

Response to call for evidence: Reform of the Gender Recognition Act

I am Senior Lecturer in Politics at the University of Bath, and Head of the University's Gender and Sexuality Research Group. I specialise in the intersection of activism and public policy around issues of gender and LGBTQ+ equality, including on abortion and reproductive rights. For a list of my publications, see here: <https://researchportal.bath.ac.uk/en/persons/fran-amery/publications>

I am currently undertaking a project on activism and lobbying around trans health and rights which involves close analysis of materials produced by both those in favour of and against GRA reform. This research has allowed me to develop a detailed understanding of how different groups interpret the Gender Recognition Act 2004, the Equality Act 2010, and their potential interaction. I draw upon this research in my responses below. While my response to the call for evidence will include answers to some of the questions regarding the Government's response to the GRA consultation, I will focus primarily on the wider issues concerning transgender equality and current legislation, as this is where my expertise lies.

Will the Government's proposed changes meet its aim of making the process "kinder and more straight forward"?

Barely. The proposals to reduce the associated fee and move the process online are moderately progressive and to be welcomed. However, they do not address the key complaints that trans people have regarding the process: namely that it is laborious, invasive and humiliating.

Should the requirement for a diagnosis of gender dysphoria be removed?

Yes. I reject on principle this medicalised approach to gender recognition. It must surely be a fundamental principle of social justice that the right to self-determination cannot be dependent on medical authority and approval.

Moreover, the requirement for a diagnosis worsens the inequality that results of what is already in practice a two-tier system in trans healthcare in the UK. Those who are able to afford to can access specialist treatment (and therefore a diagnosis) in the private sector, cutting their waiting time to a few months, while those who cannot must wait years to access care and a diagnosis via the NHS. The end result of this is that access to GRCs is dependent on wealth.

What else should the Government have included in its proposals, if anything?

The Government should review the necessity of recording sex/gender¹ at birth altogether, with reference to the pioneering work of the Future of Legal Gender Project (<https://futureoflegalgender.kcl.ac.uk/>). Abolishing legal sex/gender would remove the need for the GRA together and would also remove a substantial legal and bureaucratic difficulty faced by trans people in their everyday lives. Alternatively, an 'opt-in' approach, such as that adopted in Tasmania, Australia, could be considered, in which sex certificates only record sex if requested by applicants. It is possible for governments to monitor equalities issues arising from sex and gender differences without needing sex/gender to be certified at birth; this regularly happens in the case of other

protected characteristics. Moreover, in many cases pertaining to both trans and intersex people, knowing someone's legal sex is not an adequate proxy for knowing their social circumstances, what their body looks like or what it does.

Failing this, legal recognition for non-binary people is required to ensure their equal rights under current law. The Government should also introduce the possibility of further updates to one's legal gender marker/an altered GRC. This is necessary both to accommodate the needs of those who detransition and of those who come to a more developed understanding of their gender identity over time (for example, individuals who may have identified as a trans man or trans woman feeling that this was the closest 'fit' to their identity available, but who later come to better understand themselves as non-binary).

1. I use the term 'sex/gender' as UK law often uses these words interchangeably.

Why is the number of people applying for GRCs so low compared to the number of people identifying as transgender?

In addition to the laborious nature of the current process, one reason commonly identified by trans people themselves is the requirement, upon the award of a GRC, for details of individuals to be entered into a Gender Recognition Register. There is substantial concern that such a register represents state surveillance of trans people and that any move towards authoritarianism in the political climate could see future Governments misuse the register in order to visit harm on trans people.

The low number of trans people applying for GRCs suggests that possession of a GRC does not in fact have a substantial impact on a trans person's ability to access single-sex services and facilities, contra the arguments of some groups lobbying against GRA reform.

Are there challenges in the way the Gender Recognition Act 2004 and the Equality Act 2010 interact? For example, in terms of the different language and terminology used across both pieces of legislation.

The terminology used in the Equality Act 2010 is open to misinterpretation. This has provided grist for groups currently lobbying against trans equality, and these misinterpretations form a key part of the misinformation circulated by these groups to the public, including to schools and parents.

Specifically, a misunderstanding pertains to the protected characteristic of 'sex'. The Equality Act defines the characteristic of sex in terms of whether someone is a man or a woman. Section 212(1) defines 'man' as 'a male of any age' and 'woman' as 'a female of any age', but the Act does not define the terms 'male' and 'female'. There is a misunderstanding circulated by some anti-trans lobby groups that the terms 'sex', 'male' and 'female', as used in the Act, refer necessarily and exhaustively to biological properties, and some have accordingly claimed that possession of a GRC creates a 'legal fiction' regarding a trans person's 'biological sex'.

