

Response to Women and Equalities Committee Consultation on Reform of the Gender Recognition Act

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1. This document is a response to some of the questions in the WEC's consultation on Gender Recognition Reform.

2. I note first of all that there have now been several consultations in England and Wales and in Scotland since the original recommendations made by the Women and Equalities Committee (WEC) in their report in January 2016, and that this process has been extremely protracted and anxiety inducing for everyone who is concerned about these issues. As well as exhausting, particularly for trans and non-binary people. The vacuum left by the failure of the UK and Scottish governments to act in a timely manner on these issues has unfortunately been filled with an excess of uniformed, unsupported and in some cases over-inflated fears about the impact of gender recognition reform. There have also been some very mixed and unclear messages from those with governmental responsibility for equality about the direction of travel of proposed reforms, which has not helped assuage concerns about practical impact of proposed reforms.

The Government's long-awaited proposed changes are now clear at least, but do not, in my view, go far enough. Below I quote the consultation question before offering an answer.

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

The process will be easier and "kinder" for trans people if the fee currently in place is reduced to a nominal amount. More gender clinics are also desperately needed to tackle the inordinate waiting times for diagnosis and treatment; these waiting lists can be interpreted as cruel, as not allowing trans people access to gender identity healthcare does serious harm (as the WEC acknowledged in 2016, p3). Thus, committing to more resources here could again be said to be "kinder" (though I am not sure 3 more clinics would be sufficient, this is not my area of expertise).

But the question posed in this consultation asks us to compare the proposed minimal changes with the current process which, as the WEC pointed out 5 years ago, is out dated and "runs contrary to the dignity and personal autonomy of applicants" (2016, p3). As such, the proposed changes will inevitably improve things, but only marginally so – therefore the more relevant and important question is whether they go far enough to properly protect the dignity and personal autonomy of applicants. In my view they do not; they fall substantially short of the sorts of recommendations the WEC thought necessary to submit in 2016, such as decoupling gender identity services from mental health services (p47), and the redesignation of the gender recognition process as administrative rather than medical / pathological (p79-80).

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4. *“Should a fee for obtaining a Gender Recognition Certificate be removed or retained? Are there other financial burdens on applicants that could be removed or retained?”*

It seems to me that any fee will operate as an obstacle for the poorest applicants, but I understand that there is normally a fee for court paperwork and processes and that for example, there is nominal charge of £5 for a simple statutory declaration from a notary public. I will leave others who deal more directly with supporting trans people to answer this question more fully.

5. *“Should the requirement for a diagnosis of gender dysphoria be removed?”*

The medicalisation of gender recognition, particularly the requirement for a diagnosis of ‘dysphoria’, labels trans people as requiring psychiatric diagnosis and treatment. This is not appropriate, since being trans is not a ‘sickness’. Individuals are more attuned to their own sense of gendered self than ‘experts’. As such, individuals should be able to self-identify as male, female or non-binary.

We need to move away from the pathologisation of legal gender transition, particularly given the very long waiting lists and lengthy and complicated referral and treatment processes. Adopting a system of self-identification depathologises trans people, although it does not solve the problem of long waits for treatment and referral for those trans people seeking medical treatment for transition, an issue that needs urgent attention.

6. *“Should there be changes to the requirement for individuals to have lived in their acquired gender for at least two years?”*

The current system that requires people to live in their acquired gender for 2 years is onerous, since in our binary sex/gender culture, many people will have been struggling to understand or articulate their gender identity for themselves, and present it to others, for much longer than this final two years of ‘living’ - i.e. publicly presenting - in their self-identified gender. This is something I have heard over and over again in my research with trans people over the last decade.

Requiring a two-year period also privileges the *public* gender presentation and performance as ‘proof’ of someone’s gender, where that presentation is often required to conform to unhelpful stereotypes of what gender should ‘look’ like.

[If we move to recognise non-binary gender, under the current system it would be difficult for non-binary people to prove how non-binary they are other than the use of pronouns and possibly through ‘androgynous’ dress.]

In my view people should not have to ‘live’ in their gender in this public and often stereotypical way for any lengthy period before being able to complete the legal documentation that confirms their gender. However, I can see the appeal of a 3-month

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period as a compromise solution of sorts, as has been suggested by the Scottish government in their consultation earlier this year (March 2020).

I am sure the arguments that were made during that consultation are available to this committee and I will not rehearse them here. I would simply add that some opposed to the gender recognition reforms fear that men will "pose" as trans women to gain access to (cis) women only spaces and may feel that a period of living in the acquired gender might put said men off from doing so. However, I think the risk of cis men doing this is very small – there have been no epidemics of such incidents in jurisdictions that have changed the law to allow for self-identification. Further, as we already know, men do not need access to women's spaces to perpetuate violence on women. But in any case, as I explain below, anyone can be excluded from single sex services, even if they have a gender recognition certificate, if the service provider can meet the (relatively high) legislative threshold (proportionate and legitimate). Of course, that latter point is something this committee might want to consider, given that the WEC in 2016 recommended reforming the Equality Act to only allow trans people without a GRC to be excluded from single sex spaces (2016, p81).

7. "Does the spousal consent provision in the Act need reforming? If so, how? If it needs reforming or removal, is anything else needed to protect any rights of the spouse or civil partner?"

The veto allows the spouse of a trans person effectively to "veto" the person's gender recognition, by withholding the written consent that is needed for the Gender Recognition Panel to issue a full gender recognition certificate. Without that consent, the Panel can only issue an interim certificate, which has no legal effect on the trans person's gender.

The spousal veto is unnecessary since any spouse who does not want to remain in a marriage can seek a divorce. It seems then that giving someone the power to block state recognition of a gender transition, even temporarily, merely allows them to act in anger or retribution and further "punish" their spouse. Given that trans people often suffer harassment and abuse, or at the very least uncertainty and anxiety that harassment will occur, when their identity documents do not match their gender presentation, delaying the GRC even by 6 months may cause unintended harm in the name of protecting the "autonomy" of the cisgender spouse – an autonomy that can be just as convincingly expressed through an application for separation or divorce. This is not to mention the emotional impact of having a spouse intervene to delay transition in this way.

Scotland does not allow a spousal veto for transgender people wishing to apply for a Gender Recognition Certificate (see <https://www.scottishtrans.org/our-work/completed-work/equal-marriage/spousal-veto-amendment/>).

8. "Should the age limit at which people can apply for a Gender Recognition Certificate (GRC) be lowered?"

A young person aged 16 or over can consent to life changing medical treatment, get married, have consensual sex, be convicted of crimes, change their name, join the armed

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forces, and much more. There is no reason to think that they could not also apply for and consent to legal gender recognition.

9. *“What impact will these proposed changes have on those people applying for a Gender Recognition Certificate, and on trans people more generally?”*

I would refer the committee to my answer in paragraph 3. The process will be a marginal improvement.

