

Women and Girls in Scotland

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.:

Women and Girls in Scotland have concerns over what is meant by 'living in the acquired gender'. This is not currently defined in the bill and without this definition it is difficult to see what would constitute a false declaration in relation to this or how this would be assessed by the courts

The current diagnosis of gender dysphoria is made from an in-depth assessment carried out by two or more specialists over a period of time which takes longer than 3 months to complete thoroughly. This process has a gate keeping function which is designed to prevent abuse of the system. By removing this process, we remove that gate keeping function and as far as we can tell there is nothing in place to replace it.

We are also concerned that removing all medical observation and the requirement for a medical diagnosis means that many applicants will no longer receive any expert advice or counselling at a time of huge personal change.

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.:

Women and Girls in Scotland believes there should be an adequate process in place to ensure that a person understands the full ramifications of a gender change before a GRC is issued. This should include understanding the legal ramifications of the change and any change of mind. Under the proposed legislation this is not in place and this removes any gate keeping that would prevent abuse of the system.

We are also concerned that removing all medical observation and the requirement for a medical diagnosis means that many applicants will no longer receive any expert advice or counselling at a time of huge personal change.

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 is a large increase of young people, particularly young girls, identifying as trans or non binary. There has currently been little to no research into the causes of this or any research on the number of people who choose to detransition. Despite this young people who wish to change gender are frequently placed on an untested medical pathway which can lead to loss of sexual function, infertility and lifelong medication.

There is no increasing evidence that for the majority of young people these feelings of gender dysphoria resolve with maturity. The cause for both the rapid increase in young people seeking medical help and those who detransition needs to be investigated before any law change extends the right to legally change gender to young people.

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:

Furthermore, 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 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.:

Point 1 – The Scottish Government's failures in regard to assessing the impact of the Gender Recognition Certificate (GRC) on women's rights:

The Scottish Government has not assessed the following:

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.

The impact of the GRC on enforcing the Equality Act 2010 (EQA)

The impact of how the GRC is being interpreted by high level providers such as the MoJ as nullifying all single sex exceptions.

The government should note it is not enough to say the single sex exceptions in the EQA will not be changed by this legislation, when it cannot say how the exceptions currently function, both in terms of the law and in practice, and whether or not the paragraph 28 exception currently functions to infringe women's human rights and equality. Furthermore, the government has stated it will be working from the EHRC's interpretation of the EQA and the GRA, and as demonstrated in Q4, the EHRC's position asserts vastly different rights for transwomen with GRCs, which mean, unlike with the other single sex exceptions, that

the human rights and equality of women and cannot be upheld in relation to transwomen with GRCs. Despite this, the government has not assessed this interpretation, or what it currently means for women, or what it would mean for women should the government move forward with its GRA proposals.

The above has been evidenced in the response to Q4, however the government has made a number of claims in its EQIA regarding the need for female-only provision that will be addressed here. It is important to note that since the government has addressed the need for female-only provision in its consultation (and in

fact is almost the sole focus of its EQIA evidence regarding the impact of its proposals on women) it is acknowledging that understanding the need for female-only

provision is imperative to understanding the impact of its proposals.

Before moving forward, it is important to again note that discrimination lawyer

Rebecca Bull has stated "The Scottish Government's Equality Impact Analysis has

failed to understand the current law with regards to when a person has obtained female legal sex status using a Gender Recognition Certificate (“GRC”). It has not identified nor has it analysed the impact of Gender Recognition Reform on sex-based rights”. As such, the government’s claims that “reforming the GRA does not diminish the rights of women”, is a claim that at the very least the government has not demonstrated is the case, and which there is ample evidence to challenge.

Point 2: The main government claims in the consultation that I wish to challenge:
Government claim 1: “There is a lack of any evidence around the actual experienced impacts of trans inclusion in services”.

Firstly, there *is* evidence regarding the experienced impact of the inclusion of transwomen in women’s services. Outlined below is evidence from the Gottschalk paper (referenced by the Scottish Government in its consultation), as well as from work carried out by Women and Girls in Scotland, which demonstrates experienced impacts of the inclusion of transwomen in women’s provisions.

Additionally, Appendix One outlines a number of incidents arising from the inclusion of transwomen in women’s provisions.

Gottschalk Paper:

This paper is based on interviews with women working in women’s services and has been referenced by the government in its consultation paper in order to argue that blanket policies of trans preclusion from women’s services to allow for female-only services, would not usually be warranted. However this paper in fact makes the case for the opposite conclusion, based on the evidence gathered by the author via the interviews therein, stating “Trans-inclusion then is one of the greatest threats faced by women”.

