security arrangements, and there was an attempted assault on a speaker by a transactivist as she left the campus at the end of the meeting:

<https://www.scotsman.com/news/scottish-news/feminist-speaker-julie-bindel-attacked-transgender-person-edinburgh-university-after-talk-545841>

Most recently, the International Women's Day Rally outside the Scottish Parliament on 07/03/2020 was disrupted by protestors carrying placards and banners saying "████ TERFs" (TERF is a misogynist slur) who chanted throughout the event. They are clearly audible in this video clip (from 1:00 onwards):

https://www.youtube.com/watch?v=uR_QwEQWaqQ

These examples in Scotland are mirrored by similar events across the UK, including at our own Labour Women's Declaration rally on 09/03/2020 where masked protestors harassed people as they arrived, chanted throughout and let off smoke bombs towards the end. These are clear attempts at intimidation designed to inhibit women's freedom of assembly. There have been no comparable attempts at intimidation from feminists towards transactivists. For instance, the University of Edinburgh held at least 10 public events in 2019 platforming gender identity uncritically. None of these events were subject to any protest or attempted intimidation or even adverse comment. By contrast, the one event platforming women's rights that went ahead, referred to above, was relentlessly targeted as hateful and transphobic (though its subject was clearly women's rights as protected in law) and a second event, on the complexities of supporting gender non-conforming children in schools, has been indefinitely postponed following similar targeting by transactivists.

The verbal, online and sometimes physical abuse experienced by women who express justifiable concerns about the impact of gender recognition reform on women and girls has had a chilling effect. Research carried out by Fair Play for Women indicates that most of those working in the women's sector are afraid to share their concerns because they know they will be traduced as transphobic. This very much confirms anecdotal evidence from those of our group who work in women's organisations: that speaking out about concerns is impossible and "professional suicide". When the Scottish Government repeatedly asserts that women's organisations are in favour of its proposed reforms, it needs to consider the severe pressure on those who work in the sector, including those in middle-level and client-facing roles as well as managers, to be seen to accord with the prevailing narrative.

We think the Scottish Government should act in accordance with the Public Sector Equality Duty to promote good relationships between people who share protected characteristics and those who do not, and should intervene to create a more positive climate for discussion in which women are not targeted as hateful transphobes when we try to meet. We note the Parliamentary Motion submitted by Jenny Marra MSP after the University of Edinburgh meeting in June, and hope that it can be acted upon. We applaud the actions of those MSPs who have taken the initiative to organise meetings in Parliament where experts on aspects relating to gender recognition can engage with parliamentarians and invited members of the public. We think those meetings are a good start but only a start. We suggest that the Scottish Government explores how it can work with its third sector partners, and the organisations that it directly funds, to create spaces in which respectful, evidence-based discussion of sex and gender can take place.

3. Women have the right to discuss policies which affect them, without being abused, harassed or intimidated.

The Scottish Government has repeatedly asserted that the proposed changes will have no effect on women's rights. This has exacerbated a climate in which women are abused, harassed and intimidated for attempting to discuss how we are affected: our critics argue that we are motivated by transphobia and bigotry rather than a concern for women's rights which they (and the Scottish Government) say are not at issue.

We disagree. As already discussed, the proposed redefinition of what it means to be a woman affects us very profoundly, and affects all aspects of our fight for equality. At a more operational level, Paragraph 5.02 of the consultation paper reads:

"the Scottish Government is developing guidance to make sure that policy makers and service providers understand better how to ensure that the rights of women and trans people can be collectively realised"

We note that no timetable is given for this work. We suggest that the Scottish Government sets in train a full evidence-based discussion involving experts in a range of fields, together with women who use single-sex provision of all kinds, and with the grassroots women's groups that have been raising concerns about how the protected characteristics of sex and of gender reassignment are to be balanced going forward. Until this work is done, any proposed changes to gender recognition should be put on hold.

4. Women have the right to maintain their sex-based protections, as set out in the Equality Act 2010. These include female-only spaces such as changing rooms, hospital wards, sanitary and sleeping accommodation, refuges, hostels and prisons. We discussed in our answer to 1)c some of the ways in which sex-based protections as set out in the Equality Act 2010 have already been eroded.

It is unclear to us how far the Scottish Government is committed to ensuring that the single-sex exemptions in the Equality Act 2010 are understood and upheld. It is also unclear to us how exceptional the Scottish Government thinks they should be, and how it proposes (going forward) to define legitimacy and proportionality.

It is of particular concern to us that vulnerable women, including those living in poverty, those in prison, those impacted by male violence, and older women, will be most affected.

