The Scottish Gender Recognition Reform Bill

The Case for a Section 35 Order

Michael Foran

Foreword by Lord Keen of Elie PC KC

The Scottish Gender Recognition Reform Bill

The Case for a Section 35 Order

Michael Foran

Foreword by Lord Keen of Elie PC KC

Policy Exchange

About the Author

Dr Michael Foran is Lecturer in Public Law, University of Glasgow and Senior Fellow, Policy Exchange. In 2021, his PhD thesis won the Yorke Prize from the University of Cambridge and in revised form will be published by Hart Publishing as *Equality Before the Law: Equal Dignity, Wrongful Discrimination, and the Rule of Law*.

Published by
Policy Exchange, 1 Old Queen Street, Westminster, London SW1H 9JA

www.policyexchange.org.uk

Contents

Foreword

The Rt Hon the Lord Keen of Elie PC KC
Formerly Advocate General for Scotland and Justice Minister

I welcome this important contribution to the ongoing debate about the interface between devolved competence and reserved powers under the Scotland Act 1998.

The legal principle which lies behind section 35 of the Scotland Act is designed to accommodate devolved competence rather than to inhibit or limit it.

Section 35 is concerned with legislation which may fall within a devolved competence but the effect of which has a material impact upon the operation of the law in a reserved area, whether that effect is felt only in Scotland or throughout the United Kingdom. It would not only be impractical but constitutionally improper for the UK Government to permit a devolved legislature to enact a provision that had a material impact upon the operation of the law throughout the United Kingdom.

The immediate concern identified by Dr Michael Foran is the potential impact of the Scottish Government's gender recognition legislation upon the operation of the Equality Act 2010, an Act which clearly addresses issues reserved to the UK Government and which operates throughout the UK. Such concerns were voiced during the passage of the Bill in the Scottish Parliament. It is therefore unfortunate that the position of the Scottish Government has remained opaque and at times contradictory.

The present paper addresses an important constitutional principle in the context of a highly sensitive area of legislation. The contribution which the paper makes will, I hope, be noticed by those in the UK Government responsible for the operation of section 35 and those in the Scottish Government who have pressed this legislation in the face of real and widespread concerns about it's impact upon the law of the United Kingdom.

Executive Summary

The Scottish Gender Recognition Reform Bill is very controversial. It has divided opinion in Scotland and attracted (critical) international attention. There is an important question about whether the Bill falls within the legislative competence of the Scottish Parliament, which the courts may yet have to decide. But even before the Bill is enacted, it is possible that the government of the United Kingdom may assert its powers under section 35 of the Scotland Act 1998 to block enactment. Section 35, entitled "Power to intervene in certain cases", authorises the Secretary of State to make an order prohibiting a Bill from being submitted for royal assent. This report considers the legal case that can be made for exercising section 35. The paper argues that the UK Government would be acting lawfully – and constitutionally – if it decided to make a section 35 order and thus block the legislation.

The Gender Recognition Reform (Scotland) Bill aims to change the law regulating legal sex change for those born or resident in Scotland. The critical question on which the lawfulness of a section 35 order turns is whether these changes would amount to "modifications of the law as it applies to reserved matters… which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters". One such reserved matter is "equal opportunities". If the Scottish Bill modifies the law relating to equal opportunities by changing the operation of the Equality Act 2010, it will satisfy the conditions needed to trigger a section 35 order.

The law regulating legal sex change is found in the Gender Recognition Act 2004, an Act of Parliament that applies across the UK and which addresses both reserved and devolved matters. It provides that to change one's legal sex, one must first be diagnosed with gender dysphoria and undergo a two-year period of medically supervised social transition. The Scottish Gender Recognition Reform Bill could change all this for those born or resident in Scotland. If enacted, the Bill would remove the requirement to be diagnosed with gender dysphoria, reduce the statutory waiting time from two years to three months, and lower the minimum age for a legal sex change to sixteen.

Whether or not this has any effect on the operation of the Equality Act – adverse or otherwise – depends on whether a change in "legal sex" changes one's "sex" for the purposes of the Equality Act. For a time, the answer to this legal question was not clear and arguments could be – and were – advanced on both sides. But on 13 December 2022, Lady Haldane decided the *For Women Scotland v The Scottish Ministers* (FWS2) case in the Outer

House of the Court of Session.[1] Her Ladyship's decision was that a Gender Recognition Certificate, issued under the 2004 Act, does alter one's sex for the purposes of the Equality Act, including for provisions relating to the advancement of diversity via positive measures.

This legal holding has profound implications for the effect that the Gender Recognition Reform Bill will have on the operation of the Equality Act. Following this decision, subject to appeal, the Bill will make at least six changes to the operation of UK law. It will:

- Change the meaning of the protected characteristics of "sex" and "gender reassignment" within the Equality Act.
- Remove the requirement to be diagnosed with gender dysphoria, making it legally possible for someone without gender dysphoria to change their legal sex for the purposes of the Equality Act.
- Change the operation of the law in relation to single-sex services, making it potentially more difficult for women-only spaces to exclude biological males.
- Change the operation of the law in relation to single-sex associations which cannot discriminate on the basis of gender reassignment in their membership admissions. This will grant a legal right to biological males who hold a Gender Recognition Certificate to be included (not to be excluded from) otherwise female-only groups and associations, inclusion that would otherwise not be required under UK law.
- Change the law relating to single-sex schools. The law as it stands provides that 16-18-year-old biological males who hold a Gender Recognition Certificate cannot be excluded from single-sex girls schools. There is no exception for gender reassignment discrimination in relation to schools. This Bill will confer on certain biological males a legal right of admission to girls' schools, a right which otherwise does not exist.
- Change the nature of the Public Sector Equality Duty by changing the composition of those sharing the protected characteristics of sex and gender reassignment.

This is a very significant change to the operation of the Equality Act in Scotland. The Equality Act is reserved to Westminster and so the Scottish Parliament is not permitted to change its operation in Scotland. However, the implications of this Bill are potentially much wider than even this. If this Bill does what it claims to do and changes the criteria for obtaining a UK Gender Recognition Certificate in Scotland and for those born in Scotland, then those certificates will be valid across the UK. This will mean that the changes set out above will not be confined to Scotland; the operation of the Equality Act in the rest of the UK will also be modified.

