

Written submission from Fair Play For Women to the Women and Equalities Call for Evidence for the Inquiry into the reform of the Gender Recognition Act.

1.0 About Fair Play For Women.

- 1.1 Fair Play For Women Ltd is a campaigning and consultancy organisation which raises awareness, provides evidence and analysis and works to protect the sex-based rights of women and girls in the UK.
- 1.2 Founded in 2017, our work is focused on understanding when and how gender-and sex-based rights conflict in law and policy making. Our aim is to ensure everyone's needs are fairly balanced and women and girls are not forgotten in good policy making.
- 1.3 We believe in compassion and fairness for all. We support the rights of trans people to live in safety and to be treated fairly. We also support the rights of women and girls, and this is our focus. Protecting these rights in law requires that sex is not conflated with gender identity.
- 1.4 We are experienced policy stakeholder representatives acting on behalf of women and girls. To date we have been invited to engage in transgender policy meetings held by the IOC, World Athletics, World Rugby, England Rugby, Wales Rugby, Sport England, UK Sport, MOJ, IPSO, EHRC, GEO, ONS and numerous private organisations.
- 1.5 We ran a [public awareness campaign](#) during the Government's public consultation on GRA reform in 2018 opposing self-declaration of legal sex due to the adverse impact of women and girls. The Government received 18,370 responses via the Fair Play for Women website, which accounted for 18% of all submissions.
- 1.6 We have an in-depth working knowledge of the GRA2004 and the sex exceptions in the Equality Act 2010. This submission will focus on our experience of how the two laws interact in practice and the consequence of introducing a self-declaration system for the GRA in terms of the adverse impact on women and girls

Note: In this submission we will refer to sex *and* gender, by which we mean:

Sex: either of the two categories (male and female) into which humans and most other living things are divided on the basis of their reproductive functions.

Gender: societal or cultural expectations and norms for males and females, often expressed in terms of masculinity and femininity, largely culturally determined. A 'gender identity' being an individual's innate sense of their own gender.

In short, gender is about how we feel or are perceived by others. Sex is about the bodies we have.

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2.0 Executive summary

- 2.1 The value of female-only space is recognised around the world and is an important and well-established component of the sex-based rights for women and girls
- 2.1.1 The principle of single- and separate-sex service provision was won on behalf of women and girls in the UK and included in the Equality Act in 2010. Since then the Government has repeatedly made it clear that these provisions will not be amended¹ or weakened².
- 2.1.2 UK law allows women and girls to have a fully male-free space when necessary. The sex exceptions in the Equality Act 2010 make it lawful for services, spaces, occupations, communal accommodation, and sports to be restricted on the grounds of **birth sex**, when objectively justified.
- 2.2 The GRA2004 has reduced the availability of female-only provision for women and girls by making the sex exceptions difficult to use and talk about.
- 2.3 The GRA2004 directly interferes with and impedes the use of the sex exceptions by making them **difficult to implement and understand**. Laws on paper are worthless if they can't or won't be put into effect.
- 2.3.1 The GRA2004 means birth certificates can no longer be relied upon to provide information about the sex an individual was born. This means service providers cannot always be sure who should be included in a space they wish to reserve exclusively for people born female. (Section 8).
- 2.3.2 Strict privacy protections contained within the GRA2004 mean that some service providers now consider it a liability risk to ask anyone about birth sex at all. This means people who need to know about an individual's birth sex do not ask about it or are being told they aren't allowed to ask. (Section 9).
- 2.3.3 Service providers have been wrongly advised that they cannot lawfully exclude GRC holders using the sex exceptions. This has made the sex exceptions appear unnecessarily complex and has made service providers hesitant about excluding anyone at all in case their staff get it wrong. (Section 10).
- 2.3.4 In certain critical areas such as prisons, policies are being developed that treat GRC holders more favourably than non-GRC holders. This provides a strong incentive to

¹ In 2018 under Women and Equalities Minister Penny Mordaunt the GEO gave this response [to a government petition](#) "We are clear that we have no intention of amending the Equality Act 2010, the legislation that allows for single-sex spaces"

² In April 2020 the current Women and Equalities Minister Liz Truss [told the Women and Equalities Select Committee](#) about the principles underpinning her decision on GRA reform. One of these principles was "the protection of single-sex spaces, which is extremely important".

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obtain a GRC to facilitate transfer into a women's prison. Retaining the existing eligibility process for a GRC is essential for women's safety. (Section 11).