The wording of Paragraph 5.17 of the consultation paper suggests that the Scottish Government tends to read the Equality Act as requiring individual by individual decisions on exclusion, rather than supporting policies that allow a service to make a positive choice to provide a woman-only environment that is based on physical sex. By contrast, the analysis in the Journal of the Law Society of Scotland argues that the exemption could be applied as a principle and not only individual by individual (<https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-01/sex-and-the-equality-act/>). The draft EQIA cites one academic paper (Gottschalk 2009) to support its assertion that there is little evidence to justify blanket single-sex exemptions. However, that paper actually draws the opposite conclusion to the one the Scottish Government cites it to support, and instead makes the case for retaining single-sex spaces, concluding that "Trans-inclusion then is one of the greatest threats faced by women".

We are unconvinced that the Scottish Government has engaged properly with the articulation of the proposed reforms and the provisions of the Equality Act. In a

recent briefing in Scottish Legal News, Rebecca Bull analysed the pressure points that may be expected to emerge in the public sector and concluded that, “Gender recognition reform renders public sector single natal sex services unworkable”

(<https://www.scottishlegal.com/article/rebecca-bull-the-impact-of-gender-recognition-legislation-on-sex-based-rights>). The Scottish Government needs to engage further on the matter of single-sex exemptions before moving forward with gender recognition reform.

5. Women have the right to participate in single-sex sports, to ensure fairness and safety at all levels of competition.

Paragraphs 5.45 and 5.46 of the consultation paper note that the Sports Council Equality Group (SCEG) is about to launch a review of the domestic guidance. There are a wide range of issues relating to sports equality at all levels: these include the availability of single-sex changing facilities for young girls in non-elite settings, as well as the more obvious considerations of fairness and safety. It is not clear to us how the proposed changes in the Bill will impact on women and girls in sport. We think it would be pre-emptive of the Scottish Government to legislate before it has time to fully consider the SCEG recommendations, and we are concerned about the timescale since that group is not expected to report until autumn 2020.

6. Women have the right to organise themselves, as a sex, across a range of cultural, leisure, educational and political activities.

Schedule 16, Part 1 of the Equality Act 2010 provides for single-characteristic associations, with the purpose of bringing together people who share that particular characteristic. The consultation paper does not discuss whether or not the Scottish Government believes this can ever be justified in relation to the protected characteristic of sex. The limited recognition in the paper of existing provisions which allow services and roles to be limited by biological sex focusses on exceptional situations. It is not clear whether the Scottish Government accepts that some women might legitimately wish to organise themselves more generally around the fact of being female-bodied, for social, educational or political purposes. We believe that women, as a sex class, should continue to have such rights. We value them ourselves, and we know of many other women who want to continue to organise as women. We also know that it is becoming harder to exercise this right. For example, the annual Edinburgh-based Audacious Women’s Festival, organised by volunteers to enable women to try new activities in a supportive environment, has in the past two years come under attack for being insufficiently trans-inclusive. We believe that it would be operationally complex, if not impossible, for women’s rights to organise as a sex to be upheld under a form of self-declaration of gender, since there would be no basis on which an obviously male-bodied person could be challenged should they want to participate. If the Scottish Government intends to proceed with reform, it needs to a) establish, drawing on evidence, its position on the matter; and assuming it intends to uphold this part of the Equality Act, b) produce robust protocols that will enable the right of women to organise as a sex to be realised in practice.

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

Yes

If yes, please outline these comments.:

The draft Impact Assessments are not fit for purpose. They fail to properly consider the impacts on (for example):

- Women as a sex class
- Lesbians and gay men (who are impacted by the erosion of understandings and provisions based on same-sex, not same-gender, attraction)
- Children and young people (including the proliferation of educational interventions that present contested metaphysical beliefs about gender identity as though they were universally-accepted fact)
- Women living in poverty (who will be less able to buy their way out of mixed-sex provision)
- Older and disabled women (who will be disproportionately affected by ambiguities in requesting female practitioners for intimate medical and health care)
- Women from religious minorities (who may be unable to access facilities such as swimming pools if women-only sessions cannot be limited to female people)

In addition to these shortcomings, the draft EQIA makes no reference to female privacy and dignity, and asserts that it has not identified any evidence to support existing concerns about the risk of assault by allowing males who self-identify as women to access female-only spaces. It cites only two pieces of research to support this assertion: both pieces are dismissive and one-sided. We understand that the Scottish Government has distanced itself from the contents of one of these papers (Dunne, 2017), saying that it only wants to cite the part of the paper with which it agrees.

We respectfully suggest that this cherry-picking is entirely inappropriate and represents very poor practice. We suggest that the Scottish Government engages much more fully with evidence from a range of relevant sources, and that it uses the material properly rather than seeking out-of-context quotations to support its existing assertions.