Although only those resident or born in Scotland will be permitted to change their legal sex via statutory declaration, this Bill will have implications for the operation of equality law throughout the UK. If

1. *For Women Scotland v The Scottish Ministers* [2022] CSOH 90.

a Gender Recognition Certificate changes sex for all purposes, those possessing Scottish Gender Recognition Certificates who travel to England, Wales or Northern Ireland will have to be legally recognised in their acquired sex, including 16-18-year-olds. This will be open to all those born in Scotland, wherever they live in the UK, and anyone who is ordinarily resident in Scotland, including students. Ordinary residence need not be permanent and so it is possible that people may cross the border into Scotland from elsewhere in the UK, temporarily reside there until they become ordinarily resident, and then return to elsewhere in the UK once they have obtained a Gender Recognition Certificate.

Although this is an exceptionally complex area of law, it is nevertheless surprising that Scottish Ministers appear to have been arguing in favour of two opposing positions at the same time. Until very recently there was, and arguably still is, ambiguity in the law as to the precise interaction between the Gender Recognition Act and the Equality Act. Many of the statements made by Scottish ministers presume an understanding of the law that the Scottish government explicitly argued against in the recently decided *For Women Scotland v The Scottish Ministers* (FWS2) case.

On the one hand, Ministers repeatedly stated throughout the course of the Bill's passage through the Scottish Parliament that the legal effects of this Bill will be minimal, amounting to a merely formal change in how certain documents are changed with no wider impact upon single-sex spaces or the operation of the Equality Act more broadly. These statements are only true if a Gender Recognition Certificate does not change one's sex for the purposes of the Equality Act. Yet the Scottish Government this year released guidance stating that a Gender Recognition Certificate does change sex for these purposes and successfully litigated in defence of that guidance in FWS2.

The result of Lady Haldane's decision, a position that many in favour of the Gender Recognition Reform (Scotland) Bill argue is simply a clarification of the law as it has always been, is that the statements made by Scottish government ministers relating to the interaction between the Bill and the Equality Act have been mostly false. At the very least, these statements are out of line with the law is it has now been authoritatively stated and which the Scottish government argued for.

As such, biological males possessing a Scottish Gender Recognition Certificate, regardless of where they are in the UK, will be legally female and will benefit from inclusion within that category for the purposes of the Equality Act. They will be included within positive measures designed to advance equal opportunities such as female-only shortlists or scholarships, and they will have a right of access to female-only associations and schools. Equally, the same will apply for biological females who will be included in the category of 'men', gaining new rights of access but also losing the benefit of provisions designed to protect women from pregnancy discrimination or to advance their group-based interests.

All of this can happen without repealing or replacing any provision in the Equality Act. On the current understanding of the law, the Equality Act

depends upon the Gender Recognition Act to set out the conditions for inclusion within the categories of male and female for the purposes of its provisions. If those conditions are changed, as the Scottish Bill purports to do, that will modify the operation of the Equality Act and so will modify the law as it relates to the reserved matter of equal opportunities.

The UK government is within its legal rights to make a section 35 order prohibiting the Bill from gaining royal assent in its current form. There is a separate question concerning whether or not the UK government believes this course of action to be prudent or desirable. The decision to make a section 35 order will require the government to assess the political consequences of both action and inaction in response to the passing of this Bill. If the UK government does choose to make an order, it will then be open to the Scottish government to reintroduce the Bill into the Scottish Parliament sufficiently revised such that it does not modify the law relating to reserved matters. This will place an effective pause on the introduction of the Bill and allow time for both governments to constructively negotiate about changes to the Bill that will clarify its precise legal implications and address any additional concerns relating to its impact on UK wide equality law.

There remains a genuine concern over the lack of adequate safeguarding in the Bill, leaving this system open to abuse. The UN Special Rapporteur on Violence against Women and Girls, Reem Alsalem, has warned that this legislation "would potentially open the door for violent males who identify as men to abuse the process of acquiring a gender certificate and the rights that are associated with it". This concern should not be easily dismissed. Yet, even without that concern, there would be substantial issues relating to the effect that the Bill will have on the operation of wider equality law throughout the UK.

On this basis alone, a section 35 order is justified. At a minimum, it cannot be denied that there are very complicated legal questions that need to be resolved if this Bill is to be workable. Additional time to sort out these complexities would be of great value in this context. Action is needed on the part of the UK and Scottish governments to resolve these issues and bring coherence to the law in this area. A section 35 order will give both governments the time needed to address issues which will affect both the operation of reserved matters in Scotland, and the implications that this will have for the rest of the UK.

Introduction

The Gender Recognition Reform (Scotland) Bill (GRR Bill) has proven to be extremely controversial, prompting calls from some feminist groups that the introduction of "Self-ID" via a statutory declaration will undermine women's sex-based rights. In contrast, trans-advocacy groups have welcomed this Bill, viewing it as necessary for the full recognition of gender-based rights. This very contentious debate reveals an important tension running through UK equality law.

In ordinary parlance, sex refers to one's biological sex - male or female. Gender is generally much more contested. To some, it simply connotes biological sex. To others, it refers to the social norms and expectations which attach to one's sex in a given socio-temporal context, often amounting to stereotypes. Further still, and increasingly popular, is the claim that gender is an individual identity, which one either finds (discovers) or asserts (chooses), or perhaps even both.

It might seem as though it should simply be up to every individual to decide how he or she wishes to conceive of sex, gender, and the relationship between them. But if legal rights and obligations are grounded in one or both of these concepts, then neutrality is not an option. These are not simply different concepts. They are rival conceptions of the same concepts.

The situation is further complicated by the fact that these concepts are never simply a manifestation of individual claims. They are always group-oriented ones. The claim that one is a woman is a claim to be included within a particular category of persons and to be excluded from another. Legal protection for one's membership within a protected group cannot be provided if there are no settled criteria for determining whether one falls within or outwith that category.

This report will begin by setting out the existing legal framework for the law in this area; first the law relating to devolution and then the law relating to gender recognition and equality. Here it is important to look at the purpose and justification of the inclusion of the veto provision by the then Labour government. Section 35 was introduced so that the Scottish Parliament would have more leeway to legislate. It permitted an expansive reading of devolved competence because it provided a mechanism for intervention by the UK government in certain cases even if a Bill was within competence.