There is nothing in the Act to suggest that the legal meaning of 'sex' refers only to biological or physical characteristics; indeed the Act's definition of 'gender reassignment' suggests that sex may include attributes 'other' than physiological ones (for more detail on these points, see Cowan et al.

2020). Nonetheless, in lay usage ‘sex’ is commonly used to denote biological attributes. As a result, anti-trans lobby groups have been able to circulate the myth that women’s rights in UK law are ‘sex-based’ (i.e., based on some shared physiological attribute or attributes that trans women are understood not to have) and that, therefore, trans women should be excluded from the protections afforded to cisgender women in law and from access to women-only facilities and services. This argument is further used to build the claim that the inclusion of trans women *as women* somehow erodes these ‘sex-based’ rights by making them meaningless. This is used to recruit members of the public – who may be unfamiliar with what rights women and trans people actually have in law, but alarmed by the claim of a potential threat to women’s rights – into anti-trans views and activism.

Cowan S, Giles HJ, Hewer R, Kaufman B, Kenny M, Morris S and Baines KN (2020) ‘Sex and Gender Equality Law and Policy: a response to Murray, Hunter Blackburn and Mackenzie,’ *Scottish Affairs*, forthcoming. Pre-print available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3730090

Are the provisions in the Equality Act for the provision of single-sex and separate-sex spaces and facilities in some circumstances clear and useable for service providers and service users? If not, is reform or further guidance needed?

Some groups claim that there is lack of clarity among service providers, particularly those of domestic and sexual violence services, surrounding when and how it is permissible to exclude a trans woman from accessing women-only services. This is often related to the belief, or suspicion, that trans women who do not hold a GRC are ‘legally male’ and that therefore it is permissible under EA2010 to impose a blanket restriction on their access to women-only services (by excluding them under the sex-based exemptions rather than under the gender reassignment-based exemptions, which would require a case-by-case approach).

There are issues here: it is not at all settled that trans women who do not possess a GRC should be regarded as ‘legally male’ for all purposes; indeed, some case law suggests that they should not (again see Cowan et al. 2020). However, regardless of non-GRC-holders’ status under EA2010, it is clearly not practicable for an organisation such as a women’s refuge to regulate access to its services on the basis of seeing a birth certificate or a GRC. Any such requirement would have a hugely negative impact on any woman – cis or trans – fleeing an abusive situation. Therefore, it is difficult to see how clarifying the impact of a GRC on trans women’s legal status could have a practical impact for service providers. Indeed, many providers do not feel that service users’ GRC status is relevant to how they run their service (Stonewall 2018). However, it might nonetheless be helpful if providers of these services could receive clear specialist guidance that outlines their legal obligations regarding trans people seeking access to services they provide.

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Stonewall (2018) Supporting trans women in domestic and sexual violence services: Interviews with professionals in the sector. Available at: https://www.stonewall.org.uk/system/files/stonewall_and_nfpsynergy_report.pdf

What issues do trans people have in accessing support services, including health and social care services, domestic violence and sexual violence services?

It is very clear that health services are currently not set up to cater to the needs of trans people. This is particularly the case for specialist 'sexed' services. Updating one's gender marker in one's NHS records typically means that one will no longer receive invitations to, for example, cervical screening. Moreover, stories abound of trans people being turned away from specialist (e.g. obs and gynae) services due to a judgment on the part of the service provider or receptionist that they do not 'look right' or that the provider 'does not know how to provide care for them'. Trans people have also reported issues around picking up prescriptions at pharmacies, in particular if their pharmacist judges that the name on their prescription does not 'fit' their appearance, or asks invasive questions about why, for example, a young woman would be accessing hormonal medication more commonly used to treat the symptoms of menopause.

There are also issues around trans women's access to domestic and sexual violence services. Some such services will not cater to trans women on principle. However, research by Stonewall (2018) suggests that many services do wish to support trans women, but sometimes feel ill-equipped to do so effectively. Over the last year or so, domestic and sexual violence services that explicitly adopt a trans-inclusive stance have begun to face sustained, targeted abuse on social media and via private channels such as email. There is a real risk of this having an inhibiting effect on service providers' willingness to support trans women, their willingness to speak publicly about this fact, and trans women's feeling of confidence and security in accessing such services.

There is a particular risk of trans youth being negatively impacted by the targeting of organisations with trans-inclusive policies. In particular, there has been a move to target the trans inclusion toolkits for schools adopted by local authorities, with many (for example, Oxfordshire and Warwickshire) withdrawing their trans inclusion toolkits under threat of legal action from anti-trans lobbyists. Individual schools are also being targeted with materials – including both professionally-produced 'resource packs' and template letters to be sent to schools by parents – offering misleading information about trans identities as well as the provisions of the Equality Act 2010, with the aim of undermining both efforts to educate all students about trans lives and identities and initiatives to accommodate the needs of individual trans students.

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