10. *“What else should the Government have included in its proposals, if anything?”*

As intimated above, there should be, in no particular order: a move away from the requirement for a medical diagnosis for gender recognition; an extension of the process to those who are 16 years and over; recognition processes for non-binary people.

I would also add the following. It seems sensible to have a system where people are asked to sign a statutory declaration confirming their decision, and legally registering their gender: we currently live in a world where gender is still deemed to be important (for instance for single sex/gender services; or for monitoring of sex/gender discrimination, hate crime etc); and applicants should understand the potential consequences of changing their legal gender. But this should be an administrative process, not a medical one – medical treatment is a separate issue to legal recognition of gender.

11. *Does the Scottish Government’s proposed Bill offer a more suitable alternative to reforming the Gender Recognition Act?*

My view is that the Scottish bill goes much further in addressing the concerns raised about the current system of gender recognition (such as those raised by the WEC in 2016). I am sure you have the comments on this consultation on the bill available to you, and so I will not reiterate them in detail here, but in short the proposals depathologise the process, make it available to those who are 16 and over, and significantly shorten the time period needed for the ‘real life test’.

12. *“Why is the number of people applying for GRCs so low compared to the number of people identifying as transgender?”*

I think those who provide services to trans people are better placed to answer this question than I am. I would simply say that the process is pathologizing, lengthy, expensive, intrusive and anxiety inducing. Who would want to go through that if they did not need to?

13. *“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?”*

I think it is important to recognise that there is no single definition of either sex or gender in law, and so any perceived difference in use of these terms across the two Acts (or any other Act) is not inherently problematic. Concepts are sometimes left open-ended so that they can be used differently in different legal contexts, and those interpreting and applying law can adjust the concepts’ meaning to the specific situation in which they are used. This is because flexibility is necessary in some contexts. For example, section 7 of the 2010 Act, on the protected characteristic of gender reassignment, refers to ‘physiological *or other attributes of sex*’ (emphasis added). It is possible that courts in future may interpret this to mean that sex, for the purposes of the 2010 Act, is not a purely physiological concept. In other words, the meaning of sex is not settled for all time, and in all legal contexts, and nor should it be.

To take another example of the need for a flexible approach, discrimination on the grounds of ‘sex’ (the protected characteristic) has long ‘read in’ gender discrimination and in that sense the two have been used interchangeably in equality law. Likewise the Gender Recognition Act allows one’s gender to be recognised, and the ‘sex marker’ on one’s birth certificate to be changed. This shows that in some contexts, there is not such a stark opposition between sex and gender (in law at least) as some may suggest; though at other times, the terms ‘sex’ and ‘gender’ may be used to refer to different things.

This means that in legislation, the government is free to refer to the category of ‘sex’ (or indeed ‘gender’) according to the given context, in a manner that is appropriate to that context, without having to definitely determine ‘sex’ (or gender), and without having to abide by any previous definition or application of the term ‘sex’ (or gender), so long as the meaning of the concept works for the context in which it is used.

14. *“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?”*

With co-authors, I have written an article on these issues, which has just been published “online first” in the peer reviewed journal *Scottish Affairs*, in response to an earlier article that we believe misinterprets and misrepresents the law. I have attached a word version of it to this document as an appendix. I hope it is helpful and clear in setting out the current law in this area. However, I would suggest that further guidance, and perhaps strategic litigation, is necessary to give more detail – and assurance - to service providers and users, on what the thresholds for protection from discrimination, and exclusion from these protections, are in practice.

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15. *“Does the Equality Act adequately protect trans people? If not, what reforms, if any, are needed?”*

The WEC recommended in 2016 that the protected characteristic be gender identity rather than gender reassignment. I agree with this proposal. This would be in line with advancing protections in other progressive jurisdictions such as Canada [which, since 2017, has added both gender identity and gender expression as protected grounds to the Canadian Human Rights Act and the Criminal Code]. The characteristic gender reassignment is not adequate to protect all trans people, including non-binary people.

The exceptions in the Equality Act that allow service providers to exclude trans people from single sex services or spaces should be interpreted to a high standard – ie the threshold for exclusion is high, given that it must be proportionate and meet a legitimate aim. However, there is a lack of clarity (and some misinformation) about how these provisions ought to be interpreted. As intimated in paragraph 14 above, I have attached an article that may help illuminate some of these issues.

I would like to add that women's services have been managing, containing and turning away those who are not suitable for certain services for many, many years already, on all sorts of bases, and that we should trust that in the wake of gender recognition reforms, they would continue to do so with integrity and with the benefit of experience and expertise, and in ways that would protect the safety of all their service users.

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

I will leave this question for those delivering services to comment upon as it is not my area of expertise.

17. *“Are legal reforms needed to better support the rights of gender-fluid and non-binary people? If so, how?”*

The short answer to this is yes. It is worth noting the recent Upper Tribunal (asylum) decision of *Mx M* where for the first time the court has recognised that non-binary people are due protections under the Refugee Convention as part of the LGBTQ community, as they form a “particular social group”. The grant of asylum in this case signals a clear need to recognise the identities of non-binary people, and the need to protect them from discrimination. It would be an odd outcome indeed if non-binary people fleeing persecution from their country of origin were legally recognised and protected, but those living inside the UK were not.

[*Mx M (gender identity – HJ (Iran) - terminology) El Salvador* [2020] UKUT 00313 (IAC)]

Appendix One:

Sex and Gender Equality Law and Policy: a response to Murray, Hunter Blackburn and Mackenzie

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Abstract

This article is a response to ‘Losing Sight of Women’s Rights: The Unregulated Introduction of Gender Self-Identification as a Case Study of Policy Capture in Scotland’ by Kath Murray, Lucy Hunter Blackburn and Lisa Mackenzie, published in *Scottish Affairs* 28(3). Murray et al sought to explore the legal status of women, particularly with regard to discrimination legislation, and concluded that the interests of trans women had begun to systematically erode the interests of non-trans women in Scotland. In this response, we aim to correct some of the erroneous statements made by Murray et al about legal definitions of sex and gender, and about discrimination law. In critically engaging with Murray et al’s argument we aim to build a much-needed clearer understanding of law and policy on sex and gender in Scotland, particularly as it relates to the application of the Equality Act 2010. We argue that, in that claiming that there has been policy capture in Scotland, Murray et al have neglected to contextualise ongoing debates about sex and gender in law against the backdrop of over two decades of clear legal and policy shifts across the UK. We call for researchers and others – in Scotland and elsewhere – to take care, particularly in interpreting and applying the law, especially as it applies to marginalised minority populations, so that we do not further obfuscate or mislead on important legal and social issues.

Key words: sex, gender, equality, discrimination, trans.