When assessing the justification for making a section 35 order in this context, it is important to stress that, contrary to the stated view of the current Scottish government, the Gender Recognition Act 2004 is not

fully devolved. When the 2004 Act was in the process of enactment, the then UK and Scottish governments were clear that the Act relates to both reserved and devolved matters. The effect that the Act has on equal opportunities and pensions was understood to be a reserved matter.

It will quickly become clear that the full implications of the GRR Bill can only be seen once the interaction between the Gender Recognition Act (GRA) and the Equality Act are firmly established. The law in this area suffers from a serious lack of clarity and this will be made much worse if the GRR Bill is enacted in its current form. Additionally, if possession of a Gender Recognition Certificate (GRC) changes one's sex for the purpose of the Equality Act, then uncertainty is not the only issue here. An alteration of the substantive criteria for changing legal sex has a substantial impact on the law relating to protected characteristics, single sex spaces, and equal opportunities.

Once the legal framework has been surveyed, the implication of the GRR Bill will then be explored. Specific attention will be given to how protected characteristics within the Equality Act will be substantively changed in light of this Bill. Specifically, the removal of any medical element to undergo a legal sex change will alter the meaning and effect of provisions in the Equality Act relating to both sex and gender reassignment.

That will have important implications for what it means to 'live in the acquired gender' a condition of legal sex change and a central feature of the statutory declaration that must be made under the GRR Bill. The removal of any medical element to the requirement to live in an acquired gender strips the requirement of any significant meaning. It will also render the enforcement of the requirement not to fraudulently make a statutory declaration extremely difficult, and may even raise rule of law and human rights concerns.

From here, more detailed analysis of the impact that this Bill will have on the provision of single-sex spaces will be done. The law in this area differs depending on whether the single-sex space is a service open to the public, a private association, or a school. For public services, the law in this area will alter in terms of the legal tests that are applicable, but in substance there will not be much practical changes. This change to the legal tests may however be sufficient to meet the conditions under section 35. In addition, the law in relation to private associations and schools will change dramatically, generating new rights where there previously were none and extending certain existing rights of access to anyone holding a Scottish GRC.

With that in mind, it is arguable that this Bill is not even within the competence of the Scottish Parliament, given the impact it has on reserved aspects of the Gender Recognition Act 2004. Even if that were not true, it is certain that the conditions needed to make a s.35 order have been met.

The Legal Framework: Devolution

Devolving power to make laws is a complex matter. The current settlement operates on a reserved powers model. This means that the Scottish Parliament is free to legislate for Scotland in any area it wishes, except in relation to reserved matters. If a matter is reserved, the Scottish Parliament cannot change the law in Scotland in relation to that matter. There is also a territorial limitation on the Scottish Parliament meaning that it can only change the law in Scotland, it cannot make or change laws for the rest of the UK.

Reserved matters include benefits, social security, the Union, defence, employment, foreign policy, immigration, and equal opportunities. These matters could be read very broadly to dramatically curtail the powers of the Scottish Parliament such that something that even tangentially relates to a reserved matter might be outwith its legislative competence. If viewed this way, a legislative scheme designed to fund an information campaign on Scottish history could 'relate' to the Union and so would be unlawful. For this reason, the Scotland Act was drafted and has been interpreted to only catch those Bills which modify the law relating to reserved matters where the modification is direct and substantial. As such, reserved matters will be read narrowly and devolved matters will be read broadly.[2] But the reason that the Scotland Act 1998 has this shape – the justification for it – is that the UK government at the time of draftin inserted into the devolution legislation another mechanism for intervening in certain cases even if the Bill in question is within the competence of the Scottish Parliament.

The drafting of the Scotland Act, and indeed discussion of the territorial constitution prior to the introduction of devolution, was attuned to the complexities surrounding the legal and political interaction between devolved law and broader UK-wide law. In 1973, the Royal Commission on the Constitution expressly envisaged a power to veto devolved legislation that was within competence but which nevertheless affected nation-wide interests:

However unlikely this may be, circumstances could arise in which a veto would have to be considered, whether to ensure compliance with international obligations, or to safeguard some other essential British interest, or to prevent adoption of policies considered to be inconsistent with the maintenance of the essential political and economic unity of the UK.[3]

Expressed as such, it would be unlikely that such a veto would be

2. See *Imperial Tobacco v Lord Advocate* [2012] UKSC 61.
3. Report of the Royal Commission on the Constitution 1969–1973 (the Kilbrandon report 1973), Cmnd 5460, [765]. See also; Joshua Rozenburg, 'Scottish gender recognition: who decides?' A Lawyer Writes, 28 Dec 2022, available: https://open.substack.com/pub/rozenberg/p/scottish-gender-recognition-who-decides-a41

relevant in relation to the GRR Bill. This Bill has profound effects on the Equality Act, but it is unlikely to destabilise the maintenance of the essential political and economic unity of the UK. But when the Labour government introduced the Scotland Act in 1998, it contained provisions which extended beyond these concerns. Operating on a reserved-powers model where the Scottish Parliament is free to legislate in any area which is not expressly reserved to Westminster, ss.28-33 of the Act set out the rules relating to when the Scottish Parliament is acting outwith its legislative competence. In particular s.33 provides an ability to make a reference to the UK Supreme Court to test whether a bill is beyond the powers of the Scottish Parliament.

In addition to this, however, the Scotland Act also makes provision for the UK government to intervene in certain cases, even if the Bill in question is within competence and so could lawfully be passed by the Scottish Parliament.

Section 35(1) states that:

> If a Bill contains provisions—
>
> (a) which the Secretary of State has reasonable grounds to believe would be incompatible with any international obligations or the interests of defence or national security, or
>
> (b) which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters,
>
> he may make an order prohibiting the Presiding Officer from submitting the Bill for Royal Assent.

In the rest of this report, it will be argued that there are reasonable grounds to conclude that the Gender Recognition Reform Bill would fall within the scope of s.35(1)(b) and thus might lawfully be vetoed by the Secretary of State.

In order to make a s.35 order, there is no requirement that the Bill in question be outwith the competence of the Scottish Parliament. Indeed, the explanatory notes expressly state that "there are certain limited circumstances where the UK government can exercise a policy control or veto over what legislation is enacted by the Scottish Parliament, even although it is within its competence". These orders are designed to cover modifications to the law which, although within competence (because they do not directly relate to reserved matters), nevertheless alter the law as it applies to reserved matters in a way that conflicts with UK government policy or frustrates that operation of the law relating to reserved matters in Scotland or the rest of the UK.