In this paper, a number of points were made by interviewees in regard to the adverse impact of the inclusion of transwomen in women’s services: Issues were raised in regard to trans inclusion in a women’s refuge, where a transwomen had to be moved so staff could ensure they upheld a ‘duty of care’ to ‘women and children’ in the refuge. It was also stated that workers could find trans inclusion ‘stressful’ and ‘problematic’ and ‘had exposed and confirmed their beliefs that men and MTFs did not understand gendered male and female socialisation and gender power and concluded that they were not able to empathise with the experiences of women’.

Women and Girls in Scotland:

In September 2018, Women and Girls in Scotland carried out a public survey of 2000 women in relation to self-exclusion from women’s provisions. As with the government’s consultation, surveys are not statistically representative, which Women and Girls in Scotland made clear in their report on the findings of this survey, Female Only Provision: A Women and Girls in Scotland Report. However the purpose of this survey was to gather evidence regarding the need for female-only provision, and the report contains a number of quotes demonstrating this (the quotes below relate to ‘experienced impacts’ of trans inclusion policies, but as this response will make clear, self-exclusion is also an experienced impact, and further quotes will be provided later in this response to cover that):

“I would (and do – this is happening to me currently) change in a toilet cubicle instead of the changing rooms- I would still be (I *am*) very unhappy and anxious, since a facility which allows men into the women’s changing rooms will also allow them into the ladies toilets. I need sport in my life for my mental health, but it is

horrendously stressful to have to be constantly on guard for men in what should be female-only areas.”

“I no longer use the changing rooms in my local sports centre – I use the toilets to change. This is still not a female only space, but at least I can lock a door.

Getting exercise is extremely important to me, but it is now rife with anxiety, fear and trauma flashbacks as there are males using all the female facilities now. This is not a theoretical situation – it is happening right now, in the UK”

“I *have* been forced to use survivor support services where male-bodied people (both therapists and other clients) shared the space and it’s literally devastated my life...it’s not about ‘comfort’, it’s about *CAUSING HARM* to be living in a state of constant fear in what should be a healing space”

It is important to note that despite the government stating to Women and Girls in Scotland that it had read this report months ago, the findings were inexplicably ignored in the government’s evidence gathering stage for this consultation.

The need to gauge the potential impact as part of the impact assessment process:

The government’s framing of the impact of trans inclusion as ‘experienced impact’ is of concern. In order to understand the impact of its proposals, the government cannot simply look to incidents it can find evidence of, but must endeavour to understand the *potential impact* of what its assessing and do so by collecting evidence regarding this, as well as by engaging directly with stakeholders. Additionally, the government has completely ignored self-exclusion as an ‘experienced impact’, even though there is ample evidence that women are self-excluding due to trans inclusion policies, and this is an experienced impact of those policies.

The UK Department for International Development (DfID) sets out clear guidelines for safe spaces for women and girls, supported by rigorous evidence from the UN and World Health Organisation. They state that all VAWG programming actions should be informed by consultations with women and girls and this must include why some women and girls are not using the facilities available. The Scottish government is therefore failing by not addressing why and where women may self-exclude from single sex spaces with males allowed access, including self-excluding from women’s services, as part of its EQIA.

In preparing its EQIA the government should have done its best to find evidence of women who say they would face detriment due to trans inclusion in female-only provision, including self-excluding, and should have made efforts to understand why women felt that way so it could understand the needs of women. Furthermore, the government should have made efforts to understand the impacts outlined by women, so it could have as full as possible an understanding of the detriment posed to women of the loss of female-only provision (and this would have to include direct engagement with women on this matter, which Women and Girls in Scotland has recommended to the government in June 2019).

The government must also understand that the demonstration of any detrimental impact on women of trans inclusion policies, does not depend on a majority of women sharing the same view regarding any impact, but in fact only requires that some would be detrimentally impacted in order for discrimination to occur.

Discrimination lawyer [REDACTED] has highlighted the same, stating discrimination can occur ‘even if only a minority are particularly disadvantaged because of their protected characteristic’.

Female-only provision and international best practice:

It is important that the government understands what established international best practice is in respect to female-only provision, and understands where the needs expressed by women and girls in relation to transwomen are the same as their needs regarding males as a group.

Internationally, DfID, the World Health Organisation (WHO), and UN agencies such as the United Nations Population Fund (UNFPA) understand the importance of female-only spaces in supporting women and girls recovering from male violence, and the WHO states that 'safe' in the context of female-only spaces includes "absence of trauma, excessive stress, violence (or fear of violence) or abuse". Thus if a woman or girl enters what should be a safe space and experiences distress/trauma/re-traumatisation/fears male violence due to male inclusion, then the space is no longer safe according to international best practice standards.

