

XX

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 XX Gender Recognition Reform (Scotland) Bill Working Group disagree with the notion of “living as the acquired gender” as this is profoundly sexist and naturalises the idea that there are appropriate ways for the two sexes to behave. As a feminist group, we object to this biological determinism and believe individuals should be free to express themselves in any way of their choosing and live free from discrimination.

The Bill fails to account for the growing number of referrals for children and adolescents to the Tavistock and Portman NHS Foundation Trust (2590 in 2018-19, compared with 678 in 2014-15) and the unprecedented rise in the percentage of female referrals (1740 in 2018-19, more than double the 624 male referrals the same year). [1] The Bill also fails to account for the growing number of detransitioners expressing regret, who cite a rushed legal and medical transition as one of the failings of the current system. The Tavistock have admitted to not knowing the true extent of this problem due to lack of data and research.[2] Attempts to “streamline” this system may, in fact, have the opposite effect; amplifying the flaws of the current model and moving ahead without the necessary research and understanding.

We share the aims of the Scottish Government to de-medicalise and de-pathologise gender nonconforming individuals, however, enshrining gender in law supports the idea that there is something somehow “different” about these individuals in that they need legal distinction. Be it for three months (the Bill) or two years (current system), we challenge the assumption that there are ways the “acquired gender” live that can be adopted by those transitioning. This term has not been defined within the Bill and would be difficult to define without reverting to sexist stereotypes.

[1] <https://gids.nhs.uk/number-referrals>

[2] Interview with Dr Elizabeth van Horn, BBC Newsnight, 26/11/2019.

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

Yes

If yes, please outline these comments.:

We believe that the reduction of this period to three months will have serious negative consequences for women and girls.

A three month period of “living as the acquired gender” followed by a three month “reflection” period totals only six months. Six months is an exceptionally short amount of time and many conclusions can be felt to last a lifetime during such a small window. Decisions can be made in haste and maintained for this duration that are later regretted.

As evidenced by the growing number of detransitioners, one of the failings of the current system is the speed in which one can obtain a GRC. There is misconception among the public that the current system is long, difficult and demeaning [3]; however, minutes from the Gender Recognition Panel User Group

and statistics published by the Courts and Tribunals Service show that 75% applications for a Gender Recognition Certificate receive a decision within 20 weeks, and many within 6-11 weeks.[4] Over 90% of applications are successful and receive a GRC. [5]

There is also an assumption that during this “reflection period” applicants will be acting in good faith. Many women’s groups, ourselves included, are concerned GRA reform will create a legal loophole which will allow predatory men to access vulnerable women with ease as well as impacting data collection relevant to male violence against women.

Under the Equality Act (2010): sex is a protected characteristic (Part 2, Chapter 1, Section 11); single-sex services are protected (Schedule 3, Part 7, Sections 26-28); as are single-characteristic associations (Schedule 16, Part 1) and communal accommodation (Schedule 23, Part 3).[6] There has been no clarity from the Scottish Government as to how ease of access to a GRC will impact on these single-sex exemptions.

The Scottish Government have also not considered the conflict with The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which protects women on the basis of sex: “The Convention defines discrimination against women as “...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”[7]

Section 9(1) of the Gender Recognition Act (2004) states: “Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).”[8] If an individual can obtain a GRC in 3-6 months, and upon being issued with a GRC, a person's sex “becomes that” of the opposite sex, this renders single-sex service provision unworkable and the rights women currently have on the basis of sex will be compromised. Nowhere in the bill does it state what legal right a GRC confers. This is not reasonable.

As feminists, we are concerned about the potential impact of this legal uncertainty on marginalised women (eg. women in refuges and prisons) who lack the necessary resources to come forward with test cases. We seek to protect the single-sex exemptions within the Equality Act and therefore do not think there is any conceivable time period which would justify compromising these protections.

