Equalities, Human Rights and Civil Justice Committee

Gender Recognition Reform (Scotland) Bill

Written submission from MurrayBlackburnMackenzie (MBM)

MurrayBlackburnMackenzie (MBM) is a not-for-profit independent policy analysis collective established in late 2018 by Dr Kath Murray, Lucy Hunter Blackburn and Lisa Mackenzie. Between us, we have extensive experience in policy-making, research and communications. To date, much of our work has focussed on the impact of gender self-identification on women's sex-based rights in UK law and policy-making. We have also researched and written about other areas of public policy, such as criminal justice and higher education policy.

We are funded through donations with an average value of around £30, which allow us to pay for a proportion of the time we spend: more detail is available here https://murrayblackburnmackenzie.org/funding/.

We believe all witnesses appearing in front of Scottish Parliament committees should provide information about how they are funded, including the extent to which they are funded by the Scottish Government when giving evidence relating to Scottish Government policy, as trialled for the Hate Crime and Public Order (Scotland) Bill.

The removal of the requirement for a medical diagnosis of gender dysphoria and supporting medical evidence

1. Committee members will be aware that the key area of disagreement relates to the proposed removal of a medical diagnosis of gender dysphoria. In March 2020 we met with Scottish Government officials and asked whether the government had looked at any alternatives to self-declaration that retained medical gatekeeping. We were told that it had not. We are disappointed that the Scottish Government has taken no steps to consider alternative approaches, nor to seek consensus in this area. Simply asserting that a self-declaration system of gender recognition will not adversely impact on women and girls falls far short of evidence-based policy-making. Further detail on unanswered questions can be accessed here: https://murrayblackburnmackenzie.org/2022/03/02/gender-recognition-reform-unanswered-questions/

2. The current draft Bill largely replicates the draft Bill published for consultation in 2019. As such, our detailed response to the consultation on the 2019 draft Bill is still relevant. The issues it raises flow from the decision to extend eligibility for a GRC to a much larger and more varied group than the Act was originally intended for by decoupling eligibility from a medical diagnosis, and therefore also

from the current starting criterion for accessing the specialist treatment pathway under the NHS.

3. The Scottish Government has not engaged with the detailed points in our consultation response in any evident way and so the analysis in it now passes to the Committee for consideration. We have not attempted to reproduce all the material there on the face of this response, but would ask that it is taken into account as a substantial element of our formal submission. It can be accessed here:
https://murrayblackburnmackenzie.org/wp-content/uploads/2020/03/murrayblackburnmackenzie-gra-consulation-response-final-copy-16-3-2020-2.pdf

   We have also reviewed the current EQIA. Again, this is largely unchanged from the EQIA that accompanied the draft 2019 Bill. This is despite extensive evidence on negative effects being drawn to the attention of the Scottish Government in the 2019 consultation, and summarised in the Independent analysis of consultation responses. This strongly suggests that the Scottish Government has not undertaken any further substantive analysis since then, nor explored the concerns raised in the last consultation. Our EQIA review, which also takes account of policy developments and evidence since the last consultation can be accessed here:
https://murrayblackburnmackenzie.org/wp-content/uploads/2022/05/FINAL2-20-MAY-EQIA-UPDATED.pdf

4. In response to the question above, we believe medical oversight of GRC applications, as currently obtained through providing evidence of a diagnosis, should be retained.

5. This would respect the rationale for the 2004 Act, which is to provide practical assistance to people with a specific, objectively assessed need and who were expected to feel the need to make significant practical changes to how they present. By removing medical oversight, the Bill rejects this rationale.

6. Objective third party input provides the most substantial check against abuse of the process by bad-faith actors. By remaining in line with the existing rationale of the Act, it removes the cross-border complications detailed in section 4. It also removes risks in relation to the overseas route, and the extension of privacy protections to a weakly-defined group of people who assert they have changed legal gender overseas, even if this cannot be evidenced.