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1. Introduction

In August 2019, Kath Murray, Lucy Hunter Blackburn and Lisa Mackenzie (hereafter Murray et al), published 'Losing Sight of Women's Rights: The Unregulated Introduction of Gender Self-Identification as a Case Study of Policy Capture in Scotland' in *Scottish Affairs* 28(3). In the main, this article sought to explore the legal status of women, particularly with regard to discrimination legislation, and concluded that the interests of trans women had begun to systematically erode the interests of non-trans women in Scotland. Their position is clearly controversial, but in this article we do not seek to engage with the philosophically contestable features of Murray et al's work. Rather, we aim to correct some of the erroneous statements made by Murray et al about legal definitions of sex and gender, and about discrimination law. In section two, we examine the concepts of sex and gender in case law and legislation, before moving on, in section 3, to gender reassignment and discrimination as set out in the Equality Act 2010 (hereafter the 2010 Act). In section 4, we examine Murray et al's claims about the sex/gender question in the Scottish census, before concluding that their analysis is inaccurate and misleading.

Our objective is not only to critically engage with Murray et al's argument but also to build a much-needed clearer understanding of law and policy on sex and gender in Scotland, particularly as it relates to the application of the 2010 Act. We argue that, in that claiming that there has been policy capture in Scotland, Murray et al have neglected to contextualise ongoing debates about sex and gender against the backdrop of over two decades of clear legal and policy shifts across the UK. We call for researchers and others – in Scotland and elsewhere – to take care, particularly in interpreting and applying the law, especially as it applies to marginalised minority populations, so that we do not further obfuscate or mislead on important legal and social issues.

2. Legal definitions of sex and gender

In this section we analyse Murray et al's position regarding the definition of sex and gender in law.

a. Sex and gender in case law

We agree with Murray et al that there is currently no single definition of sex, or gender, in law (p266).

This is not a universally shared view. For example, one commentator - Rosa Freedman - responding to the 2018 consultation on the Scottish Census, disagreed that there was no legal definition of sex (Culture, Tourism, Europe and External Affairs Committee (2018)); she argued that the legal definition of sex was clearly set out in a 1970 decision in an English marriage case, *Corbett v Corbett* ([1970] 2 All E.R.33). In that case, the court annulled a marriage between a trans woman and a man, because marriage could only be between a man and woman; the court held that since sex was fixed at birth and could not be changed, even by surgery, April Ashley remained a man for the purposes of marriage law and thus could not consummate the marriage. Mr Justice Ormrod stated that surgery cannot

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‘reproduce a person who is naturally capable of performing the essential role of a woman in marriage’ ([1970] 2 All E.R. 33, at 48), i.e., heterosexual penetrative reproductive sexual intercourse.

The test for sex in *Corbett* is not a legally generalisable test, since it was made 50 years ago in the narrow context of 20th century English marriage law. As Mr Justice Ormrod himself stated in that judgment, ‘The question then becomes what is meant by the word ‘woman’ in the context of a marriage, for I am not concerned to determine the ‘legal sex’ of the respondent at large’ ([1970] 2 All E.R., at 48). As such, it is very surprising to see anyone propose that this half-a-century-old way of thinking about the definition of sex in marriage would be an appropriate source for defining sex *per se* in contemporary times. In any case, since then the European Court of Justice in *Goodwin v UK* (2002) 35 EHRR 18 held that UK law was in violation of Articles 8 and 12 of the ECHR in not allowing trans people to marry in their ‘post-operative’ sex. This in turn led to the Gender Recognition Act 2004 (hereafter GRA), which allowed trans people to change the sex marker on their birth certificates, and to get married and be legally recognised in their ‘acquired’ gender (section 1(2)), as discussed below (see also Whittle and Turner 2007).

It is also surprising to find distinct echoes of this reductive conceptualisation of woman in recent arguments made by Murray et al. For example, when they state that ‘[t]he so-called ‘gender pay gap’ is largely a ‘motherhood penalty’ (p265), Murray et al elide the fact that a considerable number of Employment Tribunal claims for equal pay relate to women not being paid equally for ‘like work’ or ‘work rated as equivalent’. A recent example of this would be the equal pay claim under consideration by the Supreme Court brought against Asda, where lower-paid store staff, who are mainly female, claim equal pay to warehouse workers, who are mainly male and higher-paid (*Asda Stores Ltd v Brierley* [2019] EWCA Civ 44 (31 January 2019), see also Davies (2019)). It is also worth noting how early research from Schilt and Wiswall (2008), for example, shows ‘a substantial and statistically significant decrease in earnings’ (up to a third) for trans women after transition, but either no change or a slight increase in earnings for trans men after they transition (p18-19), further indicating that child-bearing cannot adequately explain gender pay discrepancies. Thus, the causes of unequal pay are multi-dimensional; pay differentials are also attributable to stereotyping, resulting from the socially constructed gender roles, and historical disadvantage, neither of which are reducible to a ‘motherhood’ or ‘sex-based’ (as discussed in section 2c below) explanation for unequal pay.

b. Sex and gender in the Gender Recognition Act 2004

To reiterate, nowhere in law is there a single definition of either sex or gender. The GRA sets out the framework for changing sex and gender. A successful application to the Gender Recognition Panel results in the granting of a Gender Recognition Certificate (GRC), allowing the applicant’s sex and gender to change (section 9(1)), although nowhere does the statute define either term.

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In drafting the GRA, the UK Government did not enshrine the *Corbett* definition of sex in statutory form. It responded to the European Court of Human Rights' finding in *Goodwin* that a purely biological definition of sex was out of step with thinking across Europe and beyond. In determining the sex of trans people, said the ECtHR, social roles and psychological traits also had to be considered (for critical discussion of the GRA see Cowan et al 2009).

In allowing a successful applicant to change the sex marker on their birth certificate, the GRA confirms that for the purposes of the law, sex *can* be changed. This shows is that the term 'sex' means different things in different contexts, and in fact may not have a meaning beyond the qualifying term preceding it (see also the recent US Supreme Court case *Bostock v. Clayton County* (590 U.S. (2020)) on the meaning of sex and gender in US employment law).

Law is sometimes created in a piecemeal and sometimes flawed way that can leave many important categories vague and imprecisely defined. It can also be interpreted in a seemingly inconsistent way, but this is because flexibility is necessary in some contexts. Concepts are sometimes left open-ended so that those interpreting and applying law can adjust meaning to the specific situation in which they are used. For example, as noted, section 7 of the 2010 Act, on the protected characteristic of gender reassignment, refers to 'physiological *or other attributes of sex*' (emphasis added). It is possible that courts in future may interpret this to mean that sex, for the purposes of the 2010 Act, is not a purely physiological concept.

Law's categories and concepts evolve. Sex and gender are two such examples. In the following sub-section, we demonstrate why sex and gender may not be as separable in law as Murray et al's claims suggest.

c. Sex and gender in the Equality Act 2010

The Equality Act 2010 applies across the whole of the UK, consolidating and updating previous UK law on discrimination such as the Race Relations Act 1965 and the Sex Discrimination Act 1975. The 2010 Act safeguards against discrimination that occurs on the basis of a protected characteristic. Currently there are 9 protected characteristics, including sex (section 11) and gender reassignment (section 7), which are the two most relevant here.