[3] <https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-consultation-scottish-government/pages/5/>

[4] <https://drive.google.com/file/d/16AtT2wC2mjhA5HpXqI6AJ6w49QcwzujK/view>

[5] <https://drive.google.com/file/d/1WU2ddIYVIRbMf3hEajIHHlrKL3l0zggn/view>

[6] <http://www.legislation.gov.uk/ukpga/2010/15/contents>

[7] <https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article1>

[8] <http://www.legislation.gov.uk/ukpga/2004/7/section/9>

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.:

We do not agree the age should be lowered. Lowering the minimum age pays no regard to contributing factors prevalent among adolescents, such as homophobic and sexist bullying, which may contribute to cross-sex identification. Bullying can often last far longer than 3-6 months and therefore this amount of time is insufficient in allowing for any change in circumstances that might influence such a decision. Many of our members are lesbian and bisexual and can attest to the homophobic bullying they experienced at that age, in particular, bullying due to gender nonconformity in presentation and behaviour and were consequently deeply uncomfortable with their sex. Rejection of gendered expectations (that the Bill promotes through the notion of “living as the acquired gender”) can often manifest within young people as a rejection of the sexed body. Many same-sex attracted women experience social coercion to make themselves appear “straight” and it is becoming increasingly apparent from the stories of detransitioners that transition can be a means of achieving this for gender nonconforming women. Research shows that, for the vast majority of children, transgender identification does not persist into maturity.[9][10][11][12]

We do not think a 16 year old is capable of foreseeing how they may identify in the future and sign a statutory declaration on that basis. Currently, there are 592 GIDS referrals for children 16 and over.[1] This number only reflects those on a medical pathway – the figure for young people potentially impacted by this reform will likely be much higher. This problematic when considering the aforementioned research on desistance and the criminal charge introduced by the bill for false declarations. Decisions made in adolescence potentially become a punishable offence if the individual desists or detransitions. Nowhere in the Bill are detransitioners discussed. There has also been no explanation from the Scottish Government as to how this sanction will be enforced, given that there is no way of knowing the legitimacy of such a claim when the initial claim was without evidence and based on self-declaration alone.

[9] <https://www.ncbi.nlm.nih.gov/pubmed/23702447>

[10] <https://www.ncbi.nlm.nih.gov/pubmed/18194003>

[11]

https://www.researchgate.net/publication/23449293_Psychosexual_Outcome_of_Gender-Dysphoric_Children

[12]

https://tspace.library.utoronto.ca/bitstream/1807/34926/1/Singh_Devita_201211_PhD_Thesis.pdf

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

Yes

If yes, please outline these comments.:

We are concerned proposed reform also presents a conflict with the rights of lesbians and bisexual women. Same-sex attraction is a protected characteristic under the Equality Act (Part 2, Chapter 1, Section 4) and is defined with reference to sex.[13] As previously outlined, section 9(1) of the Gender Recognition Act states that upon being issued with a GRC, a person’s sex “becomes that” of the opposite sex. This renders the rights of same-sex attracted individuals unworkable. The right lesbians and bisexual women have to single-characteristic association under the Equality Act will be lost as members of the opposite sex will be rendered legally indistinguishable.

Members of XX who are also students within Scottish universities have experienced silencing and harassment on this topic and therefore feel the Bill and its potential consequences have not been sufficiently considered by many within our age group. Last year, ten events promoting transgender ideology were held at Edinburgh University, compared with just two discussing women's sex-based rights. Out of these two events, one resulted in a speaker being assaulted by a protestor, and the other has been indefinitely postponed. Students and speakers are in a position where they fear for their safety when attending events discussing reform.

EUSA liberation group, prior to the event, accused speakers and attendees of "transphobia" and called for the expulsion of "TERFs" (i.e. women who recognise sex differences) and have arguably contributed to this climate of fear.[14] Some of our members who are students at the University of Edinburgh have found the level of censorship and defamation of feminists to be incompatible with EUSA's formal stance as a 'feminist' organisation. Our student members do not feel confident that the NUS Scotland have made room for the necessary debate on GRA reform before they endorsed this Gender Recognition Reform (Scotland) Bill, as they have been unable to express criticism within NUS Scotland spaces without being defamed. Many events that seek to address the topic fall under EUSA safe space policy, which is arguably in breach of Further and Higher Education (Scotland) Act (2005) which allows for 'freedom (within the law) to hold and express opinion, question and test established ideas and received wisdom and present controversial or unpopular points of view.'[15] Feminists, who frequently test "established ideas [...] and present controversial or unpopular points of view" are being misrepresented "hateful" and "transphobic" (a view shared by EUSA liberation group) and discussion silenced in accordance with EUSA "zero tolerance" safe space policy.