7. The likely adverse effects of removing any third-party input are well-rehearsed. They arise from allowing a larger and much more diverse group of people, including those who do not have gender dysphoria, to change their sex in law, coupled with privacy protections that mean such a change cannot be disclosed in most circumstances.

8. The Scottish Government anticipate a ten-fold increase in the number of applications for Scottish GRCs. In our view, this estimate is poorly evidenced. A Freedom of Information response during the last consultation showed the Scottish Government has not modelled of the potential impact of removing the

medical diagnosis on the number and nature of GRC holders. Nor has the Scottish Government taken any account of the fact that numbers of applications doubled following the UK Government's decision to reduce the cost of a GRC from £140 to £5, even under the existing system.

9. The Scottish Government believe that reform based on self-declaration will not affect who can access to single sex spaces. This position rests on the belief that GRCs have no effect under the Equality Act 2010. Their view is contrary to the UK Government and the EHRC and also at odds with the Scottish Government's revised guidance for the Gender Representation on Public Boards Act 2018, which asserts that "*where a full gender recognition certificate has been issued to a person that their acquired gender is female, the person's sex is that of a woman"*. Both positions cannot be right, and it is likely that case law will be needed to settle this disagreement. These conflicting positions are outlined here: https://murrayblackburnmackenzie.org/2022/03/07/making-law-in-the-dark/

Provisions enabling applicants to make a statutory declaration that they have lived in the acquired gender for a minimum of three months (rather than the current period of two years) and that they intend to live permanently in their acquired gender

1. The current requirement to have "lived in the acquired gender" for at least two years was as included in 2004 as a way for people to demonstrate their long-term commitment to transition. In practice, this is interpreted by the panel simply as needing to produce documents showing that a person has changed their name (and where relevant, the M/F marker) in contexts where no GRC is required. Suggested examples include driving licences, passports, bank accounts, pay slips, utility bills and personal correspondence: applicants are encouraged to provide five or six examples. The earliest document must go back at least two years.

2. The idea that people 'live' in a specific "gender" is sexist, regressive, and reinforces stereotypes. It reduces what is meant to be female to clothes, appearance, names and pronouns (some of those in favour of reform criticise it on the same basis).

3. The Scottish Government is unable to explain what living in an acquired gender means, or relatedly, how a false declaration would be evidenced. In meetings with us and women's groups, the Cabinet Secretary stated that changing the sex marker on a driving licence might be regarded as evidence. But it is not clear whether even that would be checked at the time of application. A similar problem of inability to provide a definition of "living as a woman" has become apparent in relation to the Gender Recognition on Public Boards Act 2018. For details of our meeting with the Minister, see here: Summary-of-MBM-meeting-with-Cabinet-Secretary-210122.pdf (murrayblackburnmackenzie.org)

4. The reduction to a three-month period removes any value this provision previously might have had in showing serious prior commitment, as does leaving

applicants to determine what living in the acquired gender means. As a safeguard against bad-faith actors, this is unlikely to be any obstacle.

Whether applications should be made to the Registrar General for Scotland instead of the Gender Recognition Panel, a UK Tribunal

1. We are treating this as a question about the principle of the introduction of a fully separate GRC process for Scotland. We discuss in a later section the more general question of whether applications should be considered by an expert panel.

2. In 2003, during the passage of the original Act, the then Scottish Executive (Labour/Liberal Democrat coalition) considered whether to legislate separately on gender recognition for Scotland. This was rejected by ministers due to 'cross-border anomalies'.

3. These anomalies are now evident in the draft Bill, which opens the self-declaration process to any person aged 16 or over who was born or adopted in Scotland, or is 'ordinarily resident' in Scotland. The policy memorandum describes the latter in broad brush terms:

   > "Whether a person is ordinarily resident in Scotland will depend on their individual circumstances. Broadly speaking, a person is ordinarily resident in a place if they live there on a settled basis, lawfully and voluntarily."

4. There appears to be nothing to stop anyone arriving in Scotland from any other part of the UK or the rest of the world from accessing the GRC application process.

5. It is not yet clear whether a GRC issued in Scotland will be recognised elsewhere in the UK, where the criteria for acquiring a GRC is stricter. This situation apropos cross-border recognition appears unprecedented.

6. If a Scottish GRC is recognised elsewhere in the UK, this is likely to impact on the prison estate in England and Wales, given Ministry of Justice policy means that a person with a GRC is treated in terms of their 'acquired gender', except in very exceptional circumstances, as based on case law. It would mean that 16- or 17-year-olds living elsewhere in the UK could acquire a GRC in Scotland by dint of being born in Scotland, or even based only on a temporary period of residence, with implications for education and participation in single-sex activities.

7. Given this complex and uncertain backdrop, we suggest Committee members ask the Scottish Government to confirm:

   - Whether a GRC issued via statutory declaration will be available to anyone born in Scotland, aged 16 or over, living in the rest of the UK?

- If so, whether this will include: Scottish-born people held in prisons in other parts of the UK; and anyone aged 16 or over moving to Scotland for 'ordinary residence' for however short a period?

- Whether an individual will be expected to prove that they are ordinarily resident in Scotland at the time they make their statutory declaration? And if this is the case, how, and based on what criteria?

- Whether people considered as ordinarily resident in Scotland will include: students from the rest of the UK coming to Scotland; 16 and 17 year-olds moving to Scotland with their families; and anyone moving to Scotland from any part of the world?

- Whether a GRC obtained in Scotland will have the same legal effects in the rest of the UK as a GRC obtained in Northern Ireland, England and Wales? And if this the case, whether this will extend to 16 and 17 year-olds?

- What arrangements will apply for spousal consent for couples where both live in the rest of the UK, and one partner is eligible for a Scottish self-declared GRC?

- And what arrangements will apply for spousal consent for couples who have separated, and the person living in Scotland obtains a Scottish self-declared GRC?

For further background detail to these questions, please see: https://murrayblackburnmackenzie.org/2022/04/27/cross-border-effects-of-gra-reform-in-scotland-unanswered-questions/

Proposals that applications are to be determined by the Registrar General after a further period of reflection of at least three months

1. There is a risk that some people may make rushed decisions they later regret. This is exacerbated by the lack of any provision for detransition in the Bill. The Scottish Government appear to believe that cases of detransition are rare: we think this is confidence is misplaced. As noted in the interim Cass review of Gender Identity Services in the NHS in England, a lack of routine and consistent data collection means it has not been possible to accurately track the outcomes and pathways taken by children and young people. The Interim Report is available here: https://cass.independent-review.uk/publications/interim-report/

2. To reduce the risk of regret, we suggest a delay between initial application and granting GRC, in the form of a single period of delay of some length, perhaps the overall six months in the Scottish government model.

Whether the minimum age for applicants for obtaining a GRC should be reduced from 18 to 16

1. The significance of permanently changing legal sex cannot be overestimated. It is not comparable to other rights acquired at 16 years, for example, voting in Scottish election nor even marriage, which does not require a permanent commitment in law.

2. A University of Edinburgh review of research commissioned by the Scottish Sentencing Council found that the brain continues to develop well into adulthood and does not reach maturity until about 25 to 30 years of age. The Review recommended that sentencing should take account of this evidence. See further: https://www.scottishsentencingcouncil.org.uk/news-and-media/news/research-indicates-the-brain-does-not-fully-mature-until-you-are-at-least-25/#:~:text=Sentencing%20should%20take%20account%20of,of%20the%20Scottish%20Sentencing%20Council

3. In England and Wales and Scotland, referrals to Gender Identity services have increased sharply in recent years. In England, concerns about this increase prompted the Cass Review. Between 2014 and 2017 the most frequent age of referral to the Sandyford Clinic in Glasgow was 16 years. See: https://www.scotphn.net/wp-content/uploads/2017/04/2018_05_16-HCNA-of-Gender-Identity-Services-1.pdf).

4. Medical practitioners in Scotland have expressed concern that removing medical gatekeeping and affirming gender identity may in fact likely lead to more medicalisation. See: https://archive2021.parliament.scot/S5_European/General%20Documents/CTEEA_CensusBill_ProfByng_CTEEA_S5_18_CB_26.pdf

5. The Children and Young People's Commissioner's submission to the 2019 consultation expressed concern that more research is needed to ensure 'safeguards' are in place before the legal age is lowered. There is no evidence to suggest the Scottish Government has undertaken such research. We would urge the Committee to take evidence from the CYPCS. https://www.cypcs.org.uk/wpcypcs/wp-content/uploads/2020/03/GRA-Reform-Scotland-Bill-response.pdf

6. We note that the proposal to have the same legal framework for all applicants regardless of age appears to depart from practice in most jurisdictions which allow applications below the age of 18.

If you have any comments on the provisions for confirmatory GRCs for applicants who have overseas gender recognition

1. The overseas provisions in the draft Bill appear far-reaching, with significant implications for the operation of the operation of the single-sex provisions in the Equality Act 2010. If enacted, the provisions look to enable any person who

asserts a change of legal gender overseas, irrespective of evidence, to readily conceal their identity, with attendant risks for identity fraud.

2. Section 21 of the current Act states: 'A person's gender is not to be regarded as having changed by reason only that it has changed under the law of a country or territory outside the United Kingdom'. However, a person who has changed their legal gender in specified approved countries or territories can apply for a GRC in the UK, using the overseas track procedure. Approval is granted on the basis that the criteria for legal recognition in a given country is equivalent to that in the UK.

3. The draft Bill reverses this starting position by providing for the *automatic* recognition of gender recognition obtained outside the UK and revoking the list of approved territories for Scotland. Section 8N(1) states:

   'Where a person has obtained overseas gender recognition—
   (a) the person is to be treated for all purposes as if the person had, when that recognition was obtained, been issued with a full gender recognition certificate by the Registrar General for Scotland, and
   (b) accordingly, the person's gender is the acquired gender.'

4. 8N(2) states this rule does not apply if 'manifestly contrary to public policy to do so (for example, in a case where legal gender recognition was obtained overseas at a very young age)', although it appears that a court order would be required to determine this.

5. Section 8O enables a person who has obtained 'overseas gender recognition' to apply to the Register General for a 'confirmatory GRC', to confirm their legal gender status. In practice *this appears to be discouraged on the basis the legal recognition of overseas status is automatic*. Paragraph 80 in the Explanatory Notes states:

   > 'Asking applicants why they require a confirmatory GRC will enable the Registrar General to remind applicants that obtaining legal gender recognition overseas provides legal gender recognition in Scotland and, usually, there should be no need for a confirmatory GRC'.

6. The implication is that person who simply assets a change of legal gender overseas may acquire a letter from the Registrar General that provides assurance that they need not take any further steps to verify this. As the SPICe briefing notes, "there is no obligation" to apply for a confirmatory GRC. We suggest that Committee members ask the Scottish Government for a detailed explanation of its intentions here. It is not clear why this additional route is provided for, over and above the proposed simplified route for other applicants.

7. If a person *does* choose to apply for a confirmatory GRC, the application must include evidence of the overseas gender recognition. However, a person can also apply for a confirmatory GRC *without providing evidence*. Instead, they can make a statutory declaration stating that the applicant has obtained overseas gender recognition, the reason why they are unable to provide evidence, and details of their recognition (country, date, place). This can be rejected if the

Registrar General is not satisfied that the applicant was unable to provide evidence.

8. These provisions have far-reaching implications. Under the existing Act, it is a *criminal offence* for someone who is aware through any official role that a person holds a GRC to disclose this, except under very limited conditions, such as for the purposes of crime prevention or investigation. Under Section 22 'Protected information' includes a person's sex and previous name/s. In most circumstances, full confidentiality is required by law. For further detail on Section 22, see our response in Amendments'.

9. By dint of the automatic recognition of overseas gender recognition, the draft Bill appears to extend this protection to anyone who merely asserts a change of legal gender obtained outwith the UK, irrespective of whether they obtain a confirmatory GRC (which is discouraged).

10. It appears that there will be no record of those benefitting from this change of legal status who do not obtain a confirmatory GRC, given that the requirement for data collection is limited to GRC applications.

11. It is not clear if a confirmatory GRC acquired through the Scottish overseas route, with or without supporting evidence, would be recognised throughout the UK. Again, the Scottish Government needs to clarify this point.

If you have any comments on the offences of knowingly making a false application or including false information

A false declaration will constitute a criminal offence, punishable by up to two years' imprisonment, which is intended as a safeguard. This looks impossible to prove, rendering the safeguard ineffective. The Scottish Government has failed to provide any detail on how an application that is based only on a person's subjective feeling of identity might be assessed to be false, offering only scenarios of a person "boasting" they had made a false declaration, or a spouse or partner giving (unspecified) evidence that this was the case.

The weight being placed on this provision as a safeguard is out of all proportion to its likely effectiveness, given how difficult it will be to demonstrate falsity.

If you have any comments on the removal of powers to introduce a fee

The UK Government lowered the application fee from £140 to £5 in May 2021. As such, the proposal to remove the fee is a very minor step. We do not have a strong view on the removal of the fee, from a £5 baseline. Our main concern here relates to the number of applications. As noted earlier, since the UK-wide fee reduction was introduced, the number of GRC applications has doubled. In estimating the likely number of applications, the Scottish Government has not accounted for this increase, nor its own proposal to remove the fee entirely.

If the Bill's intended policy outcomes could be delivered through other means such as using existing legislation or in another way

1. The policy of the Bill is to 'improve the process for those applying for legal gender recognition as the current system can have an adverse impact on applicants, due to the requirement for a medical diagnosis and supporting evidence and the intrusive and lengthy process'.

2. The aim of improving the process can be delivered, without losing the link to medical oversight, via a package of measures, some of which are already provided for in the Bill. Retaining third-party input alongside these measures will help to secure consensus on the Bill. To this aim, we would support the following:

3. **Remove the Gender Recognition Panel (GRP)**
   The GRP was established as a safeguard against bad-faith actors and to protect those who might be harmed by acquiring a GRC prematurely. It is not clear how far in practice the panel has added value in either respect, as neither the UK nor the Scottish Government has done any work to evaluate this. Case law has shown the Panel to have limited powers to prevent a person receiving a GRC: in one case where the panel rejected an application because it was not happy with the evidence provided, this decision was overturned in the courts, on the grounds that the panel had acted beyond its powers.

4. **Remove evidence of physical medical treatment**
   No physical treatment is required in order to obtain a GRC. However, section 3(3) of the 2004 Act requires applicants to provide a detailed description of any treatment making physical changes or any such treatment planned. This is the most obviously intrusive evidence required. It is also an illogical requirement, given that no physical changes are needed to obtain a GRC. Removing this requirement would substantially simplify and de-medicalise the application process. For further detail, see:
   https://murrayblackburnmackenzie.org/2020/02/16/improving-the-gender-recognition-certificate-process-a-point-of-consensus/

5. **Remove the requirement for living in an acquired gender**
   See above response to 'Provisions enabling applicants to make a statutory declaration that they have lived in the acquired gender for a minimum of three months'.

If you have any suggestions for how this Bill could be amended. If so, please provide details

Disclosing protected information in an official capacity

1. As noted in relation to overseas applications, the current Act provides stringent privacy protections for GRC holders. The draft Bill extends these for domestic and overseas applicants. This extension is a reversal of the Scottish

Government position in the 2019 consultation paper, and is not explained. Committee members should not underestimate the implications of the privacy provisions for the operation of the Equality Act 2010, nor the potential for identity fraud. We strongly recommend that these are tightened.

2. The current privacy provision already raises significant challenges for the operation of the Equality Act 2010. In December 2018, one of Scotland's largest NHS Boards, NHS Lothian, admitted it was unable to guarantee a female healthcare practitioner to women who requested one given the privacy protections under Section 22 of the GRA. See further: https://www.thetimes.co.uk/article/women-risk-health-over-trans-nhs-workers-fear-5dvz86f2l

3. This type of problem was acknowledged in the 2019 consultation paper, in which the Scottish Government committed to considering further exceptions to the privacy provision, providing guidance on the use of Section 22, and outlining its approach on the introduction of any Bill:

   'One point which might arise when using the general occupational requirements exception is that some people in an organisation (eg people in its HR department) may know about a person's trans history but those actually taking the decisions on staff deployment (eg line managers) may not. In these circumstances, and when there is a legitimate case to use the general occupational requirements exception, the Scottish Government considers that it would be appropriate for information about a person's trans history to be shared in a strictly limited, proportionate and legitimate way.

   To facilitate this, the Scottish Government will consider before any Bill to reform the GRA is introduced to Parliament if:

   - Further exceptions to section 22 should be made, by way of a further Order under section 22(6).

   - Scottish Government guidance on section 22 should be issued.

   We will outline our approach in this area when any Bill is introduced into Parliament.' (2019: 34)

4. Contrary to this, and without explanation, the draft Bill extends the existing privacy protections even further. This change is made by amending section 22(2), which currently refers to information that relates to a person who has made an application and concerns that application, or, to a person whose application is granted. The Bill amends this to cover *all* gender recognition, irrespective on the application being granted.

5. This change is in the Schedule (Further modifications…) Part 1(7):

   In section 22, for subsection (2) substitute—

   "(2) "Protected information" means information which relates to a person—

(a) who has made an application for a gender recognition certificate or a confirmatory gender recognition certificate under this Act, and which concerns that application or any other application by the person under this Act, or
(b) whose gender has become the acquired gender, and which concerns the person's gender before it became the acquired gender.

6. Privacy protections start at the point of application (information of which is protected) and extend across the three-month reflection period. If an applicant has not confirmed their intention to proceed after that time, the privacy protection then extends up to a further two years. If notice is not given by the application by the end of two years, the application is withdrawn. In this way, it appears that a person can acquire strong privacy protections about their identity for a period of over two years, without acquiring any change in legal status.

7. We could not find an explanation of this change in the Explanatory Notes nor the Policy Memorandum. The Explanatory Notes simply state 'Paragraph 7 amends section 22 (prohibition of disclosure of information) to cover applications for a GRC generally'.

8. As noted earlier, it appears that privacy protections are also available to those who acquire a confirmatory GRC via the overseas route – including people without evidence of having acquired gender recognition in another country.

9. Again, this is not explained. We note similar changes are made in other places in relation to overseas gender recognition, and that the Explanatory Notes are explicit about this. Paragraphs 26 (on trustees and personal representatives) and 128 (on gender-specific offences) state that the purpose of the amendment is to cover all gender recognition, including overseas gender recognition.

10. Criminal sanctions are imposed for disclosing details about a GRC holder, but no criminal sanctions exist for falsely claiming to have a GRC or conversely for not disclosing that a birth certificate has been changed using a GRC, in any circumstances where a false statement in relation to either would benefit an individual. This creates an imbalance in the law which the Committee should address.

Introduce criteria for ineligibility

11. As a protection against bad-faith actors, and to provide public reassurance, those currently on the sex offenders register could for example be precluded from applying for a GRC. This would provide a straightforward safeguard against abuse of the process by a high-risk group, increasing public confidence about safeguards in relation to misuse

Provide for detransition.

12. The idea of living in an acquired gender until death raises legal questions in relation to detransition and how a person who wishes to detransition could do so, without being liable to having made a false declaration. There is no provision for this in the draft Bill. This is a significant omission that fails to account for

applicant vulnerability, particularly in relation to young people, who may be more likely to apply for a GRC. For example, following the introduction of gender self-declaration in Belgium in 2018, transmen aged 16 to 24 years accounted for nearly a third of all legal sex change registrations (30%).

13. Scottish Government officials have asserted that cases of transition are rare. However, Committee members should be aware that no systematic data is collected. Even if such cases are rare, the absence of any provision in the current GRA is a shortcoming and the opportunity should have been taken to correct this.

14. To better understand this issue, we invite Committee Members to read the Interim Cass Review findings, and the full report when published.

15. The Irish Gender Recognition Act includes a provision for undoing a GRC, which involves a further formal process. Some provision on these lines could be added in Scotland. It would also need some safeguard against encouraging impulsive applications (if the process is seen as too easily reversible) and against deliberate temporary switching for identity concealment, or other ill-intention.

Remodel the statutory declaration

16. The 2004 Act requires a solemn oath of intent to live in acquired gender until death. The draft Bill retains this and proposes making a false declaration a criminal offence.

17. It is not clear how false intent would be demonstrated. The Scottish Government has not provided any direction on this, other than to suggest that this could be directly disclosed. The declaration also hinges on the 'acquired gender' requirement, which is controversial and could be feasibly dropped from the application process. Moreover, there is no provision for detransition.

18. The declaration could be remodelled as a statutory commitment with specific components, under which a person must change the sex marker (and name if applicable) on all existing identity documents on a specified list (including for example passports and driving licences) to match their new legal identity within a specified period (for example, within 12 months). This would demonstrate commitment to the gender recognition process, without the complication of a statutory declaration based on subjective identity, and help to safeguard against bad-faith actors by lowering the risk of a person taking advantage of acquiring one new legally protected and documented identity while also retaining other identity documents with the original sex markers/names unchanged.

Any other comments on the Bill

Legislative approach

1. We suggest that Committee members ask the Scottish Government why it has chosen to amend the 2004 Act, rather than taking the opportunity to repeal it for Scotland, and introduce new, free-standing legislation.

2. The draft Bill complicates the current Act and is not user-friendly. There is already strong evidence that the existing UK-wide is system is often misunderstood. For example, the 2017 UK Government Equalities Office LGBT National Survey reported that when asked about the requirements of the current process, 43% of respondents incorrectly identified an interview with the Gender Recognition Panel as a requirement, and 15% incorrectly identified surgery as a requirement. A fifth were not aware that a diagnosis of gender dysphoria was needed. See Q.21. here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721622/Annex-9-Gender-Transitioning.ods

3. Good law should be as accessible and easily understood as possible. Legislating by amendment to the existing Act by contrast will create a statutory framework which is more difficult to read than now. We have not found any explanation of why the Scottish Government has preferred this approach.

4. This approach also makes scrutiny of the current Bill more difficult, because of the need to cross-reference the draft Bill and original Act.

Consultation process

5. In developing the proposals, the Scottish Government has shown a marked bias in engagement towards those who agree with its position. Despite a manifesto commitment to a consultative approach, the Scottish Government did not meet with any groups that submitted critical comments to its last consultation, until this was flagged in the media weeks before the Bill was introduced.

6. Detailed accounts of this bias in consultation process can be read here: https://murrayblackburnmackenzie.org/2022/02/04/gender-recognition-reform-and-unanswered-questions/

   And here: https://murrayblackburnmackenzie.org/2022/02/11/the-room-where-it-happens/

7. Neither we nor any women's organisations were included in any discussions with Scottish Government on the detailed development of the Bill, and we have only had a few weeks to look at the final proposals, with limited resources. Given these constraints, we reserve the right to identify further technical points as the Bill progresses.

8. Although the Bill is little changed since the consultation version, groups excluded from deliberations throughout 2021 did not know this would be the case until introduction, of which those groups had no advance notice. The decision by the Scottish Government to proceed in this way means that the Committee's deliberations at this stage cannot draw on critical analysis of the Bill in fine detail, as groups with limited resources cannot be expected to do that sort of exercise until the final text is settled.