As such, it is clear if international best practice standards are to be upheld in relation to women and girls, that 'safe spaces' for women and girls are to be understood not just as spaces that are safe from male violence, but which are also spaces where women are safe from distress, trauma and re-traumatisation, as well as from the fear of male violence – i.e. where women and girls are also psychologically and emotionally safe.

This importance of safety for survivors in particular was also highlighted in the Gottschalk paper, where the author refers to Judith Lewis Herman's 1992 publication *Trauma and recovery – the aftermath of violence – from domestic abuse to political terror*, wherein she points to 'physical and emotional safety as the first and major need of the survivors'.

Therefore if the government is to uphold international best practice regarding provision for women, particularly for survivors, it must do all it can to understand the ways in which we require female-only provision in order to have safe spaces free from distress, trauma and re-traumatisation. The government has no basis on which to claim women do not require female-only provision in relation to transwomen for the same reasons we do in relation to men, and also has not in any way demonstrated that the vast body of evidence collated over decades in relation to the needs of women regarding male people, is irrelevant to the inclusion of transwomen in women's provisions.

So long as there is evidence that women would not be safe from distress, trauma and re-traumatisation due to the inclusion of transwomen in women's provisions, the government must recognise that those spaces are no longer safe for women.

Evidence regarding the need for female-only provision:

Gottschalk:

The following is the full conclusion of this paper, based on the evidence therein from women working in women's services:

"This article acknowledges that MTFs [male to female transgender people] have special needs and equal rights before the law. However in the case of women-only space and in the current social and legal context, protecting the rights of one minority group, transgendered people, infringes on the rights of another minority group, women, with serious consequences for all women. The dilemma of managing the 'rights' perspective is the reason why many of the participants in this study opted for transgender inclusion, even while understanding the difficulties this posed for their female clients. Many other participants were prepared to take a stand and make the difficult decision that MTFs need to create their own safe space. MTF inclusion in women-only spaces, whether as clients or as

workers, compromises the rights of women to seek support in a context where they are with, and receive professional help from, people with whom they have shared experiences. The inclusion of men or MTFs results in the elimination of women-only space and re-assimilation into male dominated institutions. Such mainstreaming can potentially remove the focus from women's issues and return to a situation described by Kaplan (1996) where women's needs in health and refuge become invisible and neglected. As proposed by Freedman (1979) the decline of the gains achieved for women by feminism is under threat by the erasure of women-only space...Trans-inclusion then is one of the greatest threats faced by women."

It also important to highlight that this paper states the following: "It was also noted by providers, both those who said they would consider trans inclusion and those who said they would not, that they understood transwomen could 'trigger trauma' and remove women's 'sense of safety'", thus making it clear it was understood that the inclusion of transwomen can remove women's safe spaces.

Female Only Provision: A Women and Girls in Scotland Report:

The following is a selection of quotes women provided in their survey responses regarding how trans inclusion policies would impact them:

"Depending on the type of facility I would be extremely uncomfortable and would likely avoid it – I would not stay at a YHA anymore due to their policy of allowing self-identified women into single sex female dorms – as a teenager I was sexually assaulted by a man in a mixed hostel dorm and have relied on single-sex spaces since. I would not use showers at a pool or gym and would only change there if there were decent cubicles – even so I would be very uncomfortable as it is not uncommon for the changing rooms to be pretty empty at certain times of the day"

"I am a survivor of long term violent sexual abuse at the hands of men. In those places, that are supposed to be safe havens for victims, a male would cause inevitable re-traumatisation"

"I would feel very, very unsafe. Not only would I not feel safe using it but it would severely affect my PTSD and I would probably never feel safe to use a women's service again"

"I have had to seek refuge from violence more than once and would NOT have gone had there been males present in any format"

"I would walk out. The trauma would be unbearable."

"This is very personal to me. I am currently in a refuge and have been for over 30 months with my child. The notion that we would have been presented with someone who "identified" as female is horrifying. Women and children fleeing domestic violence have been put through horrific gaslighting and violence. To tell them that this person they can see is Male is actually a woman, and that to object to this is bigoted is a final act of violence and gaslighting. Certainly I would have been unable to stay"

Supporting Women in Domestic and Sexual Violence Services Report: Fair Play for Women:

A quote from a report by UK-based women's group, Fair Play For Women, highlights the cruelty behind forcing women to share single sex spaces with people of the opposite sex and telling them that their issues with such a setup is down to ignorance or bigotry.