- 2.4 The GRA2004 indirectly interferes with the use of the sex exceptions by undermining the concept of sex as being fixed at birth and based on the bodies we have. This has made it **more difficult for women and girls to talk about the needs** they have because they are female.
- 2.4.1 Sex-based rights can no longer be spoken about freely and openly. It has become a taboo subject and wrongly associated with being 'transphobic' or 'anti-trans rights'. (Section 7)
- 2.4.2 The meaning of common words that women and girls use to talk about their sex-based rights are now contested. This is making it more difficult to argue the case for why these rights are needed in both the public sphere and in policy meetings. (Section 12).
- 2.4.3 It has become more difficult to collect accurate and meaningful sex-disaggregated data. This undermines the evidence-base women and girls rely on to monitor and lobby for their sex-based rights and to evidence sex-based discrimination and violence. (Section 13).
- 2.5 Any reforms that increase the number or range of GRC holders in the UK will make these existing problems worse and further limit availability of female-only provision.
- 2.5.1 As such, women and girls must be considered stakeholders in GRA reform and any adverse impact (loss of female-only provision) must be balanced alongside any intended benefits to other stakeholders.
- 2.5.2 The Government decision to retain the checks and balances in the process of acquiring a GRC strikes an appropriate and fair balance between the needs of all stakeholder groups.
- 2.6 Guidance published by the EHRC and others go far beyond any reasonable legal interpretation of the Equality Act. This has led to widespread misunderstandings about how and when to use the sex exceptions.
- 2.6.1 Being covered by Section 7 (Gender Reassignment) of the Equality Act does not mean that person's sex has changed and does not confer any automatic right to treatment as the other sex.
- 2.6.2 The sex exceptions should allow for the straight-forward and unambiguous provision of single- and separate sex services using ordinary language and signage. This is not happening.
- 2.6.3 Individual 'case-by-case' exceptions to single-sex spaces do not work. If any males are included in a space designated as 'female-only' it should no longer be defined as single-sex.

3.0 Recommendations:

- 3.1 Stop using the word 'gender' as a synonym for 'sex' and retrospectively update all official documents that conflate the two terms. (Section 8)
- 3.2 Expand the list of exceptions listed in Section 22 (4) of the GRA2004 to include health and safety. E.g. *"it is not an offence under this section to disclose protected information relating to a person if: the disclosure is for the purposes of preventing injury or harm to others.* (Section 9).
- 3.3 Add an amendment to the GRA2004 making it clear that ownership of a GRC does not prevent the sex exceptions in the Equality Act 2010 from being applied. Or separate the two Acts completely by adding an extra exception to the GRA2004. E.g. *"Where someone has a gender recognition certificate they should be treated in their acquired gender for all purposes, except in relation to the protected characteristic of sex in the Equality Act 2010.* (Section 10).
- 3.4 In prison, having a GRC confers a significant advantage and so the eligibility criteria are of critical importance. Any reforms that increase the number or range of GRC holders in the UK must be fully evaluated in terms of the impact on women in prison (Section 11).
- 3.5 We urge WESC to making it clear in their report that it is possible to respect a trans person's gender identity while also acknowledging that all transwomen were born male. (Section 12).
- 3.6 Add an amendment to the GRA2004 to include an exception for data collection. E.g. *"where someone has a gender recognition certificate they should be treated in their acquired gender for all purposes, except for equality monitoring purposes.* (Section 13)
- 3.7 Better guidance is needed to ensure the workability of the sex exceptions in the Equality Act. It must be understood that the two protected characteristics are separate and should not be conflated. This guidance must be produced by a reliable, impartial source with comprehensive and transparent stakeholder involvement. This new guidance must be communicated clearly and effectively to all service providers to undo the many years of misdirection and misunderstanding. (Section 14).

The Government's response to the GRA consultation:

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

- 4.1 The Government's decision not to change the eligibility criteria for obtaining a GRC, including the need for a diagnosis of gender dysphoria, is fair and balances the needs of all stakeholders.
- 4.2 The GRA2004 enables an individual to change their birth certificate to say they were **born** the opposite sex, and makes it a criminal offence for an official to reveal that the sex on their birth certificate was not the sex they were born. It confers with it the legal rights of the opposite sex with some exceptions. It is a necessarily serious legal process with defined eligibility criteria. Eligibility criteria are normal and necessary to ensure benefits are limited to the target group for which an Act was intended. In this case a small group of severely dysphoric transsexual people.
- 4.3 The GRA2004 was created in response to a European Court of Human Rights ruling in 2002 requiring countries to have a system to enable people to change their legal sex. This judgment was based on there being a very small community of post-operative transsexuals whose legal recognition of a new sex would not be expected to have major repercussions in wider society.
- 4.4 In relation to the impact on wider society the ECtHR's ruling contains the phrase *["The Court does not underestimate the difficulties posed or the important repercussions... any spectral difficulties, are both manageable and acceptable if confirmed to the case of fully achieved and post-operative transsexuals"](#)*. On balance any inconvenience to society (women and girls) was considered by the court to be offset by the greater good of enhancing the human rights of this small number of transsexual people (estimated at the time to be [2,000-5,000 persons in the UK](#)).
- 4.5 By 2020, two things have changed. The original reasons for needing a GRA process have now been remedied by other laws (see Section 5) and the number of people who would become eligible for a GRC under a self-declaration system has increased by hundred-fold ([200,000-500,000 people](#)) the vast majority of whom [do not intend any medical transition](#).
- 4.6 This means that the intended benefit to the target group has decreased and the membership of the target group has significantly changed and expanded, thereby increasing the potential impact on others. In other words, the fair balance has shifted considerably since the GRA was first devised in 2004.
- 4.7 Changing the eligibility criteria would fundamentally change the scope and impact of the GRA2004. In this submission we present evidence that the GRA2004 in its current form is already causing problems for women and girls. It is our strongly held view that any reform that increases the number and range of people able to change the sex on their birth certificate would exacerbate these issues further and should not go ahead.

