Written evidence submitted by Legal Feminist [GRA1830]

Legal Feminist is a collective of practising solicitors and barristers who are interested in feminist analysis of law, and legal analysis of feminism. Between us we have a wide range of specialist areas of law including employment, family, discrimination, immigration, public and criminal law. Our range of specialisms enables us to consider holistically the issues raised in the Call for Evidence (**CFE**), and our collective experience enables us to comment on the practical implications of some of those issues.

We are concerned that the questions in the CFE frame a number of sensitive issues through a single perspective only - namely that of transgender individuals. However, the Government has recognised that the Gender Recognition Act (**GRA**), particularly as it interacts with the Equality Act 2010 (**EA**), impacts multiple distinct classes and we believe that the voices of all of those classes need to be heard. The impact of any reform of the GRA beyond the Government's proposals would be felt most by some of the most vulnerable women in society, including victims of domestic violence and sexual assault and women in prison. The purpose of our response is to seek to amplify those women's voices.

We formed our collective as we became increasingly concerned by the way in which women's rights were being side-lined and as we recognised a reluctance on the part of human rights organisations and some established feminist institutions to acknowledge or examine the human rights conflicts affecting women. We are also aware of female lawyers who share our concerns within many well-known human rights organisations who are too intimidated to even raise the suggestion that their institution address this issue.

Our submission includes both evidence and detailed legal analysis. A summary of our response to each question is set out below.

SUMMARY RESPONSE

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

2. 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? Yes it should be retained. Many Government administered processes require fees. In 12 years only one member of the Gender Recognition Panel User Group has raised concerns about costs.

3. Should the requirement for a diagnosis of gender dysphoria be removed? No. This would lead to *de facto* gender self-identification. Robust gatekeeping is required for protection of women's rights; a gender dysphoria diagnosis should be required as a minimum in order to fulfil this need.

4. Should there be changes to the requirement for individuals to have lived in their acquired gender for at least two years? An individual should only be granted a Gender Recognition Certificate (GRC) following a medical diagnosis of gender dysphoria which has an adverse effect on the individual and is sustained over a substantial period of at least two years (whether or not the individual has in fact adopted clothing etc. stereotypically associated with the opposite sex). A standalone test based on "living in the acquired

gender" is unworkable since it is not objective. Any attempt to create objectivity based on such a criterion relies on retrogressive sexist stereotypes.

5. What is your view of the statutory declaration and should any changes have been made to it? Despite being a criminal offence under the Perjury Act 1911, no prosecution has ever been brought for making a false statement in a statutory declaration made for the purposes of obtaining a GRC. As noted in response to question 4, there is no objective standard to judge whether someone intended to "live permanently in the acquired gender". We consider that a more effective assessment should be considered to establish eligibility for a GRC (and that the sanction for perjury that currently exists should be replaced by a more effective sanction for any false application).

6. 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 spousal consent provision should remain. It is not a long term veto on the grant of a GRC; it is merely a short term protection for a spouse who could, against their will, find themselves in a fundamentally different marriage to the one they entered into.

7. Should the age limit at which people can apply for a Gender Recognition Certificate (GRC) be lowered? No. The grant of a GRC involves important legal consequences and a decision should only be taken when the individual is legally adult.

8. What impact will these proposed changes have on those people applying for a Gender Recognition Certificate, and on trans people more generally? Legal Feminist has no comment.

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

- An Equality Impact Assessment;
- Guidance to assist employers and service providers wishing to rely on the single sex exemptions and clear confirmation that women placed at a particular disadvantage by the failure to apply such exemptions may claim indirect discrimination;
- Guidance on when sex and gender must be treated differently;
- A bar to applicants with unspent conviction for VAWG offences (i.e. offences involving violence against women and girls);
- Consideration of the interaction with documentation for non-British nationals and specifically guidance on transgender asylum applicants.

10. Does the Scottish Government's proposed Bill offer a more suitable alternative to reforming the Gender Recognition Act 2004? The proposed Bill is not a suitable alternative, although it raises some issues which bear deeper scrutiny regarding capacity, the age at which a citizen could be considered to have capacity, whether a panel should be retained and circumstances under which a GRC might be revoked.

11. Why is the number of people applying for GRCs so low compared to the number of people identifying as transgender? The Gender Recognition Act 2004 was only ever intended to apply to a very small group of people suffering from gender dysphoria and who

underwent the process of gender reassignment. The transgender "umbrella" is much wider and includes people who have not transitioned, people who have no intention of transitioning, people who cross dress part time, people with autogynephilia, and people who identify as non-binary or gender fluid. The GRC process was never intended to be used by this wider group.