"My need for female-only spaces is hardwired into me as a result of the abuse I suffered. Pretending that traumatised women can't tell the difference between

male- and female-bodied people is gaslighting. Asking us to deny the effects of our trauma, to override all those dreadful feelings destroying us from the inside out, in order to be kind and inclusive, is simply wrong.”

The Women’s Resource Centre:

The WRC affirms the need for female-only provision in its December 2019 report “Are the Equality Act 2010 and CEDAW working for the women’s voluntary & community sector in England?” and makes the following recommendations for Central Government and Local Authorities, based on the findings of its survey and focus groups with women’s service providers in England:

“Any amendments to the GRA (2004) and the EA (2010), must prioritise upholding single-sex spaces, services, provision and roles for women and girls as sex class”

“Education, training and inspections to ensure that equality duties under the EA (2010) are being met in relation to the single-sex exemption, at all levels of governance, amongst key institutions and at organisational and societal levels”

“To use consistent and clear evidence-based definitions ‘sex’ (male/female and a protected characteristic) and ‘gender’ (constructs of masculinity and femininity), in all communications and policy”

“Where the protected characteristics of sex and gender reassignment conflict a third space/service is required underpinned by an ethos of ‘led-by-and-for’ to meet the distinct need of each protected group without violating of the rights of either group”.

Additionally, the WRC note “it was considered that single-sex provision and spaces were particularly important in removing the barriers for marginalised women to participate in public life. Without single-sex provision and spaces it was claimed that particular groups of women would be at risk of increased social isolation and exclusion”.

It is also important to highlight that the work of Women and Girls in Scotland, as well as the Women’s Resource Centre and the Women’s National Commission, suggests that survivors, minorities and working class women will be disproportionately and more severely impacted by the loss of female only provision, and yet

despite the government being aware of this work, it has not addressed this at all in its EQIA.

Government claim 2: “Much of the literature identified does not justify a blanket exclusion of trans women from services or spaces (they themselves are a vulnerable group), but rather highlights the need for individual assessments and tailoring the service for each individual’s needs, where they are also likely to encompass a wide variety of things unrelated to an individual’s sex or gender identity”.

This appears to rest on the comments of an interviewee in the Gottschalk paper, that whether or not their service took on ‘a MTF client’ would depend on if they ‘looked like women’. As addressed in the response to Q4, the Scottish Government has said it is working from the EHRC position regarding the EQA single sex exceptions and the GRA, and as also highlighted in the response to Q4, it appears the EHRC has taken a position that essentially asserts a two-tier system of rights for transwomen to women’s spaces, which is that transsexuals who ‘pass’ should have additional rights to access women’s spaces, even though this is based on old, out of date case law and is not consistent with the EQA or the GRA. As such, it appears that the Scottish Government has taken comments from an

interviewee working in a different country with different laws, as meaning that precluding transwomen from women's services should not happen as a blanket policy, presuming that those who are transsexual and 'pass' would not be a problem in women's services and should have different rights to those who have not had surgery and do not 'pass'.

Again, going back to points made in the response to Q4, the idea that the preclusion of trans people from women's services should happen on an individual basis, based on risk assessments, is an approach which means trans people can never be precluded from open single sex facilities (i.e. most single sex provisions, such as toilets, changing rooms, shower facilities, communal accommodation) because they do not involve risk assessments, and since risk assessments cannot prevent physical, psychological or emotional harm, it is an approach which means women and girls cannot have the safety of male free space anywhere. As such, this is an approach which denies our human rights to privacy, dignity, safety, recovery from trauma and equality, and which shows no concern for the welfare of women, and as covered above, this is also an approach that is antithetical to international best practice standards in regard to female-only provision.

The Scottish Government simply cannot claim that the Gottschalk paper demonstrates that blanket policies of trans preclusion would not usually be appropriate or

lawful, without saying why it believes this is the case, and without tackling whether it is a correct reading of the law to say that transsexuals who 'pass' have increased rights in regard to accessing opposite sex provisions (the government would also have to address how this two tier system would be fair to transwomen with GRCs). The government also has to outline why it believes the existence of passing transsexuals should mean that women should not/cannot have single sex provisions, and thereby not have our human rights, equality or international best practice upheld, and be faced with further discrimination, marginalisation and hardship.

Government claim 3: "The Scottish Government has not identified any evidence supporting the claim that trans women are more likely than non-trans women to sexually assault other women in women-only spaces".

Firstly, this is a bogus framing of the issue for women as regards trans inclusion. The government is essentially claiming that transwomen are no different a risk to women than women are, and it is basing this claim on a 'lack of evidence' supporting the idea that transwomen are a different risk to women. While it is completely untrue that there is no evidence that transwomen pose a different risk to women than women do in terms of patterns of crime (see Appendix Two) it is important to note that just as with males, most transwomen are not predatory, paedophiles or rapists – the vast majority are just trying to live their lives in peace and safety. But also as with males, women and girls should be safeguarded against the minority who are predatory regardless.