Wider issues concerning transgender equality and current legislation:

- 5.0 Why is the number of people applying for GRCs so low compared to the number of people identifying as transgender?**
- 5.1 One of the reasons for this is because people who identify as transgender no longer need a GRC to live free from harm and unfair treatment. New laws mean they are now protected in other ways. They are also now able to officially record their gender identity on a range of different documents.
- 5.2 In 2002 the European Court of Human Rights ruled that not allowing a transsexual person to change their sex legal contravened their [right to privacy](#) and their [right to marry](#). It was argued that changing their birth certificate would allow them to keep their trans status a secret thus avoiding any discrimination or risk of harm associated with being trans. It also enabled a transsexual person living as a woman to marry a man (and vice versa). While these justifications were relevant in 2002, they have now been remedied by other UK laws.
- 5.2.1 All transgender people are now protected from unfair discrimination, victimisation and harassment with their own protected characteristic (Gender Reassignment) in the [Equality Act 2010](#).
- 5.2.2 In 2012 amendments were made to [Section 146 of the Criminal Justice Act 2003](#) to include transgender identities in hate crime legislation.
- 5.2.3 Since 2014 marriage is [no longer confined to two people of the opposite sex](#). This means that all transgender people in the UK are free to marry anyone they like. A GRC is no longer required to enable a transgender woman to marry a man (or vice versa).
- 5.3 Obtaining a GRC and a replacement birth certificate are no longer the only methods available for transgender people to record and validate their transgender identity. All commonly-used identity documents, including passports and driving licences, can now be issued according to an individual's self-declared gender identity. Medical records, utility bills and membership cards can all be updated to reflect a lived identity instead of birth sex. In fact, a birth certificate is the only remaining official document that records legal sex and cannot be changed based on self-identification alone.
- 5.4 To date only around 5,000 people in the UK have obtained a GRC out of an estimated 200,000- 500,000 in the transgender population. While some applicants may be deterred by the [process](#) or experience of applying, the very small number of GRCs in issue shows that most trans people simply do not consider a GRC to be essential to their everyday lives. Their rights can now be upheld and their identities validated in many other ways.

6.0 Are there challenges in the way the Gender Recognition Act 2004 and the Equality Act 2010 interact?

- 6.1 It is often incorrectly asserted that GRA reform will only improve the lives of transgender people and will have no impact on anyone else. [“The Gender Recognition Act will not affect anyone except transgender people”](#) (All About Trans). [“It’s just admin”](#). Ruth Hunt, while CEO of Stonewall.
- 6.2 The reason given is that possession of a GRC does not determine or enhance an individual’s right to access a single- or separate-sex space or service because this provision is entirely contained within the Equality Act 2010. Therefore, GRA reform will have no impact on female-only service provision for women and girls. As such, women and girls are not relevant stakeholders in GRA reform and so their needs and opinions should not be considered nor sought.
- 6.3 The purpose of this submission to provide the committee with evidence that women and girls **are indeed stakeholders in this process** and that GRA reform would have a material impact on their lives. As stakeholders their needs must be given due regard and balanced fairly against the needs of other stakeholders.
- 6.4 While it is true that GRC holders can, in theory, be lawfully excluded from female-only spaces in some circumstances, we provide evidence that the availability of single-sex provision is being limited as a result of **practical difficulties** caused by the GRA2004. Laws on paper for women and girls are meaningless if they cannot be made to work in real life.
- 6.5 Any reforms that increase the number or range of GRC holders will make these existing problems worse and further limit availability of single-sex provision.
- 6.6 The following Sections 7-13 list the various ways that the GRA2004 and its reform would adversely impact women and girls, using real-life examples as supporting evidence where possible.

7.0 There is widespread misunderstanding about what the Gender Recognition Act does which means people who oppose its reform are wrongly considered to be ‘against trans rights’. This is making it difficult for women and girls to talk about why they sometimes want or need a completely male-free service or space or to complain when it is lost.

- 7.1 The Gender Recognition Act was misnamed. It should have been called the ‘Sex’ Recognition Act because its purpose is to recognise a legal sex status, not a gender or a gender identity.
- 7.2 The misnaming of the Act has led to confusion which means it is often wrongly described as being about the right for trans people to self-declare their gender identity. [“UK Government drops gender self-identification plan for trans people”](#) Guardian headline, 22nd September 2020.