This veto power is an integral part of the devolution scheme and was included in order to take into account the difficulties of governance in

complex territorial areas and to allow for a UK government to intervene where the effects of a Scottish Bill might have a serious enough impact upon reserved areas, even if a Bill is within competence. As such, speaking in the House of Commons when the Scotland Bill (as it then was) was being debated, then Secretary of State for Scotland, Donald Dewar, stated that:

> We have a situation in which there is a division of responsibility as between reserved and devolved powers. If one takes a simplistic view, one might say that the writ of the Scottish Parliament runs in devolved areas and that there will be reserved areas with which the Scottish Parliament cannot meddle and where its writ does not run. That is the general description of the scheme: a division of responsibilities with strength and internal logic. However, the world of politics and of legislation is not as neatly divided as that—there are no exact demarcations or neat barriers that cannot be crossed—so legislation in a devolved area of responsibility will often have implications for reserved areas and reserved functions.
>
> We had to consider whether we stood pat on the fact that, if there was some effect on a reserved matter, it would not be competent for the Scottish Parliament to continue, or whether we should find some way of building in a safeguard, so that a knock-on effect was not an abuse of process or something that would cause problems in a reserved area. Although I understand the right hon. Gentleman's point, the power is not a blocking mechanism. I would rather see it as an enabling mechanism, because if we do not have such a piece of machinery—we can argue about the detail—we will be in great difficulties. The Scottish Parliament might find that its room for action was greatly inhibited because almost any legislation in Scots private law—to which, hon. Members will recall, clause 33(1)(b) refers—would have an impact on reserved powers or reserved responsibilities. Many United Kingdom responsibilities operate, by definition, in Scotland, and would therefore be subject to Scots private law.
>
> I was not prepared to take the rather narrow view that, if there were a reaction, that legislation would probably be called incompetent or would be open to challenge. We therefore sought a balanced way to ensure that the competence of the Parliament—its range of responsibilities—would be exercisable and at the same time would not give rise to abuse.[4]

What this means is that the UK government was concerned about the test for legislative competence being too strict, capturing Bills which were not directly and substantially related to a reserved matter. In order to permit

4. HC Deb 12 May 1998, vol 312, col 267.

the test for legislative competence to give more leeway to the Scottish Parliament, the UK government introduced a safeguard which permitted intervention in certain exceptional and limited cases. This was an integral part of a settlement that gave more power to the Scottish Parliament, not less. Speaking for the government in the House of Lords, Lord Sewel noted that:

> While for the Scottish parliament to have a workable legislative competence, its legislation for devolved purposes needs to be able to have ancillary effects upon reserved matters, the Government recognise that there need to be safeguards in cases where Acts of the Scottish parliament could have adverse effects on the law as it applies to reserved matters. For example, legislation about housing or local taxation could possibly have an impact on the operation of social security legislation. Clause 33 [which became s.35] therefore empowers the Secretary of State, by order, to prevent a Scottish Bill from being submitted for Royal Assent in certain circumstances.[5]

Provision for the making of s.35 orders is an integral part of the devolution scheme. Such orders were never envisaged to be used frequently or frivolously. The potential effects of a Scottish Bill on the operation of the law relating to devolved matters must be sufficiently serious, even if the Bill does not have the purpose or direct effect of that would render it outwith competence.

The Legal Tests to Make a Section 35 Order

Section 35 is designed to apply to Bills which are within the competence of the Scottish Parliament, but which nevertheless affect or modify the law relating to reserved matters so as to give rise to a reasonable belief that there would be an adverse effect on the operation of the law relating to reserved matters. This means that the test for whether the law relating to a reserved matter has been modified must be more expansive than the test determining whether a Bill is outwith competence because it relates to a reserved matter.

When assessing competency questions, the Scotland Act states at s.29(3) that "the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined … by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances".

"Purpose" in this context is the defining test of whether a provision "relates to" a reserved matter for assessment of legislative competence. So an Act of the Scottish Parliament could "affect" reserved matters, but so long as its "purpose" is devolved, then it would be within competence. It is at least arguable that the purpose of the GRR Bill, having regard to its effects in all circumstances, is to introduce a mechanism for changing one's legal status in multiple contexts, including reserved areas relating to protected characteristics under the Equality Act. There is thus an argument

5. HL Deb 28 July 1998, vol 592, col 1391.

to be made that the Bill is outwith competence.

Even if it were not, however, the clear change in statutory text between s.29 and s.35, coupled with the explanatory notes for s.35, suggests that the test for whether the GRR Bill modifies the law relating to a reserved matter will not focus so heavily on the purpose of the Bill. Instead, the focus will be on its legal effects. If the effect of the Bill, having regard to all circumstances, is such that it will modify the law relating to equal opportunities, that is sufficient to make a s.35 order, even if the purpose of the Bill does not relate to a reserved matter.

Put another way, if the Equality Act is generally reserved because it relates directly to the reserved matter of equal opportunities, then any Bill of the Scottish Parliament would be outwith competence if it attempted to modify or repeal provisions of the Equality Act. But, in addition, if altering the Gender Recognition Act has the effect of changing the law relating to the Equality Act, then it may 'modify the law relating to a reserved matter' without being outwith competence. In that instance, s.35(1)(b) provides the option for the Secretary of State to intervene, notwithstanding the fact that the Bill would be within competence. So the question to be answered here is firstly whether the Scottish Bill will modify the law relating to equal opportunities and then secondly whether there are reasonable grounds to conclude that this would have an adverse effect on the law relating to equal opportunities.

Gender Recognition Not Fully Devolved

It is the express position of the Scottish government that the GRA 2004 is fully devolved such that any changes made to it by the BRR Bill would not directly affect reserved matters. The Scottish government argued that "[l]egal gender recognition is a devolved matter for which the Scottish Parliament can legislate".[6] That is not entirely accurate.

It is a constitutional convention that the UK Parliament will not normally legislate in devolved matters in Scotland without the consent of the Scottish Parliament. This is known as the Sewel convention and the mechanism by which the Scottish Parliament indicates its consent for the UK Parliament to legislate into devolved areas is called a Sewel motion.