Trans people can make a claim of discrimination relying on one or both of these protected characteristics, depending on the circumstances of their case (*Brook v Tasker* 2014 (Law Centres Network 2014)). The Act protects against four basic forms of discrimination (direct, indirect, harassment, and victimisation), though Murray et al do not distinguish between these forms.

Regarding sex discrimination, Murray et al take as their definition of sex 'physical sex as observed and recorded at birth' (p264). This is clearly a genital-based definition of sex, since no simple observation at birth can record either chromosomes or definitively confirm the presence of testes, ovaries, both or neither (and sometimes simple observation of genitals is not definitive either). Murray et al say that women, for them, are the category of people

who have 'F' recorded on their birth certificate, and have the biological characteristics of a female. Though they do not specify what these biological characteristics are, they refer to 'physiological attributes', which again is presumably related to genitals, and the ability to reproduce. They warn that anyone who might be offended by their interpretations is probably only demonstrating their point that current usage has wandered too far from the intentions of the Act and that this is the problem they want to highlight (p264).

However, the meaning of sex and gender in the 2010 Act is less stark than Murray et al's definitions might suggest. On the question of interpretation of sex and gender, the 2010 Act says 'woman' is a female of any age and 'man' is a male of any age. Female and male are not defined in the legislation. The Act does not specifically state whether the protected characteristic of sex is based on biological characteristics, such as genitalia or chromosomes, or based on gender as a social category, or some combination of the two. But it does give some guidance. Section 7, on the protected characteristic of gender reassignment, refers to 'physiological or other attributes of sex' (emphasis added).

Although the 2010 Act only mentions the protected characteristic of sex, rather than gender, sex discrimination legislation has long 'read in' gender discrimination. That is, not only does the legislation offer protection against discrimination on what might be called biologically-linked grounds, such as pregnancy (in fact pregnancy and maternity are also explicitly protected by sections 17 and 18 of the 2010 Act as well as under sex discrimination claims), it also protects those who have been subjected to gender-based discrimination, for example relating to assumptions about who provides healthcare. In *Burden v Chief Constable of Hampshire Constabulary* WL 12591122 (2015) for example, a tribunal held that an employer's provisions, criteria and practices, individually or cumulatively, indirectly discriminated against female employees who were more likely to have childcare responsibilities.¹ Thus, the concepts of sex and gender are so interrelated – as indeed are sex and gender types of discrimination – that often *both* are in play when we are talking about discrimination.

Inevitably, therefore, there is a certain amount of slippage between the terms 'sex' and 'gender' in the application of discrimination law, and it is not clear that the 2010 Act does, or was ever intended to, categorically separate sex and gender in the way that Murray et al imply. In any event, even if Act was ever intended to define clear, distinct concepts, no decision-maker can rely on the law to remain static in meaning, in the hope that society will do the same. Judicial decisions do sometimes depart from existing law: this was how the exemption against rape in marriage was abolished in Scotland (*S v HMA* 1989 SCCR 248). Therefore, a law, whether statute or common law, and irrespective of the original intention of its creators, is always open to reinterpretation.

This is not to argue that there are no biological differences between people, or indeed that there is no difference between physiological characteristics on the one hand (such as having/not having a womb) and socialised traits on the other (whether someone is/is not a good parent). Rather, our point is that not everything hangs on or is reducible to biology,

¹ See <https://1mcb.com/police-sergeant-secures-reinstatement-following-successful-indirect-sex-discrimination-claim/>

particularly where biology means physiology. This is particularly true in discrimination law, where the rules, and how they are applied in practice, reflects the complexity of experience.

3. Sex and gender discrimination and exceptions under the Equality Act 2010

In this section we evaluate Murray et al's claims about the 2010 Act, beginning with their understanding of sex discrimination, before moving on to their representation of the exceptions to protections against discrimination. Note that the 2010 Act applies across all jurisdictions of the UK.

a. Sex discrimination

Murray et al state that: 'From a legal and policy perspective, the argument that a trans woman should be treated as a woman sits uneasily with the Equality Act 2010, as it renders sex irrelevant as a protected characteristic' (p266).

It is not clear what is meant here. This statement seems to follow from the assumption that the Act incorporates the definition of sex adopted by Murray et al (discussed above in section 1), despite no conclusive evidence to support this assumption. We suppose they mean that treating a trans woman as a woman somehow undermines the sex-based protections for non-trans women, so let us proceed on that basis.

Since the Gender Recognition Act was introduced in 2004, a trans woman with a gender recognition certificate is treated as a woman. Section 9(1) says: 'Where a full gender recognition certificate [GRC] 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)'. Clearly, then, a trans woman with a GRC can claim sex discrimination protections under the Equality Act, as a woman.

Even a trans woman *without* a GRC can be protected from sex discrimination under the 2010 Act. Section 13 of the 2010 Act, which contains the definition of *direct* discrimination, covers cases where less favourable treatment occurs because someone is wrongly thought to have a protected characteristic (commonly referred to as 'discrimination by perception' or 'perceived discrimination'). For example, imagine a service provider who does not know that a woman is trans, but perceives her as non-trans, and treats her less favourably than a man. This trans woman could claim sex discrimination, even if she does not have a GRC, because she has been perceived as a woman and treated less favourably on that basis.

It is not obvious why the fact that these legal protections are available to trans women, whereby trans women can bring discrimination claims for the protected characteristic of sex, 'renders sex irrelevant as a protected characteristic', as Murray et al claim. Perhaps their intended meaning is that the Act, in allowing trans women to access sex discrimination protections, precludes non-trans women from accessing the same protections. But this is plainly not so. Allowing a trans woman to claim sex discrimination does not hinder the operation of the sex-based protections for anyone else.

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It is possible that Murray et al are arguing that a trans woman should not be treated as a woman – i.e. should be denied the protections of the 2010 Act – if her presence poses some sort of risk or threat to other women, for example in a sex segregated space, such as a women’s shelter. Again, even if that were true, it is not clear how this argument ‘renders sex irrelevant as a protected characteristic’ under the Act.

Under Schedule 3 paragraph 28 of the 2010 Act, a service provider can offer a single-sex service without contravening the provisions that protect trans women on the basis of gender reassignment, if doing so is ‘a proportionate means of achieving a legitimate aim’. This allows service providers to exclude trans women, in certain circumstances, whether or not they have a GRC. We will explore these exceptions to the general protections against discrimination more fully in the next sub-section. For now, the point we wish to make is that, irrespective of whether or not a trans woman is excluded from service provision, it is not evident how this undermines the general operation of the sex-based legal protections, or renders them ‘irrelevant’ for non-trans women.