12. 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. Yes. The EA also contains important exceptions for the provision of single sex services and facilities in appropriate circumstances. It is unclear how these are intended to operate where an individual has been granted a GRC. Greater clarity should be provided in order to ensure that the rights of women and girls are protected. It is also unclear whether a woman can rely on a transwoman as a comparator under the EA, e.g. for the purposes of equal pay.

13. 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? These are important protections. Clarity as to how the provisions apply to GRC holders is required. Given that the rationale for these exceptions is based on biology (safety, security, privacy and fairness), it would be appropriate to suspend the impact of a GRC for the purposes of the single sex exceptions. More broadly, the proportionality requirements are difficult for individuals and organisations to interpret. They could be codified to create clarity and aid understanding, as they are elsewhere in statute.

14. Does the Equality Act adequately protect trans people? If not, what reforms, if any, are needed? Yes. The EA provides appropriate protection from discrimination and harassment. The rights of trans people are appropriately balanced with those of others in respect of the application of single sex exceptions (although guidance would be welcomed to assist individuals and organisations). The rights of trans people must also be balanced with the rights of others to freedom of speech. Trans people are entitled to dignity and respect; any restriction on the right of others to express their experience of the trans person's sex or its impact would nonetheless be an unreasonable encroachment on the rights of others. Similarly, the desire of trans people not to be offended should not be elevated above the rights of others to hold a belief in the scientific fact that biological sex is binary.

15. What issues do trans people have in accessing support services, including health and social care services, domestic violence and sexual violence services? All the above services are woefully underfunded generally, including for women. Appropriate provision of both single sex services and services for trans people are needed to ensure that women and girls have access to single sex services (where required), and trans people also have access to the services tailored to their specific needs.

16. Are legal reforms needed to better support the rights of gender-fluid and non-binary people? If so, how? No. Legislating to "recognise" non-binary gender identities, that is people's belief about themselves, in law, and to have this replace their actual / legal sex or take precedence over it, would impose unacceptable burdens on others to pretend not to

see someone's sex and to pretend to share in the beliefs of others, and would undermine women's sex-based rights and freedom of speech.

FULL RESPONSE

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

Yes. We also support the better trans healthcare provision. However, we question whether changes to the Gender Recognition Certificate (**GRC**) are necessary. Gender Recognition Panel User Group (**GRPUG**) statistics show that:

- 75% of applications for a GRC receive a decision within 20 weeks, and many within 6–11 weeks.
- Over 90% of applications are successful and receive a GRC.
- In User Group meetings between 2006 and 2018, few issues were raised with the cost, complexity or kindness of the process.

We recommend consideration of whether natal male (transwomen) and natal female (transmen) service users would benefit from separate services, ensuring the privacy and dignity of all service users and recognising that dysphoria in males and females may have different causes and treatments.

2. 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?

The fee should be retained. The application fee of £140 may in any event be reduced or removed if a fee remission applies (income under £20,000 pa) and this should be signalled more clearly.

Many Government processes incur application fees (as well as requirements for documentation, assessments, tests etc.). By way of comparison, an Adult Passport costs £75-£85 plus the same amount per renewal / replacement. Registration as a British citizen costs £1,206. Other fees are also involved, e.g. £50 for the Life in the UK test. Indefinite leave to remain costs £2,389.

Cost does not appear to be a significant issue for applicants; there was only one mention of the GRC being too costly in the GRPUG notes.

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

No. Removing the requirement for a gender dysphoria (or "gender incongruence") diagnosis would result in gender self-identification, which has already been rejected by the Government after an extensive open consultation.

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"Gender dysphoria" was recently removed from the WHO International Classification of Diseases list of mental illnesses, but was replaced with "gender incongruence" in a new section on "sexual health." It was not removed altogether because campaigners did not want it removed altogether as that would prevent people getting "treatment" funded by insurers. Those calling for the removal of the requirement for a diagnosis will no doubt continue to expect that the NHS should pay for their "treatment".

There is no public support for removing the requirement of a diagnosis. In a recent YouGov poll, 63% of all respondents and 67% of women respondents agreed that "a person should have to obtain a doctor's approval to change their legal gender". [1]

Our society and legal system recognise two sexes, male and female, with different needs based on their differing physical characteristics. Regrettably, men as a class pose a threat to women as a class, owing to greater size, physical strength and statistically greater propensity to violence. It is appropriate for society and the legal system to protect women.

Gender self-identification overturns those protections in unexamined ways. Every reference in statute or jurisprudence to female or male, girl, boy, woman, man, mother, father, daughter, son, sister, brother are references to binary, sexed bodies. The legal and policy implications of the redefinition of those words to include people of the opposite sex based on self-identification simply have not been thought through.

Hansard records the Gender Recognition Bill debates show (i) that the Government expressly did not intend the GRA to have the wide-ranging effects of today and (ii) that the GRA was expected to apply to only approximately 5,000 people.