There was a Sewel motion passed by the Scottish Parliament in January 2004. It indicated, contrary to what the current Scottish government has recently claimed, that the matter of gender recognition relates to both devolved *and* reserved matters. The motion (S2M-813) stated that the Scottish executive favoured a UK wide approach to gender recognition for a number of reasons, including:

> The legal recognition of transsexual people combines reserved and devolved policy areas. The devolved areas include process issues particularly the creation and maintenance of a Gender Recognition Register and the provision of birth certificates reflecting the acquired gender of a transsexual person, and the right to marry in the acquired gender. Some of the legal

6. Gender Recognition Reform (Scotland) Bill: Response by the Scottish Government to the Stage 1 Report by The Equalities, Human Rights and Civil Justice Committee, [66, 98], available: https://www.parliament.scot/-/media/files/committees/equalities-human-rights-and-civil-justice-committee/correspondence/2022/gender-recognition-reform-scotland-bill-response-by-scottish-government-to-the-stage-1-report.pdf

> consequences are reserved particularly pensions, benefits and insurance consequences. The Scottish Parliament could provide partial legal recognition of a transsexual person's acquired gender but not the reserved policy aspects. Including Scottish provisions in the Gender Recognition Bill will deliver comprehensive legal recognition of the acquired gender of transsexual people in Scotland;
>
> …
>
> If there were marked differences in the legal recognition of transsexual people north and south of the border, this could give rise to cross-border issues. For example, would a post-recognition marriage contracted in one jurisdiction be recognised in another jurisdiction for marriage-related purposes? Or, would a transsexual person living in Scotland but with a birth register entry in England find that legal recognition in Scotland is sufficient to secure a new birth certificate from the Registrar General? Including Scottish provisions in the Gender Recognition Bill ensures consistency in process and effect of legally recognising the acquired gender of transsexual people.[7]

The debate within the Scottish Parliament, including submission from interveners such as The Equality Network, all recognised that the Gender Recognition Act 2004 would impact upon both devolved and reserved areas. It was clear that marriage and divorce, birth certificates, and Scots criminal law relating to sexual offences were devolved. But it was also clear that the 2004 Act related to and affected reserved matters. There was no suggestion at the time that the substantive criteria for receiving a Gender Recognition Certificate were devolved to Scotland, given the impact that a certificate would have on reserved matters such as equal opportunities and pensions. As such, The Equality Network, in its submission to the Justice committee recognised that "some of these issues concern reserved matters – the Sex Discrimination Act, and pensions – and so do not relate to the Sewel motion" and therefore recognised that any changes to the operation of equality legislation as a result of the Gender Recognition Act 2004 is reserved.[8] This was never challenged by either government.

Given that the Sewel motion itself recognised that aspects of the GRA 2004 related to reserved matters it is extremely likely that modifications to the GRA made by the GRR Bill will meet the comparatively lower standard of modifying the law relating to reserved matters needed to trigger a s.35 order.

If this is done, it will prevent the GRR Bill from receiving Royal Assent and open the door for negotiations between the Scottish government and the UK government to rectify some of the issues set out below. This could result in changes to the Bill to ensure that it is clear that any alterations to the law apply only to Scotland such that Scottish GRCs are legally distinct

7. Scottish Executive, Sewel Motion and Memorandum for the Gender Recognition Bill, January 2004, available: https://archive.scottish.parliament.uk/business/committees/justice1/papers-04/j1p04-04.pdf
8. The Equality Network, Submission to the Justice Committee, January 2004, available: https://archive.scottish.parliament.uk/business/committees/justice1/papers-04/j1p04-04.pdf

from UK GRCs and do not affect the operation of the Equality Act across the UK. It could also result in the UK agreeing not to veto a revised Bill if it no longer affected the law in relation to reserved matters. It is not clear at this point whether the UK government will make a s.35 order or what it will wish to achieve from any discussion with the Scottish government. Nevertheless, if the situation set out below is not desirable, there is a legal option open which will permit a political resolution to be reached, should both sides be open to it.

The Legal Framework: Gender Recognition and Equality

The Gender Recognition Act 2004 deals with the legal mechanism by which an individual can change their legal sex. The Equality Act 2010 is a much broader piece of legislation which deals with the law relating anti-discrimination, positive measures designed to increase diversity, and the provision of single-sex services, associations, and schools. How these two Acts interact with each other is not entirely clear at present.

Within the past year, Scottish courts have decided two cases on this issue, coming to opposite conclusions in each case. In the first case, *For Women Scotland No. 1*, the court concluded that a change in legal sex does not change one's sex for the purposes of the Equality Act, or at least it does not change sex for purposes relating to affirmative action policies. In the second case, *For Women Scotland No. 2*, the court concluded that a change in legal sex changes one's sex for all purposes within the Equality Act. Whether the new Gender Recognition Reform (Scotland) Bill modifies the law in relation to the reserved matter of equal opportunities will depend entirely upon which of these two opposing approaches is correct. Rather surprisingly, the Scottish government appear to have argued in favour of both of these positions at the same time. Scottish Ministers have claimed that the Bill is within legislative competence on the basis of it's limited legal effect. But this is simply incompatible with claims they have made – including within statutory guidance and in court – about the wide-ranging legal effect of obtaining a GRC.

The Gender Recognition Act 2004

The Gender Recognition Act 2004 (GRA) is UK legislation that makes provision for a process by which someone can change their legal sex. Section 9(1), GRA 2004 provides:

> "Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)."