Murray et al’s sentence would make sense if rewritten as follows: ‘From a legal and policy perspective, the argument that a trans woman should be treated as a woman sits uneasily with the Equality Act 2010 as it renders *birth genitals* irrelevant as a protected characteristic’. But as we have already said, sex discrimination protections extend to more than just anatomy-based instances of discrimination. Read in the only way that makes sense, Murray et al’s argument either ignores the gender-based aspects of sex discrimination claims, or reduces all forms of gender-based discrimination (such as the gender-pay gap) to sex-based claims. This reduction is also evident in the following sentence: ‘Under section 11, sex is a protected characteristic. For almost everyone this is biological sex, as originally recorded on the person’s birth certificate’ (p267). The sentence implies only sex, and not gender, is protected by sex discrimination legislation. It would be a sorry and retrograde state of affairs if that were true, but it is self-evident that UK law and how it is applied in practice is much more complex, and much better equipped, to help protect against different sorts of sex discrimination.

b. Discrimination exceptions

We spend considerable time analysing Murray et al’s argument here because it is a technical area of law that they and others have misunderstood or misrepresented, and it is important to clarify the current law as it stands.

i. Legislation and the Statutory Code of Practice

Murray et al claim that ‘The [2010] Act **does not provide that those with the characteristics of gender reassignment have a general right of access** to single-sex spaces and services based on gender self-identification, despite a common and influential assumption that it does’ (p268, emphasis added).

In effect, the protections enshrined in the 2010 Act do just that, as is explicated by the provisions of the Act itself, and the Statutory Code of Practice: Services, Public Functions,

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and Associations, developed by the Equality and Human Rights Commission (EHRC, 2011) for service providers and employers.

Tellingly, the 2010 Act provisions allowing for trans women to be excluded from services, without it constituting discrimination, are called 'exceptions'. Paragraphs 26 and 27 of Schedule 3 of the Act deal with sex discrimination exceptions, and paragraph 28 deals with gender reassignment exceptions. The default position, therefore, is that you cannot discriminate. If they disagree, Murray et al might have explained the basis on which they have arrived at their understanding of the legislation. The 'common and influential assumption' that they describe is in fact authoritative statutory guidance.

Schedule 3 paragraph 28 says:

(1) A person does not contravene section 29 [provision of services], so far as relating to **gender reassignment discrimination**, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.

(2) The matters are—

- (a) the provision of separate services for persons of each sex;
- (b) the provision of separate services differently for persons of each sex;
- (c) the provision of a service only to persons of one sex.

A service provider can therefore lawfully exclude a trans woman only if they can show that the exclusion relates to the matters mentioned in paragraph 28 (2), *and* that it is a proportionate means of achieving a legitimate aim. This makes the exceptions rather narrow.

Under Schedule 3 paragraphs 26 and 27, the **exceptions relating to sex discrimination** in the provision of separate services and single sex services are even narrower. The service provider must again show that providing separate or single-sex services is a proportionate means of achieving a legitimate aim. But under paragraph 26, in providing separate services for the sexes, they also have to show that providing joint services would be less effective. Further, according to paragraph 26 (2) (the provision of separate services differently), the service provider must show that it is not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex. And under paragraph 27 (single-sex services), the service provider also has to meet all of the conditions set out under sub-paragraphs 2-7.

Thus, the provisions of the 2010 Act set in place stringent criteria that must be met in order for a service provider to exclude anyone (either on the basis of gender reassignment or sex) from separate or single-sex services. The Statutory Code of Practice is also clear, at paragraph 13.57, that:

If a service provider provides single- or separate sex services for women and men, or provides services differently for women and men, **they should treat transsexual people according to the gender role in which they present.**

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(EHRC 2011 para 13.57, emphasis added).

While not legally binding, the Statutory Code of Practice has authoritative force, and must be considered by a tribunal or court when deciding on discrimination claims. If the Code is ignored by a service provider an adverse inference can be drawn.

In practice, the exceptions are used rarely. In fact, women's services in Scotland that provide shelter and other sex-specific services have been trans-inclusive for around 7 years (Stonewall 2018; Scottish Women's Sector 2018). This is not to say that the exceptions could never be relied upon, but as Murray et al rightly note (p268), Dunne and Sharpe (2019) have stated that the threshold of 'legitimate' and 'proportionate' is high. Murray et al describe this as merely Dunne and Sharpe's 'understanding'. Yet Dunne and Sharpe's 'understanding' is based on what the Code of Practice for Service Providers actually states:

[A]ny exception to the prohibition of discrimination must be applied as **restrictively as possible** and the 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... Also, the provider will need to **show that a less discriminatory way to achieve the objective was not available**. (2011 para 13.60, emphases added).

This is known as the proportionality test, i.e. 'a proportionate means of achieving a legitimate aim' (*Bilka-Kaufhaus GmbH v Weber von Hartz* (C170/84) [1986] 2 CMLR 701, ECJ), and is well established in UK law (see for example *Allonby v Accrington & Rossendale College and others* [2001] IRLR 364 (HL)). This means in practice that, as the Code states, a service provider should take a case-by-case approach, rather than making blanket exceptions. Given the dearth of case law in this area, what case-by-case means in practice in the trans context has not yet been tested in court in the ten years that the 2010 Act has been in force.

Neither the detailed legislative provisions described above, nor the authoritative Code of Practice are cited by Murray et al. By depicting Dunne and Sharpe's position (that the bar for establishing an exception is high) as an 'understanding', they risk misleading readers unfamiliar with the law. Their failure to cite applicable legislation and guidance, and/or research/authorities in support of their position, suggests of a lack of rigour in their scholarship and, regrettably, results in an argument wanting in accuracy and balance.

When they also state:

In practice, many organisations and service-providers within Scotland already operate on the basis of gender self-identification, thereby ignoring the protections based on sex available in the Equality Act. For some, this is a conscious choice to provide 'inclusive' services, although such decisions may be shaped by Scottish Government funding arrangements that are conditional on including transwomen (Engender, 2018a: para. 2.4) (p269),

Murray et al imply that the organisations concerned are exercising a discretionary choice. However, by treating trans people according to the gender in which they present, *organisations are simply applying the law*. In addition, the Engender reference cited by the authors is not only wrong (there is no paragraph 2.4), it also omits a clarifying caveat from Engender² that ‘our funding from Scottish Government does not require any of us to adopt any particular policy positions, and that we have autonomy with regard to the content of our policy advocacy’. This appears to be either misrepresentation, or poor academic research on Murray et al’s part.

ii. Equality and Human Rights Commission (EHRC) guidance on the Equality Act exceptions

Murray et al go on to argue that Dunne and Sharpe’s view – that the bar for establishing an exception is high – and the view that inclusion of trans people is a settled matter, is inconsistent with EHRC advice (p268).

The EHRC advice Murray et al refer to is a paragraph from an EHRC (2018) statement, which reads:

Under the Act, the **protection from gender reassignment discrimination** applies to all trans people who are proposing to go, are undergoing or have undergone (part of) a process of gender reassignment. At the same time, **a trans person is protected from sex discrimination** on the basis of their legal sex. This means 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, and a trans woman with a GRC would be treated as female. **The sex discrimination exceptions in the Equality Act therefore apply differently to a trans person with a GRC or without a GRC** (emphasis added).

First, with all due respect to the EHRC, this paragraph inaccurately represents the 2010 Act, not least because, as noted above, the 2010 Act extends to direct discrimination based on perception, and so any trans woman, with or without a GRC, who was treated unfairly on the basis that she was a woman would be able to claim sex discrimination.

It is misleading of Murray et al to refer solely to this statement and not to the 2010 Act or the Statutory Code of Practice. The statement has less legal weight than legislation or the Code of Practice. It is to statutory authorities that courts and service providers ought to refer in the first instance, not an (erroneous) statement indicative of the EHRC's current position.

Murray et al claim that the Dunne and Sharpe view (i.e. that the bar for establishing an exception is high) is inconsistent with the EHRC statement. However, they do not explain *why* they think this. Indeed, the extract they quote from the statement does not say anything about the bar for establishing exceptions. Neither do they explain why the view

² See <https://www.engender.org.uk/news/blog/letter-to-joan-mcalpine-msp/>

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that the inclusion of trans people is a settled matter is inconsistent with the ERHC statement (p268). The extract they quote from the statement does not speak to this point either.

As already noted, the inclusion of trans people *is* a legally settled matter. Trans people are not to be discriminated against unless there is reason to do so under an exception to that general rule. As yet, there is little case law examining how the exceptions are to be applied, and it may be, of course, that the absence of such case law suggests that the legal position is straightforward, and that how the law applies in practice has yet to give rise to any issues or concerns for service providers and service users.

Importantly, Murray et al further misunderstand or misrepresent the EHRC statement when they state that it ‘indicates **only those with a GRC have any basis for seeking admission to single-sex provision**’ (p268, emphasis added). The statement – and crucially, the Statutory Code of Practice and the 2010 Act itself - indicate no such thing.

Trans women can seek admission to a single-sex service regardless of whether they hold a GRC. As already pointed out, the Statutory Code of Practice at paragraph 13.57 says trans women seeking services are to be treated according to how they present rather than on the basis of their possession of a GRC: ‘If a service provider provides single- or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present’ (Code of Practice p. 197, para 13.57). The Code does not say that a trans person must have a GRC to be treated in this way.

Although, as explained above, trans women may be refused access to a service under very narrow exceptions, the Equality Act says nothing about GRCs in its exceptions, and neither does the Code; in other words, the law does not distinguish here between those who have GRCs and those who do not. Trans people can access services available to the gender in which they present, regardless of whether or not they have a GRC, and they can also be excluded under an exception, regardless of whether or not they have a GRC (see also Sharpe, 2020).

The EHRC statement that Murray et al refer to does identify a distinction in relation to the protections from sex discrimination, depending on whether or not the claimant has a GRC. But there are issues with the accuracy and clarity of the EHRC statement itself here. The paragraph in question, quoted above, begins by referring to protections from discrimination for trans people on the basis of the protected characteristic of *gender reassignment*, where establishing a claim is not dependent upon the trans person having a GRC. Then it moves on to the separate issue of discrimination against trans people on the basis of the protected characteristic of *sex*. Here it says that the protections differ according to whether a trans person has a GRC or not (and in doing so omits to consider perceived discrimination). After stating that a trans person is protected from sex discrimination on the basis of their legal sex, it confusingly concludes that ‘The sex discrimination exceptions in the Equality Act *therefore* apply differently to a trans person with a GRC or without a GRC’ (emphasis added). But this is incorrect. As explained above, the Schedule 3 exceptions relevant to sex discrimination (contained in paragraphs 26 and 27) under which a service provider might, in

certain limited circumstances, lawfully exclude a trans person contain no mention of GRCs. And the logical connection implied by ‘therefore’ in the final sentence is non-existent.

It is essential to highlight this crucial point, because the EHRC’s inaccurate statement that ‘[t]he sex discrimination exceptions in the Equality Act therefore apply differently to a trans person with a GRC or without a GRC’, is the basis of Murray et al’s erroneous claim that ‘only those with a GRC have any basis for seeking admission to single-sex provision’ (p268).

In the next section we focus on Murray et al’s claims about the Scottish Census 2021.

4. The Scottish Census 2021

Murray et al worry that a ‘precedent’ might be set for how sex is understood as a policy and legal category in Scotland in the future (p263), if the Scottish Census 2021 includes a question about sex that allows people to answer in the sex they identify with, irrespective of the sex marker on their birth certificate.

Historically, the census has recorded the sex of respondents. Previous censuses in both England and in Scotland asked respondents to record their (binary) sex, and allowed trans people to answer the question in a way that reflects their self-identified gender regardless of the sex as recorded on their birth certificate (for discussion of the English census see Sullivan (2020) and Hines (2020)). This has been accepted practice for two census cycles and was formally codified in the guidance for the sex question for the 2011 Scottish census.

During committee hearings in the Scottish Parliament on a bill to make proposed questions on sexual orientation and transgender status/history in the 2021 census voluntary, concerns were raised about the practice of allowing trans people to self-identify on the census (Culture, Tourism, Europe and External Affairs Committee 2019, paragraphs 84-89). Self-identification was opposed for various reasons, including the fear that we would lose potentially important sex-based data and the possible ‘significant implications for the legal understanding of sex’ or ‘women’s interests’ (Murray et al, p272).

It is not clear what the significant implications would be here since Murray et al do not explain. It may be that they fear a precedent will be set, one that will not work in other contexts. But, as suggested above in section 2, different areas of law at different times have taken different approaches to the meaning of sex – including only biology, as in the case of *Corbett*, or some social and psychological traits, as in the case of *Goodwin*, and it may well be that in other cases sex and gender are intimately interwoven, as in intersectional discrimination cases (section 14 of the 2010 Act). There is no reason to think that the law would or should be forced to choose one single definition of sex or gender that will stand in every context.

What Murray et al would seem to prefer the census to do is ask respondents to state the sex that was recorded on their birth certificate. This means we are asking people to record the sex that the doctor or nurse deemed them to be, having inspected their external genitals post-partum, usually in the first few days after birth. This is the definition of sex that the

authors themselves use in the article (p264). But this is *genital sex*, which clearly *can* be changed.

Therefore, if ‘biological’ sex cannot be changed, as some feminists, such as Murray et al, would argue, biological sex must mean something more than genital sex – most probably some combination of genitals, hormones, gonads and chromosomes. Note of course that these are constituent factors currently considered to be relevant to the designation of sex, but this has not always been the case; science has shifted its idea of what constitutes sex over time (see for example Ainsworth 2015). This process is ongoing, and it is unlikely that science – and /or other discourses – will ‘freeze’ their idea of what constitutes sex for all time. In any case, very few of us actually know what combination of these characteristics we have, unless we have been tested, for example, for a sex chromosome linked condition, such as haemophilia, or where there is evidence of ‘ambiguous’ or a combination of sex organs.

Ascertaining someone’s sex, for the purposes of Murray et al’s argument, then, just means knowing what the outward appearance of their genitals was when they were born. Of what use this is to the census remains to be seen. But it seems overly reductive to ask people to identify themselves solely on the basis of externally visible body parts.

In setting out an argument in favour of a sex rather than gender question in the Scottish census, Murray et al have not offered as clear an analysis as we might have hoped. For example, they state:

While badged as inclusive, the current attempt to put the principle of gender self-identification on a statutory basis risks setting a legal precedent that will challenge the very basis of the Equality Act 2010. If the argument that it is wrong in principle for organisations to identify a person’s legal or biological sex is applied more widely, it will make the practical operation of the Act unworkable in relation to the protected characteristic of ‘sex’ (p275).

There are several problems with this argument, and we will examine each sentence in turn.

a. ‘Gender self-identification on a statutory basis’

In the first sentence, Murray et al say that the ‘current attempt to put the principle of gender self-identification on a statutory footing’ is a ‘precedent’ that ‘challenges the basis of the EA 2010.’

Gender self-identification has had a statutory footing since long before the Equality Act 2010.

Before the 2010 Act, the Sex Discrimination Act 1975 had been amended by regulation in 1999 to include gender reassignment within ‘sex’ discrimination claims (Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102) (Gender Reassignment Regulations)). Those were prompted by the ECJ decision in *P v S and Cornwall County Council* [1996] IRLR 347. The Court held that Article 5(1) of the EU’s Equal Treatment

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Directive (76/207/EEC) extended the right not to be discriminated against on grounds of sex to discrimination arising out of gender reassignment, since to dismiss a person on the ground that they intended to undergo, or had undergone, gender reassignment was to treat them unfavourably by comparison with persons of the sex to which they were deemed to belong, before their reassignment. In consequence, those undergoing gender reassignment have been able to bring a claim of sex discrimination since 1999. Those presenting in a self-identified gender were protected on a statutory footing within the category of sex. This shows a long line of legal authority, stemming from European law, rather than a history of Scottish 'policy capture'.

It follows that Murray et al's first sentence does not make sense, and in addition gives a false impression of conflict between a census that introduces protections for self-identifying trans people (when in fact these protections have been around for a long time), and the 2010 Act (which already protects trans people in their self-identified gender).

b. If we can't identify sex ... does it makes the Act unworkable?

Murray et al's second sentence reads: 'If the argument that it is wrong in principle for organisations to identify a person's legal or biological sex is applied more widely it will make the practical operation of the Act unworkable in relation to the protected characteristic of 'sex'.

It is not clear what organisations Murray et al are referring to here. In practice, most institutions and organisations do not as a matter of course identify a person's legal or biological sex. More often than not, they identify a person's sex through perception, and/or through self-identification. For example, an employee is required to show either a birth certificate or a passport / visa / residence permit, to demonstrate a right to work in the UK,³ but there is no way to tell whether a birth certificate or passport is the original document or one amended through the gender recognition process, and no one is under an obligation to confirm or deny whether the sex marker on their birth certificate is the same now as it was originally (under s22 of the GRA, it is also an offence to share confidential information about someone's GRC without their consent – for discussion see Sharpe, 2020).

Again, it is not obvious what Murray et al mean when they write that not being able to 'identify a person's legal or biological sex...*make(s) the practical operation of the Act unworkable in relation to the protected characteristic of "sex"*' (emphasis added). Since they use sex in a narrow 'biological' sense (see above in section 1), the sentence implies that the Act only protects sex discrimination claims that relate directly to genital sex recorded on the birth certificate, which as we have seen is incorrect. It is unclear what is meant by 'unworkable' here, or why not being able to 'identify' sex might make gender-based or genital-based discrimination 'unworkable'. The meaning is not made any clearer by the context, or the following sentences, where Murray et al move on to make further, different points that shed no light on the issue.

³ See <https://www.nidirect.gov.uk/articles/evidence-support-your-right-work-uk>.

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The question must be asked then, what would the actual impact be of using sex self-identification on the Scottish census? Requiring all trans people to answer the census using only their sex assigned at birth or as registered on their birth certificate would force some to answer in a manner that fundamentally denies the reality of their everyday lives. This would lead to an erosion of trust by trans people in both the census and the Scottish Government that authorised it. The lack of trust would also almost certainly mean that trans people would not feel safe to honestly answer a question about their trans status/history. In those circumstances, it would be impossible to predict how many trans people would follow the guidance, or simply not answer the census at all.

Conversely, allowing self-identification would greatly improve the probability that trans people would answer both the sex and the trans status/history question accurately. This would still allow a service provider like the NHS to take the total number of people who answered female and said yes to the trans status/history and subtract this number from the total number of people who answered female, with simple maths determining roughly how many people were born with cervixes and need to be reminded to get a smear test.

In January 2020, National Records of Scotland, the organisation which manages the Scottish Census, released a statement confirming that they were recommending keeping a binary sex question. They also recommended a single question for trans people to record their trans status (NRS 2019, 28, 32). The census regulations were passed and came into force on 12 March 2020, with the NRS recommended questions included.⁴

5. Conclusion

There are many reasons to be concerned about Murray et al's article. Some relate to its lack of academic rigour. Other than one brief reference to a chapter in an edited collection, it does not cite peer-reviewed references; instead references are made only to news articles, personal blogs and institutional reports. This is a serious concern in an article advancing arguments that rely on emphatic claims such as '[g]ender identity may be understood as either a person's strong sense of how 'masculine' or 'feminine' one is, or a person's own belief about whether one is a man, woman or non-binary' (p265). This claim is not evidenced through any peer-reviewed literature about how trans people actually regard gender identity, or how gender identity operates or is regulated in law. Instead, Murray et al cite Stock (2018) as their source here, though no such reference appears in the bibliography. The 2019 Stock reference that is cited is not a peer reviewed source but there are countless peer reviewed publications that discuss these issues (see, diversely, for example, Koyama (2003), Whittle and Turner (2007), Bettcher (2009), Serano (2016), Jenkins 2018). The absence of peer-reviewed sources also undermines the authority of empirical claims such as, for example, '[t]he so-called "gender pay gap" is largely a "motherhood penalty", while sexual violence and domestic abuse can be related to the lower status ascribed to the female class' (p265, where the referenced source is a TUC document). There are also glaring inaccuracies and discrepancies within the article. Clearly it lacks the kind of thoroughgoing review of literature or attention to detail that academic rigour demands.

⁴ See <https://www.scotlandscensus.gov.uk/census-order-0>.

Murray et al's general argument is that 'policy capture on gender identity has undermined the rights and interests of women' (p265). This is weakly supported: they fail to clearly identify any way in which protections from sex discrimination have been undermined. Their legal arguments are reliant upon misinterpretations and selective quotations from statute and case law, without considering alternative interpretations or undergoing more thorough analyses. Further they give no consideration to how institutions in Scotland have been adhering to legal protections for decades.

Authors in this field should exercise care when making categorical statements on these issues, in order to help prevent erroneous interpretations that jeopardise the protection of those who are vulnerable and most exposed to unlawful discrimination. One would hope that a common objective of those working on equality might be to ensure that people better appreciate the protections in the 2010 Act. With this objective in mind, we should all strive towards helping improve the general understanding of how the law in this area has been – and should be – interpreted.

Trans people across the UK - who are a small and vulnerable minority of the population - have had legal protections against discrimination for many years. They have been protected from discrimination based on how they present - i.e. on the basis of self-identification (not their genitals) - since gender reassignment was added to the Sex Discrimination Act 1975 as a specific ground of protection (by the Sex Discrimination (Gender Reassignment) Regulations 1999).

The Equality Act 2010 is consolidating and reforming legislation that builds upon these previous laws. We have argued at length above, pointing to specific examples, that Murray et al's arguments about the application of the Equality Act 2010 are not built on rigorous scholarship but on a selective reading and misinterpretation of the relevant law. We do not agree with their conclusion that recent 'policy capture' demonstrates "single-minded ideologically-driven lobbying" that threatens "democratic policy making" in Scotland (p285), since this representation ignores the gradual shifts in law and policy across the UK over at least the last two decades, and, particularly with respect to the GRA and the 2010 Act, the processes of scrutiny and consultation that accompanied them.

References

Ainsworth, C. (2015). Sex, Redefined. *Nature* <https://www.nature.com/articles/518288a>, 18 February 2015

Bettcher, T. (2009). Trans identities and first-person authority. In L. Shrage (ed.), *You've Changed: Sex Reassignment and Personal Identity*, 98–120. Oxford: Oxford University Press.

Cowan, S. Sandland, R. and Sharpe, A. (2009). Debate and dialogue – The Gender Recognition Act 2004. *Social and Legal Studies*, vol. 18(2) 241-263

Culture, Tourism, Europe and External Affairs Committee. (2019). Stage 1 Report on the Census (Amendment) (Scotland) Bill. Available at <https://sp-bpr-en-prod-cdnep.azureedge.net/published/CTEEA/2019/2/7/Stage-1-Report-on-the-Census--Amendment--Scotland--Bill/CTEEAS052019R1.pdf>.

Culture, Tourism, Europe and External Affairs Committee. (2018). Census (Amendment) (Scotland) Bill - supplementary submission from: Prof. Rosa freedman, University of Reading. Available at: www.parliament.scot/S5_European/Inquiries/CTEEA_CensusBill_ProfFreedmanRosa_CTEEA_S5_18_CB_24.pdf

Davies, C. (2019). Asda shopworkers win landmark ruling in equal pay dispute. Available at: <https://www.theguardian.com/society/2019/jan/31/asda-shopworkers-win-landmark-ruling-equal-pay-dispute>

Dunne, P. and Sharpe, A. (2019) Gym use and changing rooms: the illegality and chilling effect of (trans)gender segregation. Available at <https://ohrh.law.ox.ac.uk/gym-use-and-changing-rooms-the-illegality-and-chilling-effect-of-transgender-segregation/>.

Equality and Human Rights Commission. (2011). Services, Public functions and Associations: Statutory Code of Practice. Available at <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>

Equality and Human Rights Commission. (2018). Our statement on sex and gender reassignment: legal protections and language. Available at: <https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language>.

Hines, S. (2020). Counting the cost of difference: a reply to Sullivan. *International Journal of Social Research Methodology*. Available at: <https://doi.org/10.1080/13645579.2020.1768344>

Jenkins, K. (2018). Toward an account of gender identity. *Ergo: an Open Access Journal of Philosophy*, vol. 5(27). Available at: <http://dx.doi.org/10.3998/ergo.12405314.0005.027>.

Written evidence submitted by Professor Sharon Cowan [GRA1544]

Koyama, E. (2003). The Transfeminist Manifesto. In R. Dicker and A. Piepmeier (eds.) *Catching A Wave: Reclaiming Feminism for the Twenty-First Century*, 244-262. Boston: Northeastern University Press.

Law Centres Network. (2014). Kirklees Law Centre wins landmark transgender discrimination case. Available at: <https://www.lawcentres.org.uk/policy/news/news/kirklees-law-centre-wins-landmark-transgender-discrimination-case>

Murray, K., Hunter Blackburn, L., and Mackenzie, L. (2019). Losing sight of women's rights: policy capture and public policy. *Scottish Affairs*, vol. 28(3) 262-289.

Murray, K. and Hunter Blackburn, L. (2019). Losing sight of women's rights: policy capture and public policy. Holyrood. 29 April 2019. Available at https://www.holyrood.com/comment/view,losing-sight-of-womens-rights-policy-capture-and-public-policy_10632.htm.

National Records of Scotland. (2019). Scotland's Census 2021 Sex Question Recommendation Report. Available at: [https://www.scotlandscensus.gov.uk/documents/Scotland's%20Census%202021%20-%20%20Sex%20question%20recommendation%20report%20\(2\).pdf](https://www.scotlandscensus.gov.uk/documents/Scotland's%20Census%202021%20-%20%20Sex%20question%20recommendation%20report%20(2).pdf)

Serano, J. (2016). *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (2nd ed.). New York: Seal Press.

Sharpe, A. (2020). Will gender self-declaration undermine women's rights and lead to an Increase in harms? *Modern Law Review*, vol. 83(3). Available at <https://onlinelibrary.wiley.com/doi/full/10.1111/1468-2230.12507>.

Schilt, K. and Wiswall, M. (2008). Before and after: Gender transitions, human capital and workplace experiences. *The B.E. Journal of Economic Analysis & Policy*, vol. 8(1) 1-28. Available at <https://www.degruyter.com/view/journals/bejeap/8/1/article-bejeap.2008.8.1.1862.xml.xml>

Scottish Women's Sector. (2018). Review of the Gender Recognition Act 2004: a Consultation – Scottish Women's Sector Response. Available at: <https://www.closehegap.org.uk/content/resources/Scottish-Womens-Sector-response-to-the-consultation-on-proposed-changes-to-the-Gender-Recognition-Act.pdf>

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;

Sullivan, A. (2020). Sex and the census: why surveys should not conflate sex and gender identity. *International Journal of Social Research Methodology*. Available at: <https://doi.org/10.1080/13645579.2020.1768346>

Written evidence submitted by Professor Sharon Cowan [GRA1544]

Whittle, S. and Turner, L. (2007). 'Sex changes'? Paradigm shifts in 'sex' and 'gender' following the Gender Recognition Act? *Sociological Research Online*, vol. 12 (1). Available at <http://www.socresonline.org.uk/12/1/whittle.html>, doi:10.5153/sro.1511.

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