Written evidence submitted by Radical [GRA2002]

Women and Equalities Select Committee
Inquiry on Reform of the Gender Recognition Act

Response to call for evidence from Radical: a civil-rights campaign for truth and freedom on matters of sex and 'gender', committed to free expression and equal respect.
These replies have been prepared by Victoria Hewson and Rebecca Lowe.

- Should the requirement for a diagnosis of gender dysphoria be removed?
- Should there be changes to the requirement for individuals to have lived in their acquired gender for at least two years?

We note that these questions are essentially a rerun of the Committee's 2015/16 Inquiry, which considered "the operation of the Gender Recognition Act 2004 and whether it requires amending". The government has recently published its position on the matter, some of which forms the subject matter of this inquiry, and we question the usefulness of re-litigating these questions again so soon and whose interests this really serves. We note that other previous inquiries of the Committee on related subject matter raised much more pressing concerns about, for example, sexual violence in schools, and about the operation and enforcement of the Equality Act 2010 ("EA"), which have not been returned to (although we note that the operation of the EA is raised in this inquiry in the context of transgender rights).

Self-ID

At a high level, removing the requirement for a diagnosis of gender dysphoria and to have lived in the 'acquired gender' for a period would amount to what has become widely known as 'self-ID': a person would be able to change their legal sex simply by reference to their own assertion that they are rightfully to be thought of as a member of the opposite sex to which they were born, and intend to live as such. Any gatekeeping to ensure that the applicant is genuinely subject to the medical condition of gender dysphoria, rather than acting simply out of preference or for nefarious reasons, would be removed. It has been argued, and is true to a certain extent, that the risk here is low, as changing one's legal sex has little effect in real life. Individuals can already change their name and salutation on official legal documents, and protections for people with the characteristic of gender reassignment do not need to have a gender recognition certificate. However, the fact of legal sex still has significance. For example, under the Equality Act there are distinctions between exceptions as they apply to treatment of a trans person with and without a gender recognition certificate ("GRC"), and self-ID would also affect such matters as identification of comparators in equal pay and discrimination claims.[1]

But the very fact that trans-rights activists are so committed to bringing self-ID into law surely indicates that its significance goes wider that the operation of Schedule 3 of the Equality Act. If the state recognises that a person can, for (almost) all legal purposes change their sex on demand, then this will have serious repercussions, as those who seek to redefine the meaning of sex across law and policy — in education, crime, provision of services, and so on — will be

[1] As described in detail here: https://womansplaceuk.org/2020/07/02/legally-this-is-not-a-trans-rights-issue-its-a-sex-rights-issue-a-blog-about-boxes-audrey-ludwig/

able to leverage the fact that the law no longer recognises any objective criteria of determining who is a man and who is a woman. Indeed, a gradual erosion of the way in which legal sex tracks biological observation effectively serves to undermine a general societal commitment to objective truth.

Institutional Capture

Many areas of the public (and increasingly private) sector have already acquiesced to self-ID in practice, largely thanks to misleading and incorrect guidance and educational material that has been widely published by the EHRC, local authorities, the judiciary, charities, and educational bodies, as well as inherent flaws in the EA's approach to defining and protecting gender reassignment. Rather than amending the EA itself to reflect these problems, preserving some semblance of objective reality and truth within the Gender Recognition Act ("GRA") should be a first step towards reforming and clarifying these other laws and pieces of guidance.

A key example of the risks involved in what is best described as the capture of many UK institutions by the activists who propagate misunderstandings of these pieces of legislation is the worrying case of the upcoming census. Without trustworthy societal data, serious problems go unnoticed, policy solutions go untested, and accountability is scarce. Yet guidance set to accompanying the upcoming UK censuses will advise respondents to answer the standard 'sex question' based on their self-declared gender identity. This will conflate the provable scientific concept of sex with the contested subjective concept of gender identity, thereby making it unclear what is being measured, and rendering the resulting data unreliable. It seems undeniable that this situation is a powerful example of the institutional capture achieved by activists. Analysis by MBM tracks how the National Records of Scotland was in regular and close correspondence with Stonewall,[2] and much of the Office for National Statistics' output on the topic of the sex question betrays, through the use of tell-tale words and phrases, an uncritical absorption of post-modernist gender ideology.[3] The tail of UK departments, captured regulators, and charities producing incorrect and misleading guidance should not be allowed to wag the dog of recognition of legal sex.

Other options for GRA reform

This is not to say that the aforementioned sections of the GRA should not be reformed, however. It is questionable as to whether a diagnosis of gender dysphoria should entitle a person to change their legal sex. After all, this is not a diagnosis of being the opposite sex, but rather of a condition in which the person feels like they should be the opposite sex. And it is not obvious that the law should accommodate this feeling. Being legally and biologically male does not prevent a person from acting and presenting themselves as if they are a woman (and vice versa), and of course the law should protect such a person from being attacked, or facing illegal discrimination, because of it. But it is not obvious that the law should actively assist the person to deceive others — or indeed themself — as to the matter of their biological sex.

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[2] https://murrayblackburnmackenzie.org/2018/12/16/a-review-of-the-sex-question-in-the-census-since-2001/

[3]https://www.ons.gov.uk/census/censustransformationprogramme/questiondevelopment/sexandgenderidentityquestiondevelopmentforcensus2021

Similarly, beyond providing a gatekeeping mechanism, the requirement to have lived in the 'acquired gender' does not stand up to scrutiny in itself. The GRA is silent as to what is involved in living as a member of the opposite gender, and does not even define the terms 'sex' and 'gender', so this provision is surely unenforceable in any meaningful way. Moreover, the requirement for the person obtaining a GRC to live as their new gender (which will then also be their legal sex) for the rest of their lives, has also been shown to be meaningless, with, for example, cases of natal females changing their legal sex to male, and then going through arguably the most female act imaginable: carrying and giving birth to a child. Rather, these provisions currently depend on conceptions of 'living as the opposite gender' that are supeificial (i.e. asking to be called by a different name, or for people to refer to them via new pronouns and salutations), or rely on objectively meaningless stereotypes (wearing particular types of clothes, or sporting hairstyles, that traditionally associated with the opposite sex). Indeed, many of these stereotypes are, at best, disappointing: they go against decades of women fighting against such reductive views, and, moreover, equally apply to (for example) women who have no desire to be seen as the opposite sex, but who prefer to wear trousers than skirts, and have their hair cut short. Can such women be said to be living as the opposite gender? In practice, the only evidence of living in the 'acquired gender' that the Gender Recognition Panel requires is official documentation and correspondence, such as a driving licence and utility bills, showing use of the applicable name and salutation.

If the GRA is to continue to allow someone to apply to change their legal sex, and to acquire a new birth certificate issued showing their adopted sex, then the requirements referred to in the above questions should remain. However, owing to the poor draftsmanship and circularity of these requirements, a better approach would be to reform the approach entirely. The GRA was originally enacted in order to help transsexual people to protect their privacy, by preventing them from being required to produce official documents that showed them to have been born one sex, when they had been living as the other (as well as enabling them to marry a same-sex partner – a consideration that is no longer relevant, owing to the introduction of Equal Marriage). However, rather than maintaining this legal fiction, in which a person can have a legal sex that is different from their biological sex, the process for obtaining copies of birth certificates could simply be amended to allow the provision of versions that do not show sex at all.[4] This would allow trans people to use such documents for identification purposes without disclosing their sex — unless this was necessary for, for example, medical reasons. It is important to note that this approach would not need have the effect of de facto 'outing' trans people, by virtue of them being the only people to have sex-free birth certificates, as anyone would be entitled to one. There are no doubt many people who feel that their sex is irrelevant to the purposes for which a birth certificate is required, and supporters of trans people, in particular, might be expected to apply for sex-free documentation, to show allyship. This would lead to a situation in which it would not be possible to assume that the holder of a sex-free birth certificate must be trans.

Single-Sex Spaces

[4] https://mforstater.medium.com/what-reforms-of-the-gender-recognition-act-would-work-a6f30dc6aa6c

To turn to another matter related, at least in part, to privacy, it is important to note that the reason it is important to maintain single-sex spaces and services on the basis of biological sex is not that transwomen are considered to pose particular risks to biological women, and must therefore be excluded from places and activities where women would be vulnerable. Rather, it is because, firstly, women and girls are at risk from men (and adolescent boys), when undressing in public or communal facilities, playing contact sports, and discussing private matters like domestic or sexual abuse.

If self-identifying transwomen were allowed in such spaces, these spaces would become mixed-sex, and it would not be practically or legally possible to exclude biological men, whether or not they had GRCs. The default position, in which men and women can act to have a man removed from a women-only facility, would then change, as it would become impossible to know whether the man were entitled to be there as a self-identified woman, and action could only be taken ex post, if the man were to have behaved inappropriately or illegally. The idea that predatory men would not seek to exploit such mixed-sex spaces seems utterly implausible. And this would surely have the effect of deterring women from using such facilities — disadvantaging, in particular, less confident girls and women, those who have suffered abuse or assault in the past, and those with conservative or religious values. The argument that, for example, gym changing rooms should have private cubicles instead of communal areas, so that all users can change in privacy, even if they are content with changing together with members of the same sex, seems extremely regressive, not to mention extremely costly — a cost that will be passed on to the user.

But why should women have to hide their bodies, and be deprived of the social interaction and comfort of freely changing in a communal changing room, out of fear that a biological man could be present, with no possibility to have them removed? At a time when there is so much concern about sexual assault and harassment, it seems extraordinary that the desire of many women to have sex-segregated facilities should be considered unreasonable, or even bigoted. Secondly, even when there is no physical risk from the presence of the opposite sex, women sometimes wish to have time and space separate from men (and vice versa). This might be because they wish to discuss private or personal matters, the nature of which would mean the presence of men could cause distress — regarding intimate medical procedures, or in order to organise politically. Or it might simply represent an exercise of personal autonomy, by acting on a preference to associate with members of the same sex. In these cases, we are dealing not least with the matter of consent: women should not be forced to engage with biological men in private settings against their will.

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

The draft Bill published by the Scottish Government would enable self-ID, by providing for the issue of a Gender Recognition Certificate on the basis of a declaration by the applicant simply stating that they have lived in the 'acquired gender' for three months and intend to do so permanently. The draft Bill does not attempt to clarify the definition of 'gender', or how an

applicant should be considered to be 'living in one gender' or the other. Now, practice in Scotland (as in the rest of the UK) has raced ahead of the law in implementing self-ID in contexts like prisons and hospitals. But, in putting forward the proposed legislation, the Scottish Government does not appear to have taken proper account of the implications for the safety and privacy of women, the safeguarding of children, and the importance of accuracy and truth in data collection. As such, it does not offer a more suitable approach to reform in the GRA than that put forward by the UK government for England — and in fact represents the position that the Minister for Women and Equalities has expressly (and rightly) rejected, following consultation on the matter.

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

One of the issues that has concerned us most over the past years of thinking about these matters relates to the ongoing exploitation and harm of children, in the name of 'gender' progressiveness. An urgent priority for the government must be to ensure that children and teenagers who are suffering from uncertainty about matters relating to their biological sex receive the proper support they need, rather than being instrumentalised and abused by political activists and politicised medical professionals, as all too often currently occurs.

One serious problem with reducing the age at which people can apply for a GRC — to below the current required age of 18 — would, therefore, be the risk that vulnerable children would be even more likely to be pressured into taking physically irreversible correlative steps. With regard to puberty blockers, for instance, which are, by nature, prescribed early on, the problem is not just that decisions about such matters are irreversible, or even harmful. It is that a child is incapable of making such a serious decision, in a sufficiently reliable manner. Not only is their decision-making capacity under-developed, they are particularly susceptible to influence. Yet, the carrying out of these treatments is dependent on the child's belief that what they need is for their puberty to be prevented; that belief is a necessary condition for treatment. It is also wrong, therefore, to think that a parent could take on their child's responsibility, here, by consenting to this treatment for them (although that's what is currently being taken to happen, often after the parent is subject to emotional blackmail from the power-base). In other words, any parental consent given, in this kind of case, would be in order to meet a need for treatment that's predicated on the belief of someone – a child – whose beliefs are inadequate for the purpose. This analysis may seem patronising, and even invoke a need for reassessment of the age of majority, but it seems clear that the only solution is for the option of such treatment to be taken off the table. This is even more clearly the case regarding cross-sex hormones and further physical interventions such as elective mastectomies.

Again, any reduction of the age at which which people can apply for a GRC — to make this an option for people who are legally children — would not only be asking children to make important choices about their identity, which they may be incapable of deciding about, it would also risk increasing the chance of them undertaking serious medical treatments, against their own interests.

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- 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.
- 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 GRA suffers from the lack of a definition of the word ‘gender’, and its circular and interchangeable use together with the word ‘sex’. The EA further muddies the waters with its extremely wide definition of ‘gender reassignment’, which refers only to reassigning and changing attributes of sex. We hope that, in this inquiry, the Committee takes a more critical view on questions of definition of terms like ‘sex’ and ‘gender’ and does not repeat its mistake in the 2015/16 inquiry on Transgender Equality of accepting uncritically, and seeking to use terms simply as they are “generally accepted and in wide use within the trans community”. From the premise of sex being ‘assigned at birth’ onwards, trans activists do not own the language, or shoud they have the ability to redefine law and biology to suit their world view and interests.

It is currently not necessary to have obtained a GRC to be protected on the basis of gender reassignment under the EA. Equally, it is possible to have a GRC and to be discriminated against on the basis of gender reassignment under the exceptions provided for by the EA. This is not well understood. The opacity of the drafting of the EA (it is necessary to read across multiple sections and schedules) and legally questionable guidance from the EHRC, have allowed activist organisations to put forward incorrect interpretations and intimidate service providers (both public and private) into believing that it would be to breach the EA to maintain single-sex services that exclude male bodied people (with or without a GRC) from female-only spaces (and vice versa).

A useful amendment of the EA that would serve to clarify the interaction between the EA and the GRA would be to carve out the EA from the purposes for which a person’s legal sex is changed under section 9 of the GRA. The GRA specifically envisages such carve-outs, as section 9 is stated to be “subject to” provision made under any enactment. This would mean that for the purposes of the EA, “sex” would always mean biological sex. Single-sex exceptions in the EA make it lawful to exclude trans women from female-only spaces and services, but the rules include subtle differences depending on whether those trans women have a GRC or not (although in most cases a service provider could not know whether someone has or not). These differences are difficult to interpret, and are, consequently. a source of debate among lawyers, creating jeopardy for service providers. The single-sex exceptions are only necessary when biology matters; but when biology matters, it will always matter: the certificate makes no difference.

EHRC Guidance (some of which has been withdrawn as it as was acknowledged to include inconsistencies) asserts that the single-sex exception in the EA “must only” be used in “exceptional circumstances”, or “as restrictively as possible”. Its Code of Practice on Services,

Public Functions, and Associations, states that people with the characteristic of gender reassignment should generally be treated in line with their self-declared gender, irrespective of whether they hold a GRC, but provides no support for this position by reference to the wording of the Act.[5] These pieces of guidance go far beyond the wording of the EA, which provides that discrimination on the grounds of gender reassignment is permitted if it is 'a proportionate means to achieve a legitimate aim', and nowhere is it suggested that a person with the protected characteristic of gender reassignment is to be treated as if they had actually changed their sex. A much more plausible interpretation of the EA has been put forward by legal scholars and practitioners:[6] that the EA characteristic of gender reassignment does not in itself give rise to a legal right to treatment as a member of the opposite sex. This should be clarified and widely publicised by the EHRC as a matter of urgency.

Guidance by local authorities and the Crown Prosecution Service for schools that effectively adopted self-ID and activist positions of gender identity has been successfully challenged by concerned parents and school children. But it should not have been necessary for such challenges to have been brought. We should not have to rely on individuals with the courage and resources to bring legal challenges to such egregiously wrong positions that threaten safeguarding in schools, amongst many other dangers. (The problems of allowing teenage boys to self-identify into girls, regarding the use of toilets, changing rooms, and dormitories, will surely be obvious to the Commitee in light of its 2016 report on sexual violence in schools.)