Goodwin, which prior to the GRA was the leading case on gender recognition, noted (at §87) that there was no threat of *"overturning the entire system"* given that the number of transsexuals in the UK was estimated at only 2,000 – 5,000, and (at §91) that although there would be legal repercussions these were not insuperable "*if confined to the case of fully achieved and post-operative transsexuals."* Applying this logic, if gender recognition is not so confined, then the legal repercussions are likely to be insuperable and there may even be a threat of *"overturning the entire system"*

There should be a balance between the rights of women to single sex provision and the rights of transsexuals (the term used in *Goodwin*). Both are diminished if dysphoria is removed and replaced with gender identity to which societal consent is minimal, scientific consensus uncertain, legal opinion divided and some in the affected communities at loggerheads.

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

We consider that there should be a material and objective gateway to changing sex for legal purposes rather than self-identification. Nonetheless, there are two problems with the current requirement to live in the "acquired gender":

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[1] https://docs.cdn.yougov.com/ai3h3xvf7o/Transgender%20data%202020.pdf

1. It is insufficiently precise and so incapable of having any meaningful impact.
2. It creates difficulties for organisations in creating and maintaining single-sex spaces.

It is a fundamental principle of the law that it must be accessible, intelligible, clear and predictable. A requirement to "have lived in [an] acquired gender" is none of these, particularly in relation to the current medical focus of the GRA and also to self-identification.

"Living in an acquired gender" is a subjective concept, and one which relies on harmful and retrogressive stereotypes when an attempt is made at objectivity. Stereotypical gender roles are beginning to fade away; men have careers in fashion and beauty, or in childcare, or stay at home to raise their children whilst their female partner works. Likewise, a woman may eschew feminine beauty such as wearing makeup, eschew society's dress norms and/or pursue a career in (still) male dominated fields.

Recently, the Court of Appeal confirmed that a transman who gives birth is still the "mother" of the child, GRC notwithstanding.[2] Pregnancy and childbirth are intrinsically female acts, but no challenge was made to the status of the GRC in question.

How can the law prescribe what it is to "live in a gender" whilst remaining "*accessible, intelligible, clear and predictable"?* A GRC applicant must be able to understand the criteria they should meet and this criteria must not be offensively sexist or contradictory. The relevant eligibility criteria (whether the "lived in" concept as now, or an alternative replacement) should be sufficiently codified so that it can be applied equitably to all who seek to make an application.

Alternatively, the requirement to "live in an acquired gender" may refer to the use of a gender conforming title and name on utility bills and official documents. Such a requirement would be purely administrative and change nothing else about one's behaviours or presentation. In what sense do these basic changes amount to "living" as a particular gender?

The requirement to "live in an acquired gender" also brings a transgender person into conflict with those who require or provide a single-sex service. For example, an organisation that provides women-only changing facilities under the exemptions provided for in Part 7 of Schedule 3 of the Equality Act 2010 should refuse access to a transwoman who does not have a Gender Recognition Certificate and so whose sex is male. This would be a lawful decision on the part of the service provider. However, a decision to refuse access is likely to cause hurt and a sense of grievance to transwomen, who may have been led to believe that they need to access women-only spaces in order to demonstrate that they are living publically in their acquired gender.

It is therefore unsurprising that lobbying groups' have suggested that refusing transgender people access to the single-sex provisions of their acquired gender is unlawful discrimination. It has, regrettably, led to an unstated culture of self-identification effectively by stealth, as a result of service providers feeling unable to properly protect single-sex spaces as a result of misinformation and for fear of accusations that they have unlawfully discriminated against transgender people.

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[2] R (McConnell) v Registrar General for England and Wales [2020] EWCA Civ 559

We consider that demonstration to the relevant medical professionals and GRC panel of a sustained diagnosis of gender dysphoria is an essential qualifying criterion. However the current legal requirement to live in the "acquired gender" does not have any meaningful effect. We ask the Committee to consider whether there can be an alternative basis for assessing objectively whether someone meets the requirements.

5. What is your view of the statutory declaration and should any changes have been made to it?

Applicants for a Gender Recognition Certificate are asked to make a statutory declaration to confirm that they intend to "live permanently in the acquired gender until death". Under s 5 of the Perjury Act 1911, making a false statement in a statutory declaration is punishable by a fine or up to two years imprisonment.

Prosecution is unlikely, and indeed it is noted that there have been no such prosecutions since the Gender Recognition Act came into force. We refer to our response to question 4 above and note that the required statement lacks the requisite legal certainty for consistent and fair application.

Stonewall (in its particular desire to move to self-identification) would enable individuals to define their own gender identification in whatever way is meaningful to them. Objective criteria are removed. A prosecution for a false statement requires an objective standard against which it could be determined that someone is not 'living' as that gender. This is intrinsically incompatible with the idea of self-identification and self-determination of gender.