The GRA was enacted as a direct response to the European Court of Human Rights (ECtHR) case of *Goodwin v UK* where the UK was found in breach of Art 8 (the right to respect for private and family life) and Art 12 (the right to marry) of the European Convention on Human Rights for its failure to make legal provision for post-operative transsexuals. For those individuals who had gone through a "long and difficult process of

transformation" including surgical intervention, full recognition in law "might be regarded as the final and culminating step" in changing sex.[9] As such, the Court concluded that "the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable".[10] This case was concerned entirely with post-operative transsexuals who have gone through a medical process of sex change or gender-reassignment. The GRA, introduced in response to the Courts judgment, was specifically enacted to remedy the situation identified in *Goodwin*. Under s. 2 of the GRA, in order to change one's legal sex, one must first

a. be diagnosed with gender dysphoria
b. have lived in the acquired gender for two years, and
c. intend to continue to live in the acquired gender until death

There is no requirement to undergo invasive medical or surgical alteration to one's body. It was nevertheless envisaged by lawmakers at the time that this would be an important step for the vast majority of cases. The 2004 Act was narrowly targeted to address the legal status of those diagnosed with gender dysphoria. The understanding of lawmakers and other legal actors at this time was that there was a distinct category of persons who suffered acute psychological distress that could only be rectified by changing social and physical aspects of one's appearance to resemble that of the opposite sex. The House of Lords in *Bellinger v Bellinger* described this as typically involving four steps of treatment; "psychiatric assessment, hormonal treatment, a period of living as a member of the opposite sex subject to professional supervision and therapy (the 'real life experience'), and in suitable cases, gender reassignment surgery".[11]

It was believed at the time that the vast majority of GRC holders will have taken extensive – often surgical – steps to hide their biological sex. As such, the privacy of those who obtain a certificate was of great concern and so the Act attaches a criminal sanction to those who disclose this information without authorisation.

In the run-up to the enactment of the GRA 2004, the UK government recognised that "not all are able to have surgery, for medical and other reasons", but nevertheless envisaged gender reassignment, including the requirement to live in the acquired gender, as a process which involves medical diagnosis and supervision. Lord Filkin speaking in the House of Lords stressed that:

> "Such people who do not have surgery are few. There are usually good reasons for them not having done so. If the panel is not convinced that those persons are committed to living in a permanent state it will not grant them a gender certificate. However, to turn it the other way, for the state almost to say that unless people go through a process of bodily mutilation they will not have a legal recognition is wrong."[12]

9. *Goodwin v UK* [GC], judgment of 11 July 2002, ECHR 2002-VI, [78].
10. *Goodwin v UK* [GC], judgment of 11 July 2002, ECHR 2002-VI, [90].
11. *Bellinger v Bellinger* [2003] UKHL 21, [9].
12. HL Deb, 29 Jan 2004, vol 657, col 375-6.

As such the 2004 Act had the effect to remedying the situation identified in *Goodwin* while also making provision for those who cannot or do not wish to medically change their sex to be legally recognised in the opposite sex. Nevertheless, it was always envisaged that this Act was designed to respond to a very specific an numerically tiny group of people: those who have been diagnosed with gender dysphoria and who were undergoing a medically supervised process of living as the opposite sex.

If one meets the requirements set out in the Act, one is entitled to receive a Gender Recognition Certificate (GRC) which will change one's legal sex "for all purposes" throughout the UK. In reality, however, although the Act states that a GRC will change sex for all purposes, this is not strictly true. There are specific exceptions to this provision within the Act and they will be discussed in detail below.

The Equality Act 2010

The Equality Act 2010 consolidates several different anti-discrimination statutes stretching back decades. It is a monumental piece of legislation that attempts to put into one place a coherent body of equality law that can set a framework for employers, landlords, the providers of goods and services, public officials and even private associations.[13]

Sections 4-12 of the Act set out a list of protected characteristics. They include 'sex' and 'gender reassignment'. Sex is defined by reference to whether someone is a man or a woman.[14] In section 212, the interpretation provision, it is stated in subsection (1) that "'woman' means a female of any age and 'man' means a male of any age." Gender reassignment is defined by reference to whether a person "is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex".[15]

It is unlawful for a duty-bearer to treat someone less favourably than another on the basis of one of these characteristics (direct discrimination) or to apply a provision, criterion or practice to someone which would put those who share a particular protected characteristic at a particular disadvantage without reasonable justification (indirect discrimination). There is ordinarily an absolute prohibition on direct discrimination.[16] Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.[17]

In certain contexts, the Equality Act permits direct discrimination on the basis of certain protected characteristics.[18] Most notably for our purposes, service providers are permitted to set up single-sex services in certain circumstances and to discriminate on the basis of sex to maintain the single-sexed nature of the service. In so doing, service providers are also permitted to discriminate on the basis of gender-reassignment if it is objectively justified as a proportionate means of achieving a legitimate aim. Similar provisions apply to the setting up and maintenance of single-sex associations and schools, although here, there is no exception permitting direct discrimination on the basis of gender-reassignment.

13. See; Paul Yowell, *The Future of Equality* (2021) Policy Exchange, available: https://policyexchange.org.uk/wp-content/uploads/2021/12/The-Future-of-Equality.pdf
14. Equality Act 2010, s.11.
15. Equality Act 2010, s.7.
16. Equality Act 2010, s.13.
17. Equality Act 2010, s.19.
18. These include; age, disability, gender reassignment, marriage and civil partnership, race, religion on belief, sex, and sexual orientation. See Equality Act 2010, ss.6-12.

These provisions will be discussed in greater detail below.

Whether the Gender Recognition Reform Bill will affect access to single-sex spaces throughout the UK will depend entirely on whether the protected characteristic of 'sex' in the Equality Act is confined to biological sex, or if it is taken to include both those of one biological sex and those of the opposite biological sex who hold a GRC.

The Equality Act also contains provisions for the advancement of the group-based interests of those who share a protected characteristic. As such, the law deals with both the individual rights of non-discrimination and the interests of the advancement of, for example, woman as a group relative to men. Again, the impact of the Gender Recognition Reform Bill on these provisions will depend on whether the Equality Act envisages woman as a group to track the biological category or the legal category identified in the Gender Recognition Act.

The Gender Recognition Reform (Scotland) Bill

The Gender Recognition Reform (Scotland) Bill repeals and replaces certain provisions with the Gender Recognition Act. Specifically, it introduces a mechanism whereby Scotland can issue it's own GRCs and alters the criteria for issuing one, making a different, larger group of people eligible to change their legal sex. It does this by removing the requirement to be diagnosed with gender dysphoria and lowering the age at which one can apply for a GRC from 18 to 16. It also shortens the requirement to live in an acquired gender from 2 years to 3 months for those aged 18 and older and 6 months for those under 18.