Such guidance, which has resulted in widespread claims by groups such as Mermaids and Stonewall that transpeople are allowed to "use the toilets, changing rooms and other single-sex facilities of your choice",[7] is a neat example of the 'policy capture' that has led to self-ID becoming an accepted feature of policy making and practice across the UK, without the law on gender recognition having changed, and in contravention of what the EA actually provides.[8] In reality, the kinds of interpretations of the single-sex exeptions under the EA that are needed to reach the conclusions found in such guidance — and that some activist commentators and academics have put forward — stretch credulity.

If we are to continue to have legislation on gender recognition and gender reassignment, the word 'gender' should certainly have a legal definition. Gender is now frequently used by public and private bodies instead of 'sex', and usually there is a reluctance to explain what the use of the word means, and why it has been adopted in preference to sex (and in contravention of the wording of the statute). An honest discussion of what is meant by gender and the implications of replacing protections for sex with protections for gender identity is essential. However, until any such changes to the law might be made (and we certainly do not call here for such change), the immediate focus for the Government Equalities Office, and the EHRC should be to update and clarify guidance on the EA, to correct incorrect prevailing views, such as the view that gender

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[5] https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf
[6] As summarised in https://www.euppublishing.com/doi/pdfplus/10.3366/scot.2020.0348
[7] See for example https://mermaidsuk.org.uk/wp-content/uploads/2019/12/gender-recognition-guide.pdf
[8] As described here by Hunter Blackburn et al
https://www.euppublishing.com/doi/full/10.3366/scot.2019.0284

identity is a protected characteristic, that single-sex exemption applies only on a case-by-case basis in limited circumstances, that people are able to use whichever facility they feel most comfortably reflects their gender identity, and that men are not protected from discrimination on the basis of sex. The people working in the GEO and EHRC may wish that all this were not true, and, like most government departments and agencies, have signed up to schemes, like Stonewall's Diversity Champions, which seek to propagate such misconceptions. But unless and until the law changes, it is their duty to comply with it and help others to do so.

Therefore, all public bodies and local authorities should urgently review their internal policies and external guidance in this light. It should not be possible for a public body to pursue policies, or to take positions that presume that biological sex is not a true and important fact, or that wishing to have privacy from the opposite sex (not gender) is bigoted or unreasonable. National guidance should make clear to the private sector that this is the case, and that employers and service providers will not be in breach of the EA by providing separate-sex services and facilities, where, as per the legislation, this is necessary and proportionate. Up to date guidance should also be provided on when providing single-sex facilities is mandatory — for example, in schools and prisons — or recommended for safeguarding reasons.

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

It is particularly important for legislators to define the terms they use. It is also generally important for society to consider and understand the ways in which so-called gender-fluid and non-binary people might have different rights or interests from gender-stable and binary people. If being gender-fluid or non-binary can be taken to mean acting in ways that do not conform to stereotypical social expectations of how, respectively, men and women act, then almost everyone, of both sexes, is gender-fluid and non-binary. There can be no reason to afford special legal rights and protections different to or additional to the legal rights that we all have such as to life, freedom of expression, equal treatment under the law, etc. Accordingly, while more can certainly be done to protect the rights and freedoms of people in this country, no specific reforms to support gender-fluid and non-binary people are necessary.

If these terms are, alternatively, taken to mean a particular way of identifying oneself as something other than a man or a woman — owing to an inner feeling of being neither male nor female — and the associated rights are, therefore, intended to mean the right to be recognised and treated as such, then equally no legal reforms are needed. While individuals should be free to think of themselves however they wish, and express themselves accordingly (as long as in doing so they do not harm others), this should not be extended to compelling others to recognise them as such, and, for example, to provide special treatment in service provision or access to facilities. A person may well consider themselves to be neither male nor female, but this is simply not a reflection of the biological truth, and while politeness and civic virtue may require some deference to how a person wishes to be addressed, this is not a matter for the law or for state intervention. Any legal measures taken to this end would take us even further along a path towards an authoritarian re-engineering of society, in which people are forced to deny

biological truth, placing themselves and others at risk.With regards the interests of children, in particular, educators who confuse young people with abstract and untruthful conceptions of standard biological concepts will certainly not help them to accept their bodies, and become at ease with themselves — something that is already hard during and around puberty.

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