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- 7.3 This misunderstanding exists because ‘gender’ and ‘sex’ are two different concepts that are often conflated. According to [Stonewall definitions](#) “gender” is often expressed in terms of masculinity and femininity, and is largely culturally determined, with “gender identity” being a person’s innate sense of their own gender. In contrast “sex” is either of the two categories (male and female) into which humans and most other living things are divided on the basis of their reproductive functions. In short, gender is about how we feel or are perceived by others. Sex is about the bodies we have.
- 7.4 Because of this people who voice opposition to reform of the ‘Gender’ Recognition Act are wrongly thought to want to stop transgender people from living an authentic and happy life according to the gender with which they identify. It is wrongly thought that opposing ‘self-ID’ means that transgender people should have to prove to doctors that their trans identity is real and important. This is not what GRA reform is about. The GRA is about sex not gender identity.
- 7.5 Trans people already have ‘trans rights’ in the UK. Trans people have the right to self-declare and express their gender identity and to be protected from unfair discrimination, harassment and victimisation for doing so ([Section 7 Gender Reassignment, Equality Act 2010](#)). No-one ever has to prove they are transgender or have a doctor’s diagnosis to be covered by these rights. Most people, including most people who oppose GRA reform, support these ‘trans rights’ for trans people.
- 7.6 In contrast, the Gender Recognition Act is not about gender identity at all. Instead it enables someone to change their legal sex marker, [which includes which sex they are classified as under Section 11 of the Equality Act](#) (the protected characteristic of Sex). It also enables someone to change their birth certificate to say they were born the opposite sex, along with strong privacy protections enabling someone to hide the sex they were originally born and their transgender status.
- 7.7 [Multiple polls](#) shows that when it is made clear that GRA reform is about the process of changing the sex written on a birth certificate the majority of the public agrees that proper checks and balances are necessary. Only 15% of the public thinks that medical gatekeeping is an unnecessary part of that process.
- 7.8 While most people support ‘trans rights’ in the UK it is also true that sometimes birth sex is important and relevant in policy making and law. This means the GRA sets up a conflict of rights between two groups; the right of a transgender person to hide the fact of their birth sex and the right of others to accurately know someone’s birth sex. This conflict of rights needs to be acknowledged and communicated so it can be balanced fairly in law and policy.
- 7.9 **Recommendations:** Stop using the word ‘gender’ as a synonym for ‘sex’ and retrospectively update all official documents that conflate the two terms. Clear and meaningful language is required to ensure any conflicts between gender- and sex-based rights are understood by the public and policy makers. This will enable all groups to speak clearly and openly about their needs in relation to sex and/or gender identity so that no stakeholder groups are disenfranchised in the law and policy making process.

- 8.0 **The GRA2004 means birth certificates can no longer be relied upon to provide information about the sex an individual was born. This means services and spaces lawfully reserved for people born female cannot be guaranteed even when it is considered necessary and lawful to have them.**
- 8.1 The Act's existence means there are in fact two types of 'females' in the eyes of the law; there are females by virtue of birth and females by virtue of a having GRC. The Equality Act sex exceptions make it lawful for these two types of legal females to be treated differently when necessary. It can sometimes be lawful and necessary to exclude one type of legal female (transwomen) from a service that is provided specifically for the other type of legal female (women).
- 8.2 However, there is a problem. There is no way for a service provider to easily distinguish between these two groups of legal females if/when they need to. The only legal document available that records someone's legal sex status is a birth certificate (identity documents such as passports and driving licenses are all now based on a self-declared gender identity). A birth certificate will record both types of legal female as if they were all female by virtue of birth, including legal females who were born male. The Gender Recognition Register that records which legal females are female by virtue of having a GRC is not open to the public.
- 8.3 This means service providers cannot reliably identify or make accurate decisions about who is eligible for a service they are restricting to people born female. At present there are approximately 5000 GRC holders in the UK. This relatively small number means that in practice service providers will rarely encounter this situation. In most cases a birth certificate will accurately reflect the sex someone was born (including people who identify as transgender but do not have a GRC). However, if reforms were to enable anyone who identifies as transgender (estimated by the Government to be up to 500,000 people in the UK) to change their legal sex status on demand and to hide their original birth sex by law it would become impossible for the sex exceptions to ever be reliably enforced or guaranteed. It would mean that no transgender person could be reliably excluded from a female-only service unless they willingly confirm their own trans status.
- 8.4 **Recommendations:** When a replacement birth certificate is issued upon receipt of the GRC it should be noted on the birth certificate that the sex marker has been updated and is not the sex the individual was born. This change would be required to enable service providers to have the information they need to use the sex exceptions.

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- 9.0 **Strict privacy protections contained within the GRA2004 mean that service providers are now reluctant to ask anyone about birth sex.**
- 9.1 The GRA2004 contains a prohibition on the disclosure of information³. It is a criminal offence for officials to share information about a GRC holder's transgender status and birth sex, except in very limited circumstances.
- 9.2 This means that if a member of staff was to acquire such information from a GRC holder the organisation must then have robust safeguards in place to ensure that the information is not shared illegally.
- 9.3 Acquiring information about birth sex is therefore considered a liability risk by some service providers. This means people who need to know about an individual's sex do not ask about it or are being told they aren't allowed to ask.
- 9.4 For example, if a Rugby team turns up to play a match and they suspect a member of the opposite team is not eligible to play due to age they can ask the referee to confirm the player's date of birth. It is also standard practice for players and officials to be informed if anyone outside the age-grade has been given permission to play down. This information is considered important for health and safety reasons. The same procedure does not apply to birth sex. A RugbySafe Officer of a Rugby club in England (who wishes to remain anonymous) has been told that if they suspect a player in a women's match was not born female "they can't ask or see any confirmation that a player has been approved to play women's Rugby" even though that information is relevant to the health and safety of all players.
- 9.5 **Recommendation:** Expand the list of exceptions listed in Section 22 (4) of the GRA2004 to include health and safety. *E.g. "But it is not an offence under this section to disclose protected information relating to a person if: the disclosure is for the purposes of preventing injury or harm to others"*

³ Section 22 GRA2004 states "[It is an offence for a person who has acquired protected information in an official capacity to disclose the information to another person](#)".