These changes have been presented by the Scottish government as having very minimal impact upon the law beyond the GRA itself. The policy memorandum for the Bill states that "although the Bill changes the process by which legal gender recognition can be obtained and the criteria, it does not change the effects of a GRC and the rights and responsibilities which a person has on obtaining legal gender recognition".[19]

The intention therefore is clearly that Scottish Gender Recognition Certificates have the same legal effect as a UK Gender Recognition Certificate. Anywhere a UK GRC would alter the law, a Scottish GRC will seemingly do so too. It is not entirely certain that this is how the law will operate, but the argument is that the GRR Bill does not create a new kind of certificate that is distinct from the UK GRC. Instead, the GRR Bill introduces a new method by which those resident or born in Scotland can apply for a UK GRC. The working presumption would seem to be that this will alter the criteria for obtaining a GRC in Scotland but not the legal effect of possessing one for the purposes of UK-wide law. This will mean that different people can obtain a GRC in Scotland compared to the rest of the UK, but a Scottish GRC will change an individual's legal sex for the entirety of the UK, including for the purposes of single-sex spaces, schools, and positive measures.

In the run-up to the passing of the GRR Bill, concerns were raised as to the interaction between the Bill if enacted and the Equality Act 2010. In

19. Scottish Government (2022) Gender Recognition Reform (Scotland) Bill - Policy Memorandum, available: https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-recognition-reform-scotland-bill/introduced/policy-memorandum-accessible.pdf

response to these concerns, the Scottish government repeatedly stressed that "the Bill does not amend the Equality Act 2010" and introduced an amendment to insert a provision stating that "for the avoidance of doubt, nothing in this Act modifies the Equality Act 2010".[20]

This provision can be read in at least two ways. One way is to see it as a backstop provision, ensuring that, if the GRR Bill *were* to modify the Equality Act, any provisions would be interpreted so as not to affect the Equality Act. Another way is to see this provision as merely stating the Scottish Parliament's view that an alteration to the GRA 2004 will not in any way modify the Equality Act 2010.

In either case, the effect of this provision will depend upon the meaning of 'modify' in this context. It is clear that the GRR Bill does not repeal or replace any provisions in the Equality Act. If that is what is meant here, then this statement is true. However, if modification in this context includes a change in the legal operation and effect of existing provisions within the Equality Act, then this provision stating that the Bill will not change the Equality Act could have much wider implications.

Specifically, it is clear that the GRR Bill seeks for Scottish GRCs to have the same legal effect that UK GRCs do. If the GRA 2004 has any impact upon the meaning or operation of the Equality Act, then a substantive change to the GRA would then modify the operation of the Equality Act throughout the UK.

It is also clear, given the statutory guidance produced and arguments advanced by the Scottish government during this process and including in the recently decided FWS2 case, that they believe that GRCs alter one's sex for the purposes of the Equality Act. It is therefore very hard to see how an alteration to the substantive criteria for obtaining a GRC in Scotland could not modify the operation of provisions relating to 'sex' in the Equality Act throughout the UK.

If this is correct, then the provision within the GRR Bill stating that nothing in this Bill modifies the Equality Act must mean either the narrow – and banal – proposition that the Bill does not repeal or replace provisions in the Equality Act, or the much broader proposition that any provision altering the operation of the Equality Act ceases to have legal effect.

In the case of the former, this would mean that the provision does not alleviate any of the concerns raised by those questioning the impact of this Bill on wider equality law. In the case of the latter, it would ensure that a Scottish GRC is different in kind from those issued at a UK wide level and will have no wider legal effects than a change to the face of certain documents. The difficulty is that the Scottish government have been arguing for both propositions throughout the parliamentary process. One thing we know for certain is that this provision does not avoid or alleviate any doubts relating to the wider legal effects of this Bill should it receive Royal Assent.

20. Gender Recognition Reform (Scotland) Bill: Response by the Scottish Government to the Stage 1 Report by The Equalities, Human Rights and Civil Justice Committee, [101], available: https://www.parliament.scot/-/media/files/committees/equalities-human-rights-and-civil-justice-committee/correspondence/2022/gender-recognition-reform-scotland-bill-response-by-scottish-government-to-the-stage-1-report.pdf

The Relationship Between the Gender Recognition Act and the Equality Act

In *For Women Scotland v The Scottish Ministers* (*FWS2*), the Outer House of the Court of Session had to decide which conceptions of sex and gender are embraced by UK law for the purposes of the Equality Act.[21] Up until this point there was ambiguity as to the interaction between the Gender Recognition Act 2004 and provisions relating to the protected characteristic of 'sex' in the Equality Act.[22] Section 9(1) of the 2004 Act states that a Gender Recognition Certificate (GRC) changes legal sex "for all purposes". For a time it was unclear whether this meant that the protected characteristic of "sex" contained within the Equality Act reflected biological sex or legal sex and, if so, whether it does so for all provisions within the Act, including group-based positive measures and single-sex exceptions.[23]

For example, the Equality and Human Rights Commission has changed its position on the significance of a GRC for single-sex exceptions within the Equality Act. Initially it claimed that these exceptions applied regardless of whether the trans person was a GRC-holder or not.[24] This meant that the exclusion of trans women – biological males – from female-only services was covered under exceptions relating to gender reassignment permitting such exclusion if it is proportionate, regardless of whether or not the excluded person held a GRC. It then later released updated guidance stating that "[t]he sex discrimination exceptions in the Equality Act … apply differently to a trans person with a GRC".[25] This reflects a change in understanding such that the possession of the GRC affects the operation of the law in relation to single-sex services by changing one's legal sex. This statement was praised by some as an accurate statement of the law and critiqued by others as inaccurate.

While s9(1) of the Gender Recognition Act states that a GRC changes one's legal sex "for all purposes", this is immediately qualified by s.9(3), which states that s.9(1) "is subject to provision made by this Act or any other enactment or any subordinate legislation". Thus, it was not at all clear whether the protected characteristic of "sex" in the Equality Act was subject to s.9(1) of the 2004 Act or if it established its own definition of sex, which s.9(3) would then give priority. Indeed, the Equality Act seemed to do exactly that. In section 212, the Equality Act's interpretation provision, it is stated in subsection (1) that "'woman' means a female of any age and 'man' means a male of any age." If we were to follow