Regarding the risks of including transwomen in female-only provisions:

Firstly, it is important to note that females are physically vulnerable to males, and this is because males can usually easily overpower and rape us. This capability is why males can subject women to a climate of male violence in the way they do. This material power disparity is central to the ability of males to dominate and control women in a number of ways, and to subject us to often ongoing physical and sexual violence. It is not possible to accept the reality of violence against

women without understanding the inherent vulnerability of females to males. As such, being male in itself is a risk factor, and since it is clear that transwomen do not change biological sex (and organisations such as GIRES have been clear that most trans people do not seek surgery, and that around 80% of transwomen will still be fully male bodied) it is also clear that the risk posed by males as a sex class remains in regard to transwomen as a class of people.

Additionally, the fact that male people subject women to a climate of rape, assault, abuse and violence, means not only that transwomen are part of the sex class which traumatises women, but because transwomen can also commit the same crimes *and have done* (note Appendices One and Two) even on the basis of gender identity they are also part of a class of people who have traumatised women in exactly the same ways men have. Transwomen who are predators pose the exact same risk to women as other male predators in terms of what they are capable of, the kinds of crimes they have committed, and the trauma they inflict. As such, it should be clear that transwomen not only pose a different, increased risk to women than women do to each other, but also that the risk is no different to the risk posed by other males.

Additionally, there is in fact very strong evidence that transwomen retain a male pattern of crime (see Appendix Two). It should also be noted in terms of conviction rates that around 2.5% of the female prison population in England and Wales are in prison for sexual offences, whereas just under 50% of transwomen in prison in England and Wales are in prison for sexual offences (it has not been possible to procure figures for the Scottish prison population). It is important that the government works with the available evidence when making any claims regarding the prevalence of any type of behaviour, particularly when this relates to a risk the government is addressing in an EQIA.

Government claim 4: "Much of the literature reiterates this lack of any evidence, legal, medical or otherwise, to support this characterisation of trans women as 'deviant' or predatory":

It is very concerning that the Scottish Government would portray women's safeguarding concerns regarding transwomen in female-only spaces as any kind of assertion that transwomen are inherently 'deviant' or 'predatory'. It is clearly outlined above why transwomen *as a class* pose a risk to women on the basis of our sex, which they cannot change and which presents numerous issues as outlined, and on the basis that a minority are predatory. It is also clear that for reasons of safeguarding and upholding the rights of women, female-only provisions are therefore required.

It is understood that even though only a minority of men are predators, that safeguarding against those who are is important, and that recognising this is not the same to say all men are predators. It is also understood that safeguarding children is required even though the vast majority of adults are no threat, and that recognising this is not the same as to say all adults are predators. And it therefore should be easily understood that safeguarding women in relation to transwomen is required, even though the majority of transwomen are not predatory, and that this recognition is not the same as to say all transwomen are predators. As such, the opinions in references such as Dunne that "viewing male bodies as a threat...promotes the 'sexist and heterosexist assumption that a [person] with a penis will inevitably attack and rape a female' (Wenstrom, 2008: 151)" should be rejected as akin to gaslighting.

Government claim 5: “In addition to concerns about the inclusion of trans women in women-only spaces and services, some respondents expressed concerns that predatory men posing as trans women would seek to gain access to women only spaces and services for malicious reasons. The Scottish Government has not identified any evidence supporting a link between women-only spaces being inclusive of transgender women, and non-trans men falsely claiming a trans identity to access these spaces and commit sexual violence. Other sources identified reiterated that there is a lack of any evidence to support this claim.”

It is simply untrue that there is no evidence that men have presented as transwomen in order to access women only spaces for malicious reasons, and there is also evidence that men would try to do so, and in the circumstances where women are at our most vulnerable (refuges and prisons).

Firstly, there is the example of <name redacted>, who falsely claimed to be a transwoman in order to access a Canadian women’s refuge. <name redacted>

[REDACTED]

State law had been changed in early 2012 to allow gender self-identification.

Additionally, in respect to prisons, the idea that men would not pretend to be trans in order to move to the female estate has been described as “naïve”, according to James Barrett of the British Association of Gender Identity Specialists (BAGIS) in a written brief submitted to the Transgender Equality Inquiry, which had been undertaken by the UK Parliament’s Women and Equalities Committee. Barrett referred to one case where there was “a plethora of prison intelligence information suggesting that the driving force was a desire to make subsequent sexual offending very much easier, females being generally perceived as low risk in this regard.”