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- 10.0 Inaccurate guidance telling service providers they cannot lawfully exclude GRA holders has led some service providers choosing not to use the sex exceptions at all.**
- 10.1 The sex exceptions in the Equality Act 2010 were designed to ensure spaces, services, sports and occupations can be lawfully restricted based on the sex someone was born, when necessary.
- 10.2 We know this was the intention because each of the sex exceptions in the Equality Act also contains a paragraph to include an exception for Gender Reassignment. It was necessary to include an exception for Gender Reassignment because the GRA2004 had previously severed the direct link between someone's legal sex status and their birth or biological sex.
- 10.3 In practice, if the sex exception cannot be applied to exclude someone from a female-only space on the basis of their legal sex (i.e. if someone born male has changed their legal sex to female by acquiring a GRC) there is the option to instead exclude on the basis of the protected characteristic of Gender Reassignment. The wording in the Equality Act means there is a legal distinction between someone who has become female by acquiring a GRC and someone who is female by virtue of birth and thus enables them to be treated differently in law when necessary.
- 10.4 Despite these legal provisions being set out in the Equality Act there is no reference to the GRA2004 in the Equality Act 2010 or vice versa. This has contributed to misunderstandings about how the two Acts interact.
- 10.5 This confusion was then further compounded in guidance produced by the Equality and Human Rights Commission and published in January 2011 to help service providers understand their obligations under the newly created Equality Act 2010.
- 10.5.1 This inaccurate statement was found on both p17 of 'What Equality means for your business' and p20 of 'Your Rights to Equality from Health and Social care services' : *"Where someone has a gender recognition certificate they should be treated in their acquired gender for all purposes and therefore should not be excluded from single sex services"*
- 10.5.2 Following a complaint by Fair Play For Women on 11th July 2018 the statement was deleted from the EHRC website guidance on 5th October 2018 (just 14 days before the end of the UK Government's public consultation on GRA reform). All internal emails relating to the correspondence between Fair Play For Women and the EHRC on this matter are publicly available via [this Freedom of Information Act response 525230](#). It is notable that during the 3 months it took to make the decision to delete this inaccurate statement a range of different views about the statement was expressed by members of the legal team including *"I think it's correct"* *"It's an issue on which we are all not agreed"*.
- 10.5.3 We present this as evidence to WESC to highlight that misunderstandings and confusion about how the GRA2004 and EA2010 interact have existed as early as 2010 and have persisted until at least 2018. These misunderstandings were held not just by members of the public and service providers but also legal experts within the

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organisation whose role it was to ensure the Equality Act was accurately understood.

10.6 Thinking they could not exclude GRC holders, some service providers are then hesitant about excluding anyone at all in case their staff got it wrong. This is because staff would be unable to know and afraid to ask who might have a GRC and who might not. This leads to three different outcomes, all of which mean women and girl lose access to a male-free space.

10.6.1 **Mixed-sex / Gender-neutral provision.** It is becoming increasing common for existing separate-sex facilities to be converted into mixed-sex (even in schools). We are even seeing signs on toilet blocks such as “gender-neutral with urinals” and “gender-neutral with cubicles” (such as the mixed-sex toilet provision at the Old Vic theatre). This approach avoids use of the sex exceptions entirely.

10.6.2 **Rules based on self-identification.** Policies are being updated to say ‘anyone who identifies as’ rather than a definition based on sex. For example, Marks and Spencer have recently confirmed their changing room policy as “*we allow customers the choice of which fitting room they feel comfortable to use, in respect of how they identify themselves*”. However, this ‘inclusive’ arrangement fails to cater for women and girls who require a male-free space to feel comfortable when undressing. We asked women to send us their experiences of these policies. We are submitting these stories as evidence. They can be accessed via this link. Our second policy example is the ECB’s (England Cricket Board’s) eligibility criteria for ‘female-only cricket’. It is defined in their policy as “a cricket competition, league or match governed by the ECB which are available for a woman or a trans woman to compete in”. This means women and girls (as young as 13) may find themselves playing competitive sport against an adult male despite this quite clearly being both unfair and unsafe.

10.6.3 **No clear eligibility rules at all.** In many cases businesses and public bodies are simply turning a blind eye to who might be using their facility or service. Years ago service providers could rely on a member of the public to alert staff if they saw a man enter through a door marked with the woman symbol or the letter ‘F’. In turn, service users could rely on a member of staff to deal with the problem. This is no longer the case. There is now so much confusion around what a policy might be that people don’t want to raise concerns in case they get it wrong. This means all undefined single-sex policies effectively become ‘self-declared’ by default.

10.7 **Recommendations:** Add an amendment to the GRA2004 making it clear that ownership of a GRC does not prevent the sex exceptions in the Equality Act 2010 from being applied. Or separate the two Acts completely by adding an extra exception to GRA 2004. E.g. Where someone has a gender recognition certificate they should be treated in their acquired gender for all purposes, except in relation to the protected characteristic of sex in the Equality Act 2010.

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- 11.0 Some policies are being developed that treat GRC holders more favorably than non-GRC holders. In prison, having a GRC confers a significant advantage and so the eligibility criteria are of critical importance.**
- 11.1 Many of the sex exceptions in the Equality Act require objective justification. This means a service provider must be able to show that use of the sex exception was necessary and reasonable (i.e. is a **proportionate means** of achieving a legitimate aim).
- 11.2 Although the law is clear that sex exceptions can apply in the case of all transgender people, including GRC holders, there is no case law that clarifies whether having a GRC should be considered a relevant factor in the proportionality test.
- 11.3 In other words, does the possession of a GRC tilt the balance towards accessing a space for the opposite sex when a service provider is considering whether denying access is both a proportionate and legitimate decision. (i.e. should a trans people with a GRC be treated more favorably than trans people without a GRC).
- 11.4 If that were to be the case, any GRA reforms that increase the availability of GRCs would increase the number of people given access to spaces reserved for the opposite sex that they would otherwise be excluded from if they didn't have a GRC. This is another example of how GRA reform could directly impact the availability of male-free space for women and girls.
- 11.5 Some policies are already being created based on the assumption that GRC holders should be treated more favourably to non-GRC holders. The example we present as evidence is the HMPPS 2019 prison policies; namely the "[HMP Downview E Wing policy](#)" and "[Care and management of individuals who are transgender](#)".
- 11.5.1 Prison policy now requires that "[all individuals who are transgender must be initially allocated to part of the estate which matches their legally recognised gender \[sex recorded on their birth certificate\]](#)"(Section 4.6). This is to give time for a transgender case review to be conducted that includes an assessment of the physical risks to other prisoners if a transwoman wishes to transfer into a women's prison. This rule is designed to prevent a repeat of the [incident in 2018](#) where a legally male prisoner who self-identified as a woman was remanded straight into a women's prison without any safety review and subsequently sexually assaulted 2 women there.
- 11.5.2 However, this rule means that a GRC holder will be treated differently to a transgender prisoner without a GRC. A transwoman with a GRC will be located straight into a women's prison (according to the sex on their (replacement) birth certificate).
- 11.5.3 Following a transgender case review, GRC holders will again be treated differently to a trans prisoner without a GRC. If a transgender prisoner without a GRC is considered to present a high risk of harm to female prisoners that person will be located in a male prison (while being fully supported to express the gender with which they identify). However, if a transgender prisoner **with** a GRC is considered to

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present a high risk of harm to female prisoners that person will instead be located on E-Wing at Downview women's prison. This is because they are "required to be located in the women's estate because they hold Gender Recognition Certificates and are legally female" (as stated in paragraph 3.1 of E-Wing policy). During the day some of these high-risk transgender prisoners will "have access to the ... activities within the main site alongside other women" (paragraph 10.3 of E-wing policy).

- 11.6 Fair Play For Women attended a meeting with HMPPS and MOJ representatives on 2nd May 2019 to discuss the new prison policy prior to publication. We learned that while the physical safety of the female inmates has been considered as part of E-wing policy it became apparent that the psychological impact of forcing women to share space with high-risk prisoners they perceive as male has not. A high proportion of women in prison have experienced male violence and sexual abuse. The impact on their mental well-being, rehabilitation success and self-harm rates has never been assessed.
- 11.7 The proportion of transgender prisoners that currently have a GRC is expected to be low (in line with what is known for wider society). No official figures are available for the number of GRC holders in prison but it has been reported there has been approximately 3 GRC holders requiring supervision in E-wing. However, that number could dramatically increase if obtaining a GRC became a self-declaration process. The evidence is as follows:
- 11.7.1 The latest HMPPS Offender Equality report published in November 2019 revealed there were 163 transgender prisoners without a GRC in England and Wales, the majority of whom were male-born transwomen (140). Most were located in the male estate (129) with a much smaller number in the female estate (11).
- 11.7.2 If the process for acquiring a GRC changed to self-declaration it is possible that all 129 transgender prisoners in the male estate could then choose to apply for a GRC making them all eligible for transfer into the female estate. This means GRA reform could increase the number of male-born prisoners living in the female estate to over 140. This number would mean that 1 in every 30 prisoners in the women's estate would have been born male and not female.
- 11.7.3 It is known that over half (76) of the 129 male-born transgender prisoners housed in the male estate have at least one conviction for sexual offending. Freedom of Information request #200615022 submitted by Fair Play For Women has revealed this includes 36 convictions for rape, 10 for attempted rape and 21 sexual assaults. The high frequency of sexual offending observed by this cohort is similar to estimates we made in 2017.
- 11.7.4 This means one of the adverse consequences of reforming the GRA to become a self-declaration process could be for women in prison to be required to live alongside dozens of sex offenders, some of whom would be categorised as presenting a high risk of harm to women and requiring supervised association with other prisoners.
- 11.8 The fact that GRC holders are treated differently to non-GRC holders in prison also means there is an incentive for non-transgender prisoners to obtain one. The current medical

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gatekeeping process prevents exploitation of this incentive but a self-declaration system will be more open to abuse. Expert evidence was given to support this at the 2015 WESC Trans inquiry.

11.8.1 *“It has been rather naively suggested that nobody would seek to pretend transsexual status in prison. There are, to those of us who actually interview the prisoners, in fact 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..... a plethora of prison intelligence information suggesting that the driving force was a desire to make subsequent sexual offending very much easier”.* [British Association of Gender Identity Specialists](#)

11.9 **Recommendations:** In prison, having a GRC confers a significant advantage and so the eligibility criteria are of critical importance. Any reforms that increase the number or range of GRC holders in the UK must be fully evaluated in terms of the impact on women in prison.

12.0 **Common words that women and girls use to talk about their sex-based rights are now contested. This is making it more difficult to argue the case for why these rights are needed in both the public sphere and in policy meetings.**

12.1 Any good policy making related to sex and gender identity requires policy makers and stakeholders to be free to accurately discuss both characteristics without ambiguity or sanction. In the vast majority of cases that distinction is clear. The sex of transwomen is male (by birth and by law) with only a small number of exceptions (GRC holders). If the GRA was reformed to allow self-declaration of sex it could lead to a situation where the sex of all transwomen would need to be officially regarded as female.

12.2 How will campaigners, policy makers or journalists be able to do their job if we are all obliged to name someone born male, with a male body and male genitals, as being the female sex? How can we protect single-sex spaces and services when we can no longer know or say who was born male or female? How can a female-only space ever be guaranteed to be male-free if we can no longer acknowledge that transwomen were born male.

12.3 It is our experience that sex-based language is already being discouraged in sport policy meetings. Requests have now been made by participants in three separate sports policy meetings attended by Fair Play For Women that no one should be allowed to refer to the sex of a transwoman as male. This is despite policy discussions needing to focus on the consequence of being born male, the impact of male puberty on the body and the resulting male performance advantages in sport. Selectively prohibiting language referring to one of the protected characteristics will result in bad policy making.

12.4 **Recommendations:** We urge WESC to making it clear in their report that it is possible to both respect a trans person’s gender identity while also acknowledging that all transwomen were born male.

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- 13.0 The GRA2004 causes problems for data collection and is making official statistics unreliable. Bad data leads to bad policy decisions.**
- 13.1 The GRA2004 means birth certificates can no longer be relied upon to accurately record someone's birth sex in all cases. This presents a problem when data on birth sex needs to be collected for equality monitoring purposes. Any reforms that increase the availability of birth certificates that do not accurately record birth sex will exacerbate these existing problems leading to further problems for data collection and statistical analysis.
- 13.2 For example, the HMPPS Annual Equalities report provides an annual snapshot of the number of transgender prisoners in England and Wales. This number is inaccurate because it does not include transgender people with a GRC. Page 14 of the HMPPS Annual Equalities report for 2019 states ["Prisoners who have already transitioned and have a full Gender Recognition Certificate are excluded from this dataset"](#) . The proposed self-declaration system for the GRA would enable all transgender prisoners to acquire a GRC on demand meaning many more would not be counted in the annual transgender offender statistics rendering the figures meaningless.
- 13.3 The MOJ also releases [offender management statistics](#) each quarter. This includes important information about which groups are committing which types of crimes. These datasets consistently show that 99% of all sexual offenders are male. At the last count (30th September 2020) there were 11,892 males in prison in England and Wales convicted of a sexual offence. In contrast, sex offending by the female sex is rare. There were only 113 female sex offenders in prison at the last count. However, male-born transgender prisoners with a GRC are being counted as female and will make up an unknown contribution to this total of 113 female sex offenders. This means the female sex offending statistics now include sex offending by people born male, including exclusively male types of sexual crime such as rape (penetration with a penis). Accurate information on sex offending by people born female has now been lost and would be made worse by GRA reform. If the GRA was reformed to allow self-declaration of legal sex it would mean all 76 of the current male-born transgender prisoners convicted of sexual offences (referred to in Section 11.7.3) would be free to change their legal sex to female. The female sex offending statistics would increase dramatically from 113 to 189 with at least 40% of female stats then being made up of male-born sex offenders rendering them meaningless.
- 13.4 Accurate statistics about sex and gender identity matter to good policy making. Our knowledge of male-pattern criminality is part of the evidence-base that stakeholders and policy makers use to objectively justify female-only spaces and services. Bad data inevitably leads to bad policy decisions for women and girls.
- 13.5 **Recommendations:** Add an amendment to the GRA2004 to include an exception for data collection. *E.g. "where someone has a gender recognition certificate they should be treated in their acquired gender for all purposes, [except for equality monitoring purposes](#)".*

14.0 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?

14.1 This submission focuses on the GRA2004 and how it interacts with the Equality Act and fetters the use of the sex exceptions. However, there are additional problems with the sex exceptions that exist independently to the interactions with the GRA2004.

14.2 These other problems stem from guidance published by the EHRC and others that appear to go far beyond any reasonable legal interpretation of the Equality Act. This has led to widespread misunderstandings about how and when to use the sex exceptions.

14.3 Being covered by Section 7 (Gender Reassignment) of the Equality Act as a transsexual does not mean that person's sex has changed and does not confer any automatic right to treatment as the other sex.

14.3.1 "Transwomen are women" is a political and ideological mantra that has no basis in law. Nevertheless, its widespread and frequent use has caused confusion. The public now assumes that signs or policies that say "women-only" must always include transgender women. The public is largely unaware that the sex exceptions even exist and that transwomen can be lawfully excluded from 'women-only' services.

14.3.2 Such was the confusion the EHRC published a [legal clarification in June 2018](#) that confirm that transwomen are not women in the eyes of the law. They said "*A trans person who does not have a GRC retains the sex recorded on their birth certificate for legal purposes*" and that "*a trans woman who does not hold a GRC and is therefore legally male would be treated as male for the purposes of the sex discrimination provisions*" (note: "man" is defined in the Section 212 of the Equality as a "male of any age").

14.3.3 A legal note such as this published on the EHRC website is not enough to disseminate this information to the public. The public remains largely unaware that women and girls are allowed space away from the male sex, including those males who identify as women or girls.

14.4 The sex exceptions should allow for the straight-forward and unambiguous provision of single- and separate-sex services using ordinary language and signage. This is not happening. This excludes people who can't or don't want to share with members of the opposite sex.

14.4.1 It is a long held and widely accepted cultural norm in the UK that the two sexes can and should sometimes do things separately. Separating the sexes is considered legitimate, proportionate and uncontroversial by most people.

14.4.2 We frequently encounter the sex exceptions in everyday life. They are not 'exceptional' but can simply apply when "*the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex*" (as clearly stated in the Equality Act [Schedule 3 Paragraph 27](#)). These reasons can be to uphold privacy and dignity, fairness, or safety.

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- 14.4.3 People who choose a single-sex service have not consented to sharing with members of the opposite sex. People who choose a mixed-sex service have consented to share. For the principle of consent to work the rules need to be clear and obvious to everyone. No one should have to guess or have a detailed understanding of the law to know who they might be sharing with.
- 14.4.4 Fully inclusive options should be found to accommodate everyone's needs; this includes women and girls who need female-only provision. No one should be forced to use a facility they don't feel comfortable using.
- 14.4.5 Some women and girls don't feel comfortable or safe sharing a facility with the opposite sex. They should not be forced to. They need to be able to choose a female-only option. Some trans people don't feel comfortable or safe sharing facilities designated for their birth sex. They should not be forced to. They need to be able to choose a mixed-sex option instead.
- 14.5 Individual 'case-by-case' exceptions to single-sex spaces do not work. If any males are included in a space designated as 'female-only' it should no longer be defined as single-sex.
- 14.5.1 The Equality Act refers to groups of people in terms of the protected characteristics they share. Likewise, the sex exceptions apply to different groups of people based on the protected characteristics they share; all people are either the male and female sex, and people either share the protected characteristic of Gender Reassignment or they don't.
- 14.5.2 In most cases use of a sex exception needs to be objectively justified. This means a service provider must be able to show that treating different groups of people differently is a "proportionate means to achieving a legitimate aim". The reasoning needs to be specific and tailored to each service or space for which the sex exceptions are invoked.
- 14.5.3 There is no mention in the sex exceptions of the requirement to consider each **individual** in a group on a case-by-case basis. However, this has been implied in the guidance published by the EHRC.
- 14.5.4 *"Denial of a service to a transsexual person should only occur in exceptional circumstances. A service provider can have a policy on provision of the service to transsexual users but should apply this policy on a case-by-case basis in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances"*. [EHRC's Statutory Code of Practice Paragraph 13.60](#).
- 14.5.5 This concept is now embedded into most female eligibility and trans inclusion policies. It is unworkable and undermines the concept of a service or space being 'single-sex'. If it can be objectively justified to exclude the male sex there is no need to consider each individual member of the male sex to see if the rule applies to them. If any males are included in a space designated as 'female-only' it is no longer single-sex.

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- 14.6 **Recommendations:** Better guidance is needed to ensure the workability of the sex exceptions in the Equality Act. It must be understood that the two protected characteristics are separate and should not be conflated. This guidance must be produced by a reliable, impartial source with comprehensive and transparent stakeholder involvement. This new guidance must be communicated clearly and effectively to all service providers to undo the many years of misdirection and misunderstanding.

November 2020