21. *For Women Scotland v The Scottish Ministers* [2022] CSOH 90.
22. Julius Komorowski, Sex and the Equality Act, (2020) 65(1) Journal of the Law Society of Scotland, available: https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-01/sex-and-the-equality-act/.
23. See; Kath Murray and Lucy Hunter Blackburn, "Losing sight of women's rights: the unregulated introduction of gender self-identification as a case study of policy capture in Scotland" (2019) 28(2) Scottish Affairs, 262-289. Cf. Sharon Cowan, Harry Giles et al, "Sex and Gender equality law and policy: a response to Murray, Hunter Blackburn and Mackenzie" (2020) 30(1) Scottish Affairs, 74-95.
24. Equality Act 2010 Code of Practice (Equality and Human Rights Commission, 2011) [13.57].
25. Equality and Human Rights Commission, 'Our statement on sex and gender reassignment: legal protection and language" 30 July 2018, available: https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language

ordinary principles of statutory construction, the references to male and female would connote references to biological sex. Nowhere is explicit reference made to the holder of a GRC falling under this definition. Indeed, Professor Alex Sharpe has stated that:

> [P]lacing emphasis on section 9(1) of the GRA, which recognises trans women with a GRC as women for 'all purposes', fails to acknowledge how recognition is circumscribed by the GRA in significant ways. Thus the scope of legal gender recognition is delimited in relation to … section 9(3) of the GRA which makes clear legal gender recognition is subject to 'any other enactment or any subordinate legislation'. In other words, and by virtue of this provision, legal recognition under the GRA is subject to subsequent and qualifying legislation. That is, if there is conflict between the GRA and the EA, the EA trumps the GRA to the extent of conflict. … Ultimately, it is a question of statutory interpretation. … trans people, covered by the protected characteristic of 'gen-der reassignment' enjoy a set of benefits and detriments under the EA. There appears to be no good reason to think GRC holders were intended to bear an asymmetrical relationship to this balancing of rights. While trans women GRC-holders are considered women for most legal purposes, it is clear they are not considered women for all legal purposes.[26]

As such, it was plausible to conclude either that possession of a GRC had no legal impact upon the law relating to the Equality Act or that a GRC changes legal sex for the purposes of the Act, granting the protections, entitlements, and status afforded to women under the Act if a GRC states that one is a woman.

In the run-up to the passing of the Gender Recognition Reform Bill, the position of the Scottish government was that possession of a GRC was a minor bureaucratic manner, designed to respect dignity by reflecting the gender identity of trans persons. Changes to the Gender Recognition Act were therefore presented as merely procedural in nature, removing unnecessary and invasive red tape confined to a change in birth certificate. For example, in guidance, the Scottish government describes the legal effect of a GRC as such:

> The Gender Recognition Act created a process for the legal recognition of an individual's acquired gender, which enables changing the sex recorded on a person's birth certificate.[27]

Presented as such, the effects of the GRR Bill appear to be narrow, confined, and superficial. But following *FWS2*, a GRC does much more than just change the sex recorded on a person's birth certificate. Indeed, the Scottish government's own guidance and arguments were that the implications of obtaining a GRC are much broader than a mere formal change to one's birth certificate. Specifically, in revised guidance for the Gender Representation

26. Alex Sharp, "Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?" (2020) 83(3) MLR 539-557, 551.
27. Scottish Government (2021) Supporting Transgender Young People: Guidance for Scottish Schools, available: https://www.gov.scot/publications/supporting-transgender-young-people-schools-guidance-scottish-schools/pages/6/

on Public Boards (Scotland) Act 2018, the government contended that a GRC changes sex for the purposes of the Equality Act and that

> Therefore 'woman' in the Act has the meaning under section 11 and section 212(1) of the Equality Act 2010. In addition, in terms of section 9(1) of the Gender Recognition Act 2004, 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, and where a full gender recognition certificate has been issued to a person that their acquired gender is male, the person's sex becomes that of a man.[28]

There are two cases that were decided this year, each adopting an opposing view on the relationship between the GRA and the Equality Act.

For Women Scotland v The Lord Advocate (FWS1) [2022] CSIH 4

This litigation concerns a judicial review of the Scottish Government's decision, via the Gender Representation on Public Boards (Scotland) Act 2018, to introduce positive measures designed to increase the representation of women on company boards. Here a 'woman' was considered to be a 'person [who] is living as a woman and is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of becoming female'. That would include those who do and those who do not hold a GRC within the category of women.

For Women Scotland challenged this definition as well as the Public Boards Act's disapplication of provisions within the Equality Act on the basis that they were outwith the legislative competence of the Scottish Parliament.

The central thrust of Lady Dorrian's reasoning in this case was that, by changing the definition of woman to include anyone who identifies with and intends to undergo a process of becoming female, the Scottish Parliament redefined one of the protected characteristics in the Equality Act and therefore infringed upon the reserved matter of equal opportunities.[29]

Because representation on Public Boards is expressly devolved as an exception to the reservation of equal opportunities, the Scottish Government is entitled to go beyond the positive measures provided for in the Equality Act, but cannot do so in a way that would alter or change the definition of protected characteristics. Changing the meaning of 'women' to include trans women was therefore not permitted and constituted an unlawful breach of the Scotland Act:

> By incorporating those transsexuals living as women into the definition of woman the 2018 Act conflates and confuses two separate and distinct protected characteristics, and in one case qualifies the nature of the characteristic which is to be given protection. It would have been open to the Scottish Parliament

28. *For Women Scotland v The Scottish Ministers* [2022] CSOH 90 [3].
29. *For Women Scotland v The Lord Advocate* [2022] CSIH 4, [40].

> to include an equal opportunities objective on public boards aimed at encouraging representation of women. It would have been open to them separately to do so for any other protected characteristic, including that of gender reassignment. That is not what they have done. They have chosen to make a representation objective in relation to women but expanded the definition of women to include only some of those possessing another protected characteristic.
>
> …
>
> [T]he definition of woman adopted in the legislation includes those with the protected sex characteristic of women, but only some of those with the protected characteristic of gender reassignment. It qualifies the latter characteristic by protecting only those with that characteristic who are also living as women. The Lord Ordinary stated that the 2018 Act did not redefine "woman" for any other purpose than "to include transgender women as another category" of people who would benefit from the positive measure. Therein lies the rub: "transgender women" is not a category for these purposes; it is not a protected characteristic and for the reasons given, the definition of "woman" adopted in the Act impinges on the nature of protected characteristics which is a reserved matter.[30]

The result of this conclusion was that the appeal court reduced the definition of 'woman' in the 2018 Act, and the associated statutory guