Lesbian Strength Scotland

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?

Yes

If yes, please outline these comments.:

The bill should be withdrawn. There are too many unknowns and risks for applicants for GRC and for the public.

The bill as proposed removes the impetus to consult with medical specialists and will therefore result in a loss of support and of checks and balances.

The countries named as adopting 'international best practice' such as Malta do not have good records in treatment of women and they did not consult with womens' groups before adopting the bill.

There is not yet a good enough understanding of the impact of identifying as having a particular gender to the detriment of acknowledging one's sex. This will impact on healthcare, single sex segregated spaces and identities dependent on one's birth sex such as same-sex attraction/being a lesbian or a gay man, belonging to the group 'Christian women' or 'mother' etc.

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.:

Any reflection period should be as long as possible and involve as much evidence-based support as possible.

People are isolated and vulnerable and often targeted by members of pressure groups who exert peer pressure and bully to ensure people do not think for themselves and do not change their minds.

The longer people have, the more chance they have of ensuring it is definitely the right decision for them.

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.:

There are so many pressures on young people to conform to gendered stereotypes and to fit into rigid categories. Their decision making faculties and ability to risk assess are not well-developed. Many thousands are identifying as trans or non-binary and then detransitioning and currently this has little ill effect.

By asking someone to declare under threat of criminalisation that they intend to live as their acquired gender from 16, we place young people at risk of too much bureaucracy and potentially a criminal sentence.

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

Yes

If yes, please outline these comments.:

POINT 1: The Government's failure to address how the Gender Recognition Certificate (GRC) impacts women's rights and protections, and how Self-ID as a policy could impact women's rights and protections:

In order to address how the government has failed to address the above, it is important to outline the issues with applying the single sex exception in regard to transwomen with GRCs, which can be summarised as follows:

Use of the single sex exception in paragraph 28 requires 'sophistry':

Discrimination lawyer Rebecca Bull argues in her briefing note, Impact of Gender Recognition Reform on Sex Based Rights, that when someone has a GRC the single sex exceptions in 'paragraphs 26 and 27 fall away' and it is the paragraph 28 exception which applies to transwomen who are no longer legally male. Rebecca argues that providers have to use 'sophistry' to apply the paragraph 28 exception, because gender reassignment then becomes the basis for preclusion, and the way this has been understood by at least one court is that this means sex cannot be the basis for excluding transwomen with GRCs, even though sex is the basis on which women require female-only provision.

For example the paragraph 27 exceptions, which can be applied to men and to transwomen without GRCs, only require that women might reasonably object to the presence of, or contact with, the opposite sex, in order for a female-only provision to be lawful (and reasonable objections to the presence of the opposite sex do not rely on trauma, and in fact it is recognised by the EQA that for reasons of privacy and dignity women can reasonably object to the presence of male people).

It should be obvious that the basis on which women would reasonably object to the presence of, or contact with, men and transwomen, does not hinge on legal sex, but on biological sex, and since the biological sex of transwomen with GRCs does not change, then it is clear that the paragraph 28 exception should still apply on the basis of sex, if it is to uphold women's sex based protections in the same way the other single sex exceptions do. As such, since applying the paragraph 28 exception on the basis of sex requires sophistry, and may even be deemed discriminatory

according to Rebecca Bull,it is clear that the paragraph 28 exception somewhat weakens women's sex based protections.

The human rights context:

It is important to note that the EQA single sex exceptions exist to uphold women's human rights to privacy, dignity, safety, recovery from trauma and equality. The EQA recognises that women can require our own provisions in order to ensure these human rights are upheld. In order to understand where women require our own provisions, providers and policy makers must understand the needs of women in respect to our human rights. So, for example, so long as some women require female-only provisions in order to be provided with privacy, dignity and safety, and to be able to recover from trauma and participate equally within society, it would be a human rights failure not to offer those provisions on a single sex basis.

It must also be understood that upholding women's rights does not prevent trans equality; trans people should have their own provisions just as women should to uphold these human rights. This is what it means to treat both groups equally.

There is no basis on which it can be argued that women's human rights should no longer be upheld in order that trans people can have legal sex recognition. If the current system of legal sex recognition can mean women's rights are undermined, which this response will make clear is the case, then the government should not move forward with proposals that would increase the number of those who can access a GRC, unless it can address this.

The EHRC Code:

The Scottish Government confirmed with Women and Girls in Scotland that the government will not be seeking its own legal advice regarding the EQA single sex exceptions and how these interact with the GRA, and said it would instead work from the EHRC's interpretation of these matters. This is particularly concerning, as the EHRC position is highly contested, and is also understood by legal experts such as Rebecca Bull as being hostile to implementing the paragraph 28 exception for the following reasons:

The Code examples:

Rebecca Bull makes clear in the aforementioned briefing note that the Code only provides an example of discrimination against transwomen, it does not provide examples of the 'positive use' of the paragraph 28 exception in regard to transwomen with GRCs. Every other example in the Code reflects the EQA explanatory notes except in relation to paragraph 28, even though the EQA explanatory notes provide the following example of how the paragraph 28 exception can be lawfully applied: "A group counselling session is provided for female victims of sexual assault. The organisers do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. This would be lawful". As such, the Code fails to address how the paragraph 28 exception can be used by providers, and appears to deliberately ignore the EQA explanatory notes as a guide to

how this exception should be implemented.

The Code's misrepresentation of the basis on which the paragraph 28 exception can be applied:

Futhermore, the Code says the paragraph 28 exception should only be used in 'exceptional circumstances', without providing any justification for this statement based on the wording of the EQA itself, *which in fact does not say this*. This functions to misrepresent the test for objective justification, which is whether application of the exception would be a proportionate means of achieving a legitimate aim. The test is not based on rarity. Indeed discrimination lawyer [redacted] has also commented that the term 'exception' does not mean 'exceptional', asserting the test has always been objective justification and the exception can be applied 'frequently'.

The Code also says the exception should be applied on a 'case by case basis', without saying what it means by this, and Rebecca Bull highlights that the EHRC is in fact taking 'case by case basis' to mean the exception should only be applied on an individual basis, however as Rebecca says, this would "render female-only policies unworkable". And this is the EHRC position despite that in the EQA, 'case by case basis' is used to refer to the circumstances *per provision*, for example stating the following in regard to single sex services: "in each case such provision has to be justified".

How the EHRC position that the paragraph 28 exception applies on an individual basis nullifies women's rights and protections:

If the paragraph 28 exception can only be applied on an individual basis, this would mean it can only be used where risk assessments are carried out, which means open single sex facilities (i.e. most single sex provisions, such as toilets, changing rooms, shower facilities, communal accommodation) cannot be female-only/preclude opposite-sex trans people as a policy, because access to these provisions does not involve assessments; risk assessments can only be carried out in closed settings, such as prisons, hostels and women's services.

Furthermore, risk assessments do not prevent harm, they can only work with the known history of individuals, so those with predatory histories unknown to providers will not be prevented from having access to female-only provisions via the risk assessment process (on that basis anyway). So even on the level of precluding predatory males from female provisions, risk assessments cannot work, and this has been acknowledged by the Cabinet Secretary, where in her meeting with Women and Girls in Scotland she accepted that risk assessments can only work with 'available' information.

Moreover, risk assessments cannot address emotional and psychological safety, and nor can they address needs around privacy, dignity and recovery from trauma. So the approach that says the exception in regard to transwomen with GRCs should be applied on an individual basis, is an approach which denies women's human rights to privacy, dignity, safety, recovery from trauma and equality, and which says services can never be run on a female-only basis, i.e. that women can't have the

psychological, emotional and physical safety of male free space anywhere. As is covered in the response to Q5, this is also an approach that is therefore antithetical to international best practice standards in regard to female-only provision. Again, the approach that the paragraph 28 exception should be applied on an individual basis is contrary to the EQA explanatory notes, which provides an example of the exception being used on a blanket basis, in order to allow a female only single sex service to meet the needs of women services users.

The Code's reliance on old law, and the suggestion of a two-tier system of trans rights:

Rebecca Bull outlines how it appears the EHRC is relying on legal precedent predating the GRA 2004, that conflicts with the GRA, the EQA and the EQA explanatory notes, as it seems to be taking the view that blanket policies of trans preclusion would inevitably be discriminatory, due to a judgement predating the GRA and the EQA which stated "where a transsexual person is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary". Rebecca argues this judgement is superseded by the GRA and EQA, and as such that the EHRC is relying on 'old law'. Advocate Julius Komorowski also argues in his article, Sex and the Equality Act, published by the Law Society of Scotland, that this judgement "ought to be discounted, given that it constitutes an attempt by the House of Lords to fashion a rule to ensure the observance of EU law in the absence of legislation by Parliament".

It is the EQA and GRA which should take precedent, and yet the EHRC has not addressed why it is relying on old law to essentially argue that the subsequent EQA/EQA explanatory notes are discriminatory. Furthermore, this suggests the EHRC believes there is a two-tier system of trans rights, where transsexuals who 'pass' have different rights in terms of access to single sex provisions, to other transsexuals who do not pass, and all other trans people. All of which is a major departure from these Acts.

Indeed Rebecca Bull asserts "the EHRC Statutory Code therefore clashes not only with GRA 2004 but also with the EqA 2010 Explanatory Notes. If the Code is followed, then the Paragraph 28 exceptions are almost impossible to apply. Unlike the Paragraph 26 and 27 exceptions which show sex-based service provision respecting reasonable sexed boundaries, practicality, efficacy, intersectional considerations and enabling public functions, the Code questions the motives of service-users, whereas previously the only analysis required was whether they met the positive threshold of being reasonable and straight-forward sex-based reasons were accepted"

What this means for the Scottish Government:

Rebecca Bull has highlighted that she disagrees with the EHRC interpretation, as does Julius Komorowski, who states in the aforementioned article "In my view, the exception for gender reassignment discrimination should be interpreted in a manner consistent with the exceptions for sex discrimination. It follows, in my

view, that the standard should not be assumed to be any higher than that required for excluding, for instance, men from female wards in hospitals, and the like". Many other legal experts share their view, however it is important to note again that the Scottish Government has said it will work with the EHRC's interpretation of the law and will not take its own view. Furthermore, it is clear that regardless of the government's position regarding the EHRC Code, it has to assess its proposals against the EHRC Code's interpretation of the paragraph 28 exception, because it is relied on by providers and heavily influences how the EQA is implemented in Scotland. And as Rebecca's paper makes clear, the EHRC's position on these matters is that the *the rights of transwomen with GRCs are profoundly different to the rights of transwomen without GRC's*, and in such a way that the rights of transwomen with GRCs undermine women's sex based human rights to single sex provisions and equality. Rebecca asserts "It is worth noting that the single sex exceptions set out in paragraph 27 allowed for reasonable objection to both male presence and male contact" and that if the EHRC's position is taken to be correct "then, once a GRC is obtained, it becomes much harder to provide single sex services on the basis of natal sex and more difficult to use the exceptions".

As such, the Scottish Government will have to assess the following if it is to understand the impact of its proposals; this is the only way the government will ensure to show due regard in respect to the Public Sector Equality Duty, and that parliament has the information it needs to be able to vote on the GRA Bill without uncertainty as regards the impact of these proposals:

How the paragraph 28 exception can be applied, and the ways in which transwomen with GRCs have different rights in regard to single sex provision than those who don't.
The impact of the paragraph 28 exception in various single sex settings.
The impact of the paragraph 28 exception on women's human rights and equality.
The impact of its proposals to increase the numbers of those who can access a GRC, and thus who would be subject to the paragraph 28 exception.
Enforcement of the EQA:

The EQA interacts with the GRA in such a way that it is usually impossible for providers to ascertain the trans status of a person with a GRC, as it is considered direct discrimination for a provider to ask for anything other than a birth certificate as proof of sex. As such, even where the paragraph 28 exception should be applicable, it can't necessarily be applied in respect to transwomen with GRCs, because there is usually no way for a provider to have a policy in place to enforce the EQA single sex exception.

For example Women and Girls in Scotland confirmed with Scotland's two largest NHS providers via FOI last year, NHS Lothian and NHS Greater Glasgow and Clyde, that as employers their view regarding the interaction of the EQA and the GRA meant they did not consider it possible/lawful to ascertain the trans status of employees with GRCs or to share this information in staff deployment even if disclosed. As such, they confirmed they were unable to guarantee that where female-only healthcare had been agreed, patients would in fact be attended to by a female HCP, because they could not have a policy in place to ensure this.

Furthermore, where patients would be attended to by a transwoman HCP, for the same reasons, they also did not have policies in place to ensure any such patient would be previously warned/have their consent previously sought. This is clearly a serious patient welfare and consent issue.

The Scottish Government has since indicated it believes the Genuine Occupational Requirement may be applicable in such circumstances (which in theory would mean the NHS could require transwomen staff not to provide female-only healthcare) but it is not clear whether this would be the case or not. Furthermore, even if it is the case that NHS providers can in fact use the GOR to provide female-only healthcare across their services, it would be exceptional in that it does not change that for most forms of single sex provision, there is no clear path for providers in determining the trans status of those with GRCs where they should need to in order to apply the exception.

When Women and Girls in Scotland raised this directly with the Scottish Government, the response was that maybe providers could ask all service users/suchlike to sign forms to say they are not trans. However the government could not say if this would actually be lawful, and also this is unworkable, because in most single sex settings the provision is open and no-one is subject to access checks; the issue is rather that where a provider wishes to act to enforce the Equality Act there needs to be a way for them to lawfully be able to do this in all circumstances (though it's particularly important in regard to women's VAW and health services) and currently it is not clear how providers can do this outside of the very narrow circumstances where the GOR applies. The government needs to be able to answer this question.

The impact of how high level providers interpret the GRC:

The GRC has a further real-world impact, in that many providers have misunderstood the GRC to mean that trans people who have changed their legal sex cannot ever be treated differently than the sex they identify as, and this misunderstanding can be found at the highest levels. For example the MoJ states: 'The Gender Recognition Act 2004 section 9 says that when a full GRC is issued to a person, the person's gender becomes, for all purposes, their acquired gender. This means that transgender women prisoners with GRCs must be treated in the same way as biological women for all purposes. Transgender women with GRCs must be placed in the women's estate/AP unless there are exceptional circumstances, as would be the case for biological women'.

Women and Girls in Scotland raised this example with the Scottish Government as the government should also be assessing how these interpretations are impacting women as part of assessing its proposals, however the government refused to address this. The government must revisit this and ensure to address the various interpretations of the GRC found among high level providers, as part of its EQIA.
Point 2: I would like to challenge the Scottish Government's claims that Self ID is international best practice:

The Scottish Government has been unclear which country it aims to copy to achieve best practice and leans heavily on two controversial international resolutions

and principles which are based on the ideology of sex assigned at birth (not observed at birth/ in utero) and the primacy of "gender identity". Aiming to follow these two examples would put Scotland far beyond the protections for trans people required by the European Court of Human Rights. I would like to include the quoted sections below from the consultation analysis by Murray Blackburn McKenzie, Gender Recognition Reform (Scotland) Bill Assessment of draft Bill and consultation in order to best illustrate the main issues:

On "international best practice":

"The consultation paper does not state which countries the Scottish Government considers to represent "international best practice": given that gender recognition laws vary, for example in relation to the minimum age for legal recognition, which ranges from six years upwards, the application process, and legal effects on areas such as marriage, succession and eligibility for military service.

It should also be noted that relatively few countries have taken up statutory self-declaration, and that where this has been done, exactly what detailed rights this grants in any particular state will vary, depending on how the policy has been implemented in detail and its broader approach to equalities legislation.

The paper does not consider the process for change within different jurisdictions, for example how widely governments consulted, and how rigorously policymakers assessed the potential impact on other rights-holders, or seek to understand the rapid roll-out of gender self-identification laws in other jurisdictions, which is taken for granted as an unproblematic precedent".

The Yogyakarta Principles:

"The 2017 Scottish GRA Consultation stated that "the 2004 Act requirements are unnecessarily intrusive and do not reflect the best practice now embodied in the Yogyakarta Principles and Resolution 2048". The current consultation paper also states that the Scottish Government views the Yogyakarta Principles as a further reason for change.

While stating that the Yogyakarta Principles are part of its reason for reform, the consultation paper does not consider the principles in more detail. For example, Yogyakarta Principle 31 also specifies that States should "end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality". Principle 31 also states that while sex or gender continues to be registered, States should "Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.

The consultation paper acknowledges that the Yogyakarta Principles have no standing in international law and place the Scottish Government under no obligations (this was not stated in the 2017 consultation).

However, it is still not made clear to readers that the Yogyakarta Principles were produced as, in essence, an international lobbying document to promote

self-declaration of gender identity".

Resolution 2048 of the Parliamentary Assembly of the Council of Europe:

"The consultation paper also refers to Council of Europe Resolution (CoE) 204832 as a further reason for change. This resolution calls on all Member States to: "develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards … and other similar documents.

Like the Yogyakarta Principles, the CoE resolution adopts a strongly held belief in the existence of gender identity as a "deeply felt internal and individual experience", and rests on the belief that sex is "assigned at birth".

Also like the Yogyakarta Principles, the explanatory memorandum 34 to Resolution 2048 contains no assessment of the impact of the proposals on those with other protected characteristics, including sex".

Scrutiny regarding the YP and the CoE resolution:

"Neither the current consultation paper, nor the 2017 consultation paper set out whether or how the Scottish Government has subjected the Yogyakarta Principles or CoE Resolution 2048 to independent critical scrutiny".

European Court of Human Rights (ECtHR):

"The Scottish Government is bound to observe findings of the ECtHR. The Court has ruled that states must have arrangements to protect the privacy of certain people seeking to be recognised as the opposite sex from that observed at birth, including provision to change a birth certificate. However, the current body of ECtHR law does not require states to introduce self-identification either for documentary or legal status change, and UK law as it stands appears to be fully compliant with current ECtHR rulings in this area.

The ECtHR position starts from the position of accepting that there are some people who have a strong need to live as though they were the opposite sex from that they were born as. It interprets the ECHR as requiring states to enable people who have this need to meet it as far as possible, including protecting their privacy. It allows that in assessing a person's need to change official records, states can reasonably require medical confirmation of psychological distress (but not genital surgery). The GRA 2004 follows this. Not all countries covered by the ECHR have yet made equivalent provision.

By taking Yogyakarta and Resolution 2048 to be best practice, the Scottish Government is departing from this thinking. It accepts instead, an argument that the law should be based on a (non-falsifiable) belief in the existence of a freestanding inner gender identity, which should be given primacy over physical sex for the purpose of official status; and that the only valid witness to this is the person themselves".

Point 3 – Accurate sex-based data collection

In the same analysis, Murray Blackburn McKenzie, cover how the consultation answers a series of questions in relation to how the government's GRA reform proposals could skew reliable statistics, of which seven important questions remain unanswered. I will list these questions here in order to demonstrate where the government has not addressed how its proposed changes could impact data collection. Furthermore, the Belgium Paper in Appendix One includes findings relating to the number of people acquiring GRCs in other countries, and the demographic issues for data collection.

"In relation to the 2021 census, can the Scottish Government explain how can we collect reliable data on either sex or gender identity if both are conflated into the same question?
What analysis has the Scottish Government undertaken to establish the potential impact of changing the sex question in the census to one that is explicitly based on self-identification on data quality?
What analysis has the Scottish Government undertaken to assess the impact of the decision to remove sex recorded at birth from NHS records, as recorded in the CHI system, and to record self-identity, on the delivery of sex-specific and single-sex services?
In relation to criminal justice data, what analysis has the Scottish Government undertaken to quantify the potential effects of self-identification principles on the quality of data on those crimes disproportionately committed by males, such as violent and sexual offending?
Criminal proceedings in Scotland data show that only three females were convicted of sexual assault in 2017/18, compared to 299 males. Given these low numbers, does the Scottish Government acknowledge that a small percentage of male people being recorded instead as female would skew this data?
Has the Scottish Government undertaken any analysis of the potential impact of recording based on gender identity in the monitoring of inequalities in male-dominated industries, for example the tech sector?
Does the Scottish Government support the recommendations in Caroline Criado-Perez's book Invisible Women that we must meticulously collect sex-disaggregated data to tackle sex-based discrimination?"
Appendix One: Key findings from the Belgium Paper, by Murray Blackburn Mackenzie

The analysis is based on data published by the Belgium Institute for the Equality of Women and Men (IGVM) which provides insights into how the introduction of a self-declaration model in 2018 affected the number and character of applications. The key points are as follows:
"Between 2017 and 2018, registrations increased by 575%, from 110 to 742. This can partly be read in the context of the removal of demanding requirements (notably sterilisation) placed on those wishing to change their legal sex prior to reform, although it is less relevant to the increase in younger people making applications.
More than half of all registered changes in legal sex since 1993 took place after the introduction of new legislation in 2018.

Following reform, the average age of applications fell, particularly among natal females (transmen).
In 2018/19 transmen aged 16 to 24 years accounted for nearly a third of all legal sex change registrations (30%).
The proportion of transmen aged 16 to 24 years registering a change in legal sex was more than double that of transwomen aged 16 to 24 years, at 65% and 27% respectively.
These findings have implications for the current debate on data collection. The Belgium data suggests that statistically significant differences in results are much more likely for transmen aged 16 to 24 years than for the population as a whole, depending on whether sex or self-declared gender identity is reported.

Both the marked increase in applications and asymmetrical increase in applications among young transmen merit further consideration ahead of legal reform in Scotland, to understand the factors associated with these trends.

Under the Belgian model, changing legal sex is irreversible, except in very exceptional circumstances, which is intended to act as a safeguard. Similarly, the Scottish Government propose that a person wishing to change their legal sex 'intends to continue to live in the acquired gender permanently'.

We would suggest that this provision also requires further consideration, given the potential for an increase in applications from young transwomen, as well as an apparent increase in those now re-identifying with their birth sex in the UK".

The analysis also notes "That the Scottish Government has conveyed a working group on Sex and Gender in data demonstrates there is a concern that that the accuracy of statistical information is not as it should be. However, there is no evidence that this will be tackled by the time the consultation is complete."

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

Yes

If yes, please outline these comments.:

These impact assessments are extremely poor. They do not follow Scottish government guidelines. I realise this is an area of poor performance across the board, but in this case the impact could be catastrophic and it is being minimised.

The government cannot continue to rely on the opinions of a handful of women's sector charities to inform policy here.

It's crucial to go out into communities, talk through what this law could mean and ask opinions of everyone using single-sex services.

We've heard of so many women self-excluding from gyms, lesbian groups, women's sector support such as rape crisis because they cannot cope with the idea of potentially being confronted with a male-bodied person who wishes to be treated as women are treated.

It will have a huge effect on women's dignity and safety and the gains won by the women's sector, the trade union movement and politicians fighting for women's rights alongside lawmakers.