The full section from Barrett’s submission relating to prisons reads: “The converse is the ever-increasing tide of referrals of patients in prison serving long or indeterminate sentences for serious sexual offences. These vastly outnumber the number of prisoners incarcerated for more ordinary, non-sexual, offences. It has been rather naïvely suggested that nobody would seek to pretend transsexual status in prison if this were not actually the case. There are, to those of us who actually interview the prisoners, in fact very many reasons why people might pretend this. These vary from the opportunity to have trips out of prison through to a desire for a transfer to the female estate (to the same prison as a co-defendant) through to the idea that a parole board will perceive somebody who is female as being less dangerous through to a [false] belief that hormone treatment will actually render one less dangerous through to wanting a special or protected status within the prison system and even (in one very well evidenced case that a highly concerned Prison Governor brought particularly to my attention) a plethora of prison intelligence information suggesting that the driving force was a desire to make subsequent sexual offending very much easier, females being generally perceived as low risk in this regard.”

It should be noted that the Scottish Prison Service is currently undertaking a review of its trans prison policies, and while its current policy is that all trans prisoners should be able to stay in the estate that corresponds with their identity (subject to risk assessment) this policy may change as part of the SPS review.

The current policy has been shown to adversely impact women prisoners, as is clear from the public comments of a former Governor of women's prisons in Scotland, [REDACTED], where she made clear that risk assessments cannot prevent women prisoners from being adversely impacted by having to live alongside male people, and how trans inclusion in the female estate adversely impacts women's safety and welfare. If the SPS decides to house transwomen prisoners separately, for example in a third form of estate, but takes the EHRC's and the Scottish Government's position regarding the paragraph 28 exception in the EQA (and it may even feel bound to), then it will mean that only transwomen without GRCs can be precluded from the female estate on the basis of sex, and those with GRCs will only be precluded if they fail the risk assessment, which would mean the current problems with the SPS trans policies would not be resolved, adversely impacting female prisoners. Furthermore, it means predatory men who do not have convictions which would prevent them being moved to the female estate when risk assessed, could falsely declare they are trans and obtain a GRC, change their legal sex, and move to the women's estate for the kinds of reasons James Barrett has outlined. The Scottish Government has failed to assess the impact of this possibility, even though women in prison are among the most vulnerable in society.

The Public Sector Equality Duty and the need to make the case for any reforms: It is extremely important that the Scottish Government ensures to uphold the PSED in policy making, otherwise it is failing in its equality duties, and this may result in an erosion of the welfare, protections and rights of women and girls (and other protected classes). Below is a number of relevant sections from the PSED in relation to the government's GRA consultation:

PSED: "If a body subject to the duty does not have sufficient evidence to make an informed decision about the impact of their functions for some protected characteristics the authority should consider gathering more evidence."

As outlined above and in the Q4 response, the government has not gathered sufficient evidence in relation to how holding a GRC can impact women's rights, protections and welfare, and how the government's proposals to open up the GRC to increased numbers of people will potentially impact women's rights, protections and welfare. Nor has it carried out enough work to gauge the need for female-only provision: The government has failed to collect evidence in regard to self-exclusion as an experienced impact of trans inclusion policies, and has ignored available evidence of the adverse impacts of trans inclusion in women's provisions (including evidence provided by one of its own references). It has also failed to collect evidence regarding the potential impact of trans inclusion in women's provisions, including how inclusion can lead to distress (including the fear of male violence), trauma and re-traumatisation, as well as self-exclusion, and how these impacts result in the loss of safe spaces for women and the infringing of women's rights and protections. The government has also completely failed to consider how it should act to uphold international best practice standards in relation to female-only provision.

As such, the government has neither addressed nor assessed the detriment/potential detriment to women of its proposals and of losing female-only provision, and therefore the government has not shown due regard to the impact of its proposals on those with the protected characteristic of sex, and this Bill and EQIA

does not provide parliament with the evidence base it would need to make an informed, evidence based decision about the impact of the government's GRA proposals on women.

It should be noted the government must not be selective in gathering evidence, and it is clear from this response that in addition to failing to adequately collect evidence in regard to its proposals, the government has ignored *substantial available evidence* challenging the position that its proposals will not adversely impact women and girls.

PSED: "In order to give proper consideration to the aims set out in the general duty, a relevant body will need to have sufficient evidence of the impact its policies and practices are having, or are likely to have, on people with different protected characteristics."

Again, as outlined above, the government does not have sufficient evidence of the impact its proposals are likely to have on people with the protected characteristic of sex. Thus proper consideration has not been given to the aims set out in the PSED.