The declaration requires only an expression of intent at the time at which the declaration is made. This (quite properly) allows for the possibility of a change of heart and reversion to identifying with their sex. That would not render the statement of intent to be false at the time the declaration was sworn. It would therefore in practice prove very difficult to prove that someone had made a false declaration of intent, as opposed to later changing their mind.

Investigation for or a threat or prosecution for the making of a false statement could harm a genuine transgender person. A vindictive employer disgruntled by a claim for full maternity pay by a transman could make a complaint that by stopping taking testosterone, becoming pregnant and taking a year's maternity leave that transman was no longer 'living as a man'. Conversely, there would be difficulties prosecuting a man suspected of obtaining the GRC solely to gain access to women's single-sex spaces for voyeurism, if that person 'lived as a woman' by regularly wearing a dress and full make-up in public.

Our view is that as noted above, eligibility for a GRC should be based on a sustained diagnosis of gender dysphoria confirmed by two medical professionals. A provision to prevent a GRC from being obtained for false or fraudulent purposes is needed for public confidence in the scheme. For the reasons set out above, the current Statutory Declaration fails to achieve this. We ask the Committee to consider the adoption of an effective measure to prevent abuse as the current provisions only provide false reassurance.

6. 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?

Before same sex marriages were legalised in 2013, this issue only arose in the case where a transgender person who wanted to obtain a GRC was already in a heterosexual marriage. Since same sex marriages were not possible, they were required to end the marriage first. When same sex marriages were legalised in 2013, the law was changed to the effect that now, if a person wishing to change their legal sex is married, the marriage can continue, but only if their husband or wife consents. However if their spouse does not agree to the marriage continuing post GRC, it remains the case that the marriage must first be ended, either by divorce or by annulment, before a full Gender Recognition Certificate can be issued.

The Government Equality Office explained the position to this Committee when it last considered this issue only 5 years ago:

> "[The requirement for consent] does not mean anyone will have a right to prevent their wife or husband obtaining a legal gender change; simply that they will be allowed to decide whether they want their marriage to continue before gender recognition is granted. Marriage is a contract between two individuals and it is right that both spouses should have an equal say in their future when there is a fundamental change."[3]

We agree. Marriage is a contract requiring consent of both parties, so when the nature of the marriage changes fundamentally at the behest of one partner, both parties must agree for it to continue. In our view a change in the sex of one party is a fundamental change. If Mary agreed to marry Paul, and Paul now wishes to become Pauline, Mary should not, without her consent, find herself married to Pauline.

This provision is frequently misunderstood or misrepresented in the media or social media, and has been inaccurately described as a "spousal veto". It is not. Mary has no right to prevent Paul becoming Pauline. She just has a right to delay Pauline becoming legally female until the marriage has ended.

Trans Widow Voices refer to the consent requirement as a "spousal exit clause" rather than a "spousal veto" and we agree with that description. Mary should be entitled to decide whether she wishes to continue her marriage, or to end her marriage before Paul/Pauline's legal sex changes.

We do not agree with those who suggest that this provision is homophobic. Lesbians and gay men are same sex attracted, and we believe that many would also want the right to exit a marriage before they find themselves married to a person of the opposite sex without their consent.

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[3] https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/39006.htm, para.55

Accordingly we consider that the current arrangements provide an appropriate balance between the interests of the trans person seeking a GRC and their spouse (whether of the same or opposite sex).

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

The age limit should not be lowered. Grant of a GRC has extremely important legal consequences and should only occur where the individual is both sure that they wish to legally change their gender, and of a capacity to do so. The requirement to be 18 is therefore an important safeguard.

In the UK, individuals are not legally recognised as adult until age 18, and consequently it is not lawful to (for example) smoke or to have a tattoo. There is ample evidence that teenagers are prone to risk taking and do not reach full brain maturity until their 20s. It would be extraordinary to allow an individual to legally change their gender at 16 or 17, but not allow the entirely reversible decision to smoke.

The emotional distress of gender dysphoria may also make it more difficult for someone who is legally a child to make a final judgement about legal gender. This may be compounded by:

- Side effects of treatment (whether puberty blockers or gender affirming drugs); in that regard, the NHS recognises that it is not known whether puberty blockers affect the development of the brain.
- The potential impact of other conditions. A study by the Swedish National Board of Health and Welfare found that there were high rates of incidence of health or psychological or psychiatric disorders conditions in girls seeking gender transition, (32.4% suffered anxiety disorder, 28.9% from a depressive disorder, 19.4% from ADHD and 15.2% from autism), the effects of which may compound their challenges.