Data publication and monitoring the impact of reform

9. The draft Bill requires the Registrar General to publish data on the number and type of GRC applications and outcomes. This falls short of the data on GRC applications routinely published by the UK Government as part of the Tribunal Statistics Quarterly series. We think that data collected in Scotland should, at minimum, provided the same level of detail. This includes data on applications received and disposed of, outcomes, applicant's sex at birth, marital status, and age.

10. The EQIA on the Bill states 'In line with good practice the Scottish Government will keep this EQIA under review, and will consider any emerging evidence, both positive and negative in relation to this characteristic'. However Scottish Government guidance on collecting data on sex and gender explicitly advises public bodies against collecting data on biological sex except in exceptional circumstances. This means it will not be possible to evaluate the impact of the Bill, and specifically on any harms experienced by women as a result of a self-declaration system of legal sex change, which will require data on both biological sex and gender identity. For example, it will be impossible to tell whether any increase in assaults recorded between two women in any particular setting is due to changing patterns of behaviour in the female population or more incidents involving people in those settings who are male.

SPICe briefing

11. The SPICe briefing provides much useful detailed analysis to support the Committee's scrutiny of the Bill. Taking that into account, we nonetheless wish to draw the points below to the Committee's attention.

    - The briefing uses "sex assigned at birth". This has been adopted by some organisations in recent years as a way of describing a person's sex, as registered on their original birth certificate. It wrongly implies that a person's sex cannot be observed prior to birth and that at birth sex is subject to a process of "assignment" by an unspecified third party. We urge the Committee not to use this phrase in its Stage 1 report.

    - It describes the obligation on the EHRC under s7 of the Equality Act 2006 to "seek the consent of the SHRC where it proposes to take action on devolved human rights matters". Discussion round the Bill has raised a question about the scope of the EHRC to advise the Scottish Government and Parliament independently of any other organisation. It is not clear that the EHRC's powers to advise independently have been raised at previous stages of policy development here or in other areas, such as the Gender Representation on Public Boards (Scotland) Act 2018, where the EHRC also provided advice to the Scottish Government on the potential impact of draft legislative proposals on reserved law. Where devolved legislation may have an impact on matters covered by reserved legislation, there now appears to be some dispute about whether the Scottish Government and Parliament are able to receive advice from the EHRC without the agreement of the SHRC. The guiding principle should be that this should depend on a consistent interpretation of the 2006 Act, and not on the content of that advice.

- It states that the EHRC Code of Practice “explains” the operation of the exception related to gender reassignment for single sex services. The status of the Code is not discussed, so it may be useful to note that the Code states that it “does not impose legal obligations. Nor is it an authoritative statement of the law: only the courts and tribunals can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Courts and tribunals must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.” (para 1.5). There is therefore not a strict legal obligation on providers to follow advice in the Code, if in their judgement they could defend a departure from it before the courts, given their full range of legal obligations.

- In its discussion of Section 22 of the 2004 Act, the briefing notes that the Scottish Government stated in its 2019 consultation that it would consider whether further exceptions should be made, and whether guidance should be issued. Elsewhere the briefing provides a commentary on what has happened in respect of earlier government commitments, but it does not do so here. The Scottish Government has not taken any further action on either of these points, and as discussed above the Bill extends rather than further restricts the situations in which s22 applies, in respect of individuals who state they have acquired gender recognition overseas and those who make an initial application but do not confirm it for up to two years.

- Under the discussion of proposed reduction in the age at which a GRC can be issued, the briefing does not refer to the concerns expressed by the Children and Young People’s Commissioner Scotland in his response to the most recent consultation, noted above.

- The briefing does not discuss how the Bill will change the law on gender recognition for those from outside Scotland. As discussed above, the Bill proposes substantial widening of the scope of the law.

- The briefing does not discuss how the legislation is expected to work cross-border or the extent to which the achievement of policy objectives here relies on further legislation at Westminster, under s104 of the Scotland Act. As we note above, we think there are substantial issues for the Committee to consider here.