PSED: "The courts have made clear the need to collate relevant information in order to have evidence-based decision making and a body subject to the duty will need to be able to show that it had adequate evidence to enable it to have due regard. The courts have stressed the importance of having due regard before and at the time that a particular policy is being considered, and of exercising the duty with an open mind. They have also emphasised that, without evidence of 'a structured attempt to focus on the details of equality issues', the decision maker is likely to be in difficulties if the decision is challenged. The courts have accepted the importance of ensuring that the duty is complied with at a formative stage in policy formulation..."

The Scottish Government must be clear that if it goes ahead without ensuring it has sufficient evidence of the impact of its proposals, it is also opening itself up to legal action and possible repeal of any legislation it passes to reform the GRA.

PSED: "Adequate and accurate equality evidence, properly understood and analysed, is at the root of effective compliance with the general equality duty.

Without

it, a body subject to the duty would be unlikely to be able to have due regard to the needs of the duty.

By ensuring it has a reliable evidence base a body subject to the duty will be better able to:

- understand the effect of its policies, practices and decisions
- consider whether further research or involvement is necessary
- consider whether there are ways of mitigating any adverse impact identified
- decide whether to modify, or reconsider a policy, practice or decision
- identify equality priorities; for listed authorities this includes developing equality outcomes
- monitor their progress against these outcomes.

When the government takes its Bill to parliament, it must be able to tell parliament in detail how it has shown due regard to the needs of the duty as outlined here, and how it will continue to do so.

PSED: "The general equality duty requires bodies subject to the duty to have due regard to the need to encourage their participation...A body subject to the duty will need to have sufficient understanding of the causes of disproportionately low participation to enable it to comply in substance with the duty to have due regard

to the need to encourage participation. This may require the body to collect additional evidence”.

As already outlined in this response, the government must consider self-exclusion as an outcome that indicates an equality impact (both in terms of experienced and potential impact) and the PSED highlights here that the government must understand where the participation of specific groups would be impacted by its proposals, which means in order for the government to have due regard to the PSED duty regarding encouraging participation, it must address women’s self-exclusion from provisions that are meant for us. This does not just relate to women on the level of sex class, i.e. the government must look at where there is any evidence that particular groups of women are at higher risk of self-excluding, such as survivors, and address that too. As already outlined, organisations such as Women and Girls in Scotland and the Women’s Resource Centre have collected evidence to show that survivors are at particular risk of self-excluding and being otherwise impacted by the loss of female-only provision, as are working class and minority women. It is clear that to demonstrate due regard in relation to this section of the PSED, the government has to collect much more evidence regarding the exclusionary impact on women of trans inclusion policies.

PSED: The basic presumption under the Act is that discrimination because of a protected characteristic is unlawful. However, this does not mean that the Act always requires that people with different protected characteristics be treated the same.”

The government must understand that equality does not mean treating different protected classes the same, and it must make sure it is clear on where women need our own provisions, understanding that in every case trans people can be provided with third provisions, as several women’s organisations such as Women and Girls in Scotland, the Women’s Resource Centre and Fair Play for Women have called for.

PSED: “A relevant body will only be able to comply with the general equality duty in relation to a decision, if the ultimate decision maker:

- understands the body’s obligations under the general equality duty
- has sufficient information
- demonstrably takes this information fully into account throughout the decision-making process.

There is no point in collecting equality evidence if it is not used to inform a body subject to the duty about the potential impact of its decisions, as well as establishing where action needs to be taken, and measuring its success. The courts have emphasised the duty to assess the extent of any adverse impact and the ways in which such risk may be eliminated before a proposed policy is adopted. This will involve having due regard to the need to take steps to gather relevant information”.

It is very clear that the government should have assessed the extent to which its proposals may have any adverse impact on women and girls before it even went ahead with its consultation regarding the Bill and the EQIAs. Since the government has not done this, it has not given consultees the opportunity to respond to the assessed impacts of the government’s proposals in respect to the protected characteristic of sex. This is the second time the government has done this. The government must uphold the PSED and collate and assess what it needs to (as outlined above), and also has to show how it has considered the evidence

provided via consultation responses as part of its EQIA, including the personal testimony of women highlighting how the government's proposals will impact them, which not only includes experienced impacts, but potential impacts. And again, the government must note that their proposals need only adversely impact a minority of women to be discriminatory and harmful to women as a class.

APPENDICES:

Appendix One: Examples of women being adversely impacted by trans inclusion in women's provisions:

Example A:

The experience of <name redacted> is an unfortunate example of the potential psychological trauma of forcing trans inclusion in spaces like the recovery shelter in <name redacted> where <name redacted> found herself unexpectedly sharing a small bedroom with a fully intact transwoman. She says:

"It's affecting everyone in the house. This can completely ruin your recovery, let alone your safety, let alone your life... All of us were completely upset and flabbergasted, pretty much, and instantly all full of fear. They won't even allow a man on the property without permission by the staff and all the residents. And we had no pre-warning of any of this. There was never any discussions. It was never mentioned. We were all just blindsided."

Example B:

In Scotland last year serial sex offender <name redacted> admitted sexually assaulting and filming young girls between the ages of 10 and 12 in female toilets in <name redacted>. Despite this highly sexual pattern of offending, the sex offender was placed in a female hostel for offenders where fellow residents reported "feeling sick" and unable to stop thinking about the nature of the offender's sex crimes.

Example C:

The Gottschalk paper refers to [REDACTED] having to close down after the inclusion of a male to female transgender person was later revoked due to expressing 'aggressive and sexually offensive behaviour' and they took legal action against [REDACTED], who could not afford to fight it.

Example D:

<name redacted> is a convicted serial paedophile. A 2006 psychiatric evaluation considered <name redacted> has an "all-encompassing preoccupation with sexually abusing underage girls." Despite this, <name redacted> was incarcerated in the <name redacted> for Women in <name redacted>. This is because Bill C-16, the Canadian Human Rights Act, was amended to include "gender identity or expression" as prohibited grounds of discrimination. From December 2017 it became Canadian prison policy to arrange "the placement and transfer of offenders according to their gender identity" in a male or female facility "if that is their preference". In 2016 the <name redacted> Herald reported <name redacted> was facing allegations of sexual assault whilst in prison. Later reports suggest the female victims were "child-like in appearance". In 2019 a female offender who had been a victim of childhood sexual assault complained to the prison service that staff at the <name redacted> were aware <name redacted> was sexually harassing her and ignored the situation. Her complaint was dismissed by the Offender Redress Division because of the time elapsed between the events and her formal complaint. She specifically recalls <name redacted> telling her she had a "young spirit" before describing being sexually excited and asking the female offender if she was having her period while listening to her use the toilet.

Example E:

<name redacted> was convicted of the rape, strangulation, stabbing and bludgeoning of a 13 year old in 2005 and the subsequent attempt to hide her body by setting it on fire. <name redacted> started identifying as a woman while in prison and was relocated to the <name redacted> for Women, however was then returned to a male prison after three accusations of sexual assault. <name redacted> is currently campaigning, with the support of transgender activist <name redacted>, to be returned to a woman's prison.

Example F:

Two women were expelled from a homeless women's shelter in [REDACTED] in 2017 after raising fears over sharing a bedroom with a pre-operative transwomen. "Some women have had bad experiences with men so they are fleeing men and now we have a man living there," one woman said.

Example G:

Nine women staying at a [REDACTED] women's shelter are taking the organisation to court after staff allowed a transwoman to make "sexually inappropriate comments" and carry out "sexually harassing activities" in 2018. Shelter staff not only refused to take action but threatened the women with expulsion for complaining about having to share showers with the transgender woman.

Example H:

In 1991, <name redacted> broke into a house where he tortured and raped two women. <name redacted> transitioned while in prison by cutting their own penis off and then relocated to a <name redacted> female prison in 2009. One female inmate, age 57 at the time described "experiencing constant panic attacks at the thought of this male inmate". A daughter of one of the terrified prisoners started a (successful) public campaign to relocate <name redacted>, explaining "due to inmates being unable to be interviewed what wasn't revealed was <name redacted> was still in fact raping women within the facility, just now with foreign objects".

Example I:

The case of <name redacted> is the most recent example of a transwomen who is a sexual offender and who was transferred to a female prison- <name redacted> - where they went on to sexually assault four female prisoners between September and November 2017, and was later convicted of sexual assault and rape.

Appendix Two:

In England and Wales 60 out of 125 transgender prisoners had been convicted of one or more crimes of a sexual nature. (April 2017 stats). The 60 prisoners include 27 rape convictions, 13 sexual assault/ attempted sexual assault and 36 relating to children-indecent images possession, grooming, assault and gross indecency.

In Canada 50% of male to female transfer requests come from prisoners convicted of sex offences (compared to 2% of the female).

A long-term clinical cohort study of transgender prisoners in Sweden found the following: "male-to-females had a significantly increased risk for crime compared to female controls (aHR 6.6; 95% CI 4.1–10.8) but not compared to males (aHR 0.8; 95% CI 0.5–1.2). This indicates that they retained a male pattern regarding criminality. The same was true regarding violent crime."