XX maintain that there is nothing hateful about discussing legislation and to argue such is a new version of misogyny that seeks to prohibit women from fully engaging in public life. As an organisation, we are united under the principle of women's oppression being sex-based. We are concerned about the impact of the Bill on the rights of the most marginalised women who currently are protected on the basis of sex. We would recommend the Scottish Government investigate to what extent single-sex exemptions are being implemented and resolve to strengthen existing laws for women.

[13] <http://www.legislation.gov.uk/ukpga/2010/15/section/4>

[14] <https://www.scotsman.com/news/politics/university-debate-womens-rights-branded-transphobic-1418085>

[15] <https://www.legislation.gov.uk/asp/2005/6/section/26/2014-08-01>

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

Yes

If yes, please outline these comments.:

The impact assessments are not fit for purpose.

We are concerned that the concerns of many women's groups have not been sufficiently considered. In particular, Fair Play for Women, who have said the following:

"On 21st August 2019 the Scottish Government library was asked to perform a literature search to identify the evidence to inform the Equality Impact Assessment

(EQIA) for the Scottish Government's Gender Recognition Reform Bill. This was revealed through a Freedom of Information Request here. They were asked to find "Evidence on legitimate basis on which trans women might need to be excluded from some women-only services, locations, or provisions, or on which their presence might put non-trans women at a disadvantage." The Scottish Government library did its job well and identified Fair Play For Women in its list of Key Results highlighting that 'the following results may be particularly relevant'. However, none of our published resources were quoted in the final EQIA or even listed in the references. The omission of evidence from FPFW, and indeed any advocacy group for sex-based rights, means that a full and comprehensive search for evidence was not conducted by the Scottish government consultation team and this casts serious doubt over the validity of the EQIA."^[16]^[17]

As a feminist organisation, we are worried by the omission of evidence on topics such as domestic violence, sex offenders, single-sex services, female sport and even miscarriage, as was included in the Fair Play for Women references.

Murray Blackburn Mackenzie have also expressed doubts over the draft Impact Assessments:

"The draft EQIA notes that some respondents raised concerns about the impact on gender self-declaration on data collection in the 2017 consultation. The consultation paper does not however discuss data collection in relation to the census, NHS records, criminal justice statistics, the recording of employment data and/or the impact on equal pay claims, or the need to collect sex- disaggregated data to tackle sex-based discrimination.

Instead the draft EQIA refers to the Scottish Government Working Group on Sex and Gender in Data,⁵⁹ which is chaired by the Chief Statistician and will consider what guidance should be offered to public bodies on the collection, disaggregation and use of data on sex and gender.

The membership of the Working Group is drawn exclusively from organisations that have implemented or support gender self-identification policies and/or approaches to data collection. These include National Records of Scotland and the Office for National Statistics, both of whom have recommended that the sex question in the 2021 census is framed in terms of self-declared gender identity." ^[18] We share the concerns of MBM on the potential impact of GRA reform on data collection. Accurate data surrounding representation, equal pay, healthcare and criminal justice statistics are crucial for informing feminist analysis. It is therefore vital that data relating to such remains sex-disaggregated but we do not feel this has been sufficiently considered by the Scottish Government.

It is claimed that the existing exceptions in the Equality Act will remain in place; however, there has been no analysis on the impact of the changes to the process of obtaining a GRC, nor the expansion in the number of GRCs granted. As outlined in our response to questions 2 & 4, XX believes there is a fundamental conflict between the rights of women and the legislative changes proposed by the Bill, a conflict that has not been adequately investigated by the draft Impact Assessments.

^[16]

<https://www.whatdotheyknow.com/request/632143/response/1513545/attach/html/6/Document%204%20Literature%20Search%20Results.pdf.html>

^[17] <https://fairplayforwomen.com/eqia/>

^[18] <https://mbmpolicy.files.wordpress.com/2020/01/final-mbm-gra-reform.-assessment-of-draft-bill-and-consultation-26-january-2020.pdf>