Further, if the age is lowered there would be a material risk that a larger number of teenagers subsequently regret their decision. We note that there has been only very limited study of rates of detransition and even less study of the causes of detransition. Indeed it is unknown how many have detransitioned. Some reports indicate numbers are low, but since individuals do not have to report their detransition to the doctors who treated them in transition, or anywhere else, reliable records do not exist. Those who elect to detransition face physical and emotional difficulties in reverting to their birth gender which would be compounded if they had also elected to change their legal gender.

In the circumstances it would be unwise and unsafe to lower the age at which gender dysphoric teenagers are permitted to make such a momentous permanent decision.

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

Legal Feminist does not have any comment on this question.

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

An Equality Impact Assessment should have looked at the impact of proposed reforms on women. More clarification and guidance is needed on single sex spaces. We note and endorse Recommendation 14 of the October 2019 Report on enforcing the Equality Act:

> We recommend that the Government Equalities Office issue a clear statement of the law on single-sex services to all Departments, including the requirement under the public sector equality duty for commissioners of services to actively consider commissioning specialist and single-sex services to meet particular needs.[4]

The Government should have included a clear confirmation that women may bring indirect discrimination claims in circumstances where a decision of a service provider or sporting body not to rely on a single sex exception places women at a particular disadvantage.

The Government should also have included proactive measures to ensure that sex rather than gender is recorded where relevant - for example, in equal pay reporting - and to make clear where sex and gender are not interchangeable.

The Government should have considered including a suitability requirement. Where changing legal sex is easier, or self-identification has been accepted at a policy level as determinative of sex, vulnerable women and girls have been exposed to male offenders in places which were previously single sex only. Examples include Karen White in England, Barbie Kardashian in Ireland, Christopher Hambrook in Canada, Katie Dolatowski in Scotland. The Government should have considered single sex situations where self-identification is not appropriate.

We suggest a 'suitability' requirement such that unspent convictions for offences recognised as violence against women and girls (VAWG) by the CPS preclude a GRC. This would not prevent gender expression, but would make it easier to prevent access to women only prisons, homeless shelters, refuges, and would maintain confidence in the system.

The Government should have considered guidance on transgender asylum applicants, in particular whether acquisition of a GRC will be determinative of credibility of a claim. We take the view that it must be, particularly given that a person who changes their legal sex on documents may become at risk on return to a number of countries.

We consider that rights should be enforced via the Tribunal system rather than the courts, making it more accessible for citizens who may wish to challenge practices which they consider discriminatory.

10. Does the Scottish Government's proposed Bill offer a more suitable alternative to reforming the Gender Recognition Act 2004?

For the sake of brevity, we address issues with the proposed Bill rather than repeating the proposals.

- Panel assessment is required to scrutinise GD diagnosis and (as per our proposal)

[4] https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/1470/147010.htm, para.168

unspent convictions and applicant's capacity. Scotland would only make a GRC revocable post facto but we consider that lack of scrutiny at the outset is unkind and contrary to vulnerable applicants' best interests.

- Applications for Confirmatory GRCs should be subject to the same requirements with regards to capacity and spent convictions as UK applications for GRCs
- A GRC should be revocable due to fraud and also for sexual or domestic violence offences.
- We note that application for a GRC becomes protected information under s 22 GRA. Guidance on protected information is required regarding whether sex-based data for data analysis and for medical research should be considered protected information and if so how this might affect the wider public interest in evidence based medical progress and law and policy making.

Wider issues

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

The Gender Recognition Act was only ever intended to apply to a very small group of people suffering from gender dysphoria and who underwent a process of gender reassignment; people referred to at the time (and many of whom still refer to themselves) as transsexual.

The transgender "umbrella" is much wider and includes people who have not transitioned, people who have no intention of transitioning, people who cross dress, people with autogynephilia or who get sexual pleasure from cross dressing, and people who identify as non-binary or gender fluid. Many of these people do not qualify for a GRC and that is as it should be - the GRA is not designed for anyone who has any issue with their gender, but specifically for people who undergo a process of gender reassignment because they wish to live permanently in their acquired gender.

12. 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.

Yes. Under the EA trans people have protection from discrimination and harassment on the grounds of gender reassignment.

The EA similarly prohibits sex discrimination, which means biological sex, applying the natural meaning of woman and man. It also contains important exceptions for the provision of single sex services and facilities in appropriate circumstances.

The way in which these important exceptions apply in respect of men who are not transgender is clear. However it is unclear how these are intended to operate where an individual has been granted a GRC; under the GRA the person's gender "becomes for all purposes" the acquired gender, subject to the provisions of other enactments which would

include the EA (and indeed the provision in respect of sport now in the EA first appeared in the GRA).

The legal position is less clear on whether someone with a GRC retains their birth sex or now has their acquired gender under the EA. Put simply, a transwoman is protected from gender reassignment discrimination whether or not she has a GRC; if she has a GRC is she also a woman for the purposes of the EA? If so, how do the single sex exceptions (which are based on biological differences resulting in the need for exceptions) apply in the case of a transwoman with a GRC, noting that she may have undergone a full medical transition or no medical transition at all?

The EA fails to address important questions relevant to women's rights, namely:

- Can a woman claim sex discrimination/ equal pay citing a transwoman as a comparator (with or without a GRC). This is particularly important in respect of equal pay where no hypothetical comparator is available, i.e. the woman must compare herself to an actual male comparator. We consider GRC recognition should be suspended for the purposes of such claims.

- Categorisation of transwomen (in particular those with GRCs) when undertaking an equality impact assessment to consider whether a sex neutral policy puts natal women at a particular disadvantage and in considering the public sector equality duty. We believe that the GRC recognition should similarly be disapplied for this purpose.

13. 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?

The single sex exemptions are vital to ensure fairness in sport and for the safety of women and girls.

In sport, the concept of a "gender-affected activity" is clear but it is unclear why the qualified exemption from gender reassignment discrimination provisions in the EA is limited to sections 29 (goods and services) and 33, 34 and 35 (disposal and management of premises) and why participation in professional sport is not dealt with. It may be that participation in professional sport is intended to be covered by the "occupational requirement" provisions in Schedule 9. We believe that as a matter of safety and fairness section 195 EA should be available to be relied upon for participation in every sporting activity from secondary school tournaments to adult grassroots and professional sport.

The justification for sex segregated sport is biological (i.e. on safety, fairness grounds or both) irrespective of how the person identifies and whether they hold a GRC. It would therefore make sense to acknowledge that biological sex matters; and that for the purposes of this exception, a person is to be treated as retaining their biological sex irrespective of whether they have been granted a GRC.

For single sex services and occupational exemptions, where it is justifiable to provide separate-sex or single-sex services etc., that will be because of the consequences of biological sex. Again, most of the cases that would fall under this exemption could be more

simply provided for by disapplying the consequences of a GRC in relation to the affected job or services: if there is a legitimate reason to appoint one sex or to provide single sex or segregated services, that reason will be normally be founded on biological sex, not social or legal identity. The EA should recognise and permit this so long as the single sex provision can be objectively justified.

The wording of the EA is, however, opaque as it requires that the exclusion of a transgender person be 'proportionate'. This is too technical a term for a non-legally qualified person (or organisation) to apply with confidence. It was for this reason that the Nationality Immigration and Asylum Act 2002 (as amended) codified how the Immigration and Asylum Tribunals should approach the question of proportionality when determining cases under article 8 (right to a private and family life) of the Human Rights Act 1998.

We propose similar provision be made within the Equality Act to set out the matters that must be taken into account in determining the proportionality of admitting transgender persons of the opposite sex, whether or not they possess a GRC, into single sex provision. A woman who feels that she has been disadvantaged by the failure of an organisation or service provider to follow the steps set out below should be able to bring the same type of discrimination claim as a transgender person who feels disadvantaged by failure to be admitted. This would bring about a fair balance of rights. We suggest that:

(i) Any organisation or service provider that offers single-sex provision must, before opening the provision to transgender persons of the opposite sex or to persons deemed to be of the same sex by virtue of being issued with a GRC, conduct an impact assessment as to the effect that this would have on current users of that single-sex provision. This must investigate and invite responses from current and prospective users as to whether opening up access would prevent, inhibit or deter them from accessing that service or provision.

(ii) Before deciding whether it is proportionate to open up access to the organisation or service provider must give weight to the needs of current users who would be prevented, inhibited or deterred from accessing the service for reason of a protected characteristic. Particular weight is to be given to reasons pertaining to their sex (including having been a victim of sex-based violence, biological needs and privacy), their sexual orientation or of their religious belief.

(iii) Express consideration must be given to the safeguarding implications of any proposal to open up access to a single-sex service used by minors.

The term "legitimate aim" must also be made more explicit: statute should provide express (but non-exhaustive) confirmation of the legitimacy of protecting the safety of women and girls, to protecting them from unfair treatment (for example in respect of sport and other opportunities), harassment and discrimination, and promoting their full participation in society.

14. Does the Equality Act adequately protect trans people? If not, what reforms, if any, are needed?

Written evidence submitted by Legal Feminist [GRA1830]

The EA adequately protects the rights of trans people. Broadly speaking individuals are protected from discrimination and harassment on the basis of their protected characteristic and also from indirect discrimination (where a neutral policy disproportionately disadvantages a particular group). As recognised by the incoming chair of the EHRC, there should be no hierarchy of protected characteristics, i.e. all are equal. (Note there are very limited differences in the grant of rights, e.g. disabled people are entitled to reasonable adjustments, however this is a specific provision aimed at removing disadvantages and does not specifically confer any higher or different status of right). We consider that this lack of hierarchy is appropriate and that there is no reason why trans people should have any greater (or lesser) rights than people with any other protected characteristic.

While all protected characteristics are equal, there are some limited circumstances where interests may conflict. The EA recognises this and establishes circumstances where direct discrimination may be permissible, through means of the genuine occupational requirements and the single sex provisions. It would for example be legitimate for a domestic violence refuge to cater only for women, and to employ only female staff. Again this scheme of exceptions is appropriate and necessary not least to ensure safeguarding of women and girls in a range of circumstances and ensure fair competition in sport**.** It should be noted that these provisions are neither mandatory nor in most circumstances absolute; the service provider or sporting body is not obliged to exclude trans people (although we consider that a woman affected by a decision not to do so should be able to pursue an indirect discrimination claim were to put women at a particular disadvantage), and if the provider/body wishes to do so, it must have a legitimate aim and is subject to a requirement of proportionality (which imports a requirement to consider whether there is any less discriminatory approach).

We consider it is essential that these provisions are retained. Our comments above have focused on women. Clearly trans people and men may similarly have need to specialist and single sex services; however the way to ensure such access is by the provision of separate facilities and services where they are needed, rather than through encroachment on services for women.

We also consider it essential that the rights of trans people are balanced appropriately including with the rights of those with other protected characteristics. We all agree that trans people should be treated with respect and dignity, but that should not extend to denying another person's right to express their experience of the trans person's sex or its impact. We consider this would be a fundamental and unacceptable encroachment on women's rights including their right to freedom of speech. By way of example, it cannot be acceptable that a woman suffering from PTSD as a result of a sexual assault should have to recognise a transwoman as a woman and therefore admit her to women's rape crisis survivor's group. Nor should she have to accept intimate medical care from a doctor of the opposite biological sex. Nor should the understandable desire of trans people not to be offended be elevated above the rights of others to hold a belief in the scientific fact that biological sex is binary.

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

The GRA does not address these issues. Specialist support exceptions would fall under the EA.

Health and social care services, domestic violence and sexual violence services are woefully under-funded generally, including for women. We consider that there should be appropriate provision of both single sex services and services for trans people. This would ensure that women and girls have access to single sex services where needed while trans people also have access to the services tailored to their specific needs.

At present, the default approach appears to be to expect services established for women to also cater for trans people, and in particular transwomen. This results in inadequate, ineffective service provision for women, transwomen and transmen, notwithstanding that each group is likely to have distinct and in some instances conflicting needs and issues.

Inclusion of transwomen within women's support services has only been considered from the perspective of transwomen. However the presence of a transwoman may deter vulnerable service users from using a service, or cause further distress, or may result in the focus of the service being pulled away from that of the female sex as a class. By way of example, women's support groups founded to address shared experiences such as birth trauma should be able to focus exclusively on the physical and emotional trauma a labouring woman experienced as opposed to that of her birth partner.

We consider that new services and facilities are required and that additional funding should be specifically allocated to address gender reassigned support services; the women's sector should not be expected to make this provision and absorb these costs.

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

No. There is no way to legislate to give rights to non-binary and gender fluid people that would not undermine the rights of others and in particular the rights of women.

People who identify as "non-binary" or "gender-fluid" (and other similar terms) are not covered by the GRA - you cannot get a GRC Certificate that "recognises" your gender or sex to be non-binary. Nor are they, on the face of it, covered by the Equality Act 2010, which provides a right not to be discriminated against on grounds of "gender reassignment", because they do not "change" their "gender", rather they believe they don't have one, or believe they have one but it is not "male" or "female".

In a recent tribunal case, Taylor v Jaguar Land Rover, the tribunal held that the protected characteristic of "gender reassignment" was intended by Parliament to cover anyone who departs from the binary. However, the judgment is not being appealed, is specific to its own facts and being first instance, sets no precedent. The written reasons have not yet been published but it appears from Ms Taylor's own submission to this consultation that Ms Taylor has been intending to transition from male to female for quite some time.[5] On that basis

despite adopting the label "non-binary" it would be trite law that Ms Taylor has the protected characteristic of gender reassignment. We are not persuaded that the same would apply in a case where there was no transition or intention to transition from one sex to the other.

In considering whether the Gender Recognition Act 2004 and the Equality Act 2010 should be amended to cover people who identify as non-binary, gender fluid etc., it is important to distinguish between sex and gender:

- **Sex** is biological, binary - everyone is born either male or female - and immutable. The existence of individuals with differences of sexual development - sometimes referred to as intersex people - does not alter this fact. Such people are in fact either male or female.

- **Gender** – meaning people how people see themselves – is not binary. There is no limit to the number of gender identities. People can identify as male, female, non-binary, gender fluid, genderqueer, agender, and many more.

Identification does not change sex. If a person's sex remains obvious – which for the vast majority of people identifying as non-binary, it will – other people will continue to experience them as male or female, as the case may be, even if they are aware that the person in question *identifies* as non-binary. The experience of other people should not be denied. Focusing only on the wishes of those who identify as non-binary would therefore be wrong.

Society is organised around the fact that sex is binary. This is an objective criterion, based firmly on biology, reflecting material reality, not shifting trends in terms of how people perceive themselves.

As feminists we also object to the proposition that being female equates to matters of dress, appearance and behaviour; we consider these notions to be based on sexual stereotypes, and that it is offensive and a retrograde step to suggest that a woman who does not conform to modern sexual and sexist stereotypes of dress, appearance and behaviour is not a woman or that a man cannot dress or behave in ways that modern society perceives as feminine.

Further, women (and men) have certain rights relative to their sex: the right not to be discriminated against on grounds of sex, the right to equal pay, the right to single sex spaces and services in certain cases. In a sexist society, these rights are particularly important to women.

A number of issues arise in relation to people who identify as non-binary, for example:

- It isn't simply a case of changing the way we organise society to make room for one more category. To say there are 57 varieties would be an understatement – in a recent programme aimed at teachers teaching PHSE, the BBC listed 100 gender identities.[6] They include Christie Elan-Cane, who identifies as "non-gendered" and

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[5] https://committees.parliament.uk/writtenevidence/13656/pdf/

[6] https://www.thetimes.co.uk/article/bbc-films-teach-children-of-100-genders-or-more-7xfhbg97p

has had surgery to appear non-gendered, but more typically they include people who cross dress full time or part time but have not had any surgery, and people who so far as we know do not cross dress at all but simply do not feel that the existing societal stereotypes match how they see themselves and therefore identify as non-binary etc.

- HR systems, toilets, changing rooms, single sex schools, prisons, sports, single sex associations such as scouts and girl guides – all are organised around the two sexes, and in most cases it would be difficult to make provision for one additional unisex category, let alone for 57 or 100.

- Even if there were only one other category, there is no other category that reflects material reality. If what people who identify as non-binary want is that their gender identity should "trump" their sex, this would involve the law abandoning material reality. While we respect that some individuals may wish to be referred to by a particular pronoun and have their non-binary identity respected as a courtesy, it would be an abandonment of material reality and an encroachment on the rights of others to regard "misgendering" as "harassment" and deem it to be unlawful. This is a denial of sex and also, conveniently, for males who identify as non-binary, a denial of privilege.

- Giving people who identify as non-binary, gender fluid etc. a right to register their own gender identity in place of being male / female, and in doing so to officially deny their sex, would potentially involve removing from *everyone* the right to refer to anyone by their sex, even when it is plainly relevant. It could even require everyone to pretend that they see such people as not having a sex. Such a proposal rides roughshod over the rights of others. Everyone has the right to be treated with respect, but we do not have a right to demand that others see us as we see ourselves. In Lee v Ashers Baking Company Ltd [2018] UKSC 49, the Supreme Court held that requiring the defendants to express a view with which they profoundly disagreed was a breach of their rights under the European Convention.

- What if a man who is obviously male but identifies as non-binary has a colleague who believes she was discriminated against on sex grounds when he was promoted and she was not? Should she be prevented from complaining that she was discriminated against on grounds of sex because her male comparator believes he is not a man?

- The challenges of addressing more complex identities can be illustrated by reference to a public figure such as Philip / Pippa Bunce, an executive at Credit Suisse. Bunce's own description on Twitter is a "proud husband and father" (in other words recognising that Bunce is male). However Bunce identifies as "non-binary" and "gender fluid", and dresses in stereotypically male clothes on some days and stereotypically female clothes, a "female" wig and makeup, on other days. While colleagues may as a matter of courtesy be happy to use whatever pronouns Bunce prefers, it would be a denial of material reality and unreasonable to require them to pretend that Bunce is a woman on days when Bunce presents as "female" or to

speak as if Bunce has undergone the same experiences as a biological woman may have (miscarriage or childbirth for example).

- Finally, since non-binary identities are by definition self-identified, legislating to "recognise" non-binary identities would be tantamount to legislating for self-ID, which as the government has only recently recognised, overrides important protections for women and girls.

We believe that people are free to believe whatever they like about themselves, but it would not be good law-making to legislate to the effect that this takes any precedence over a material reality such as sex. It would further be a fundamental breach of the rights of women were such legislation to encroach on existing sex-based rights such as the right to not be discriminated on grounds of sex, the right to equal pay, and the right to single sex spaces and services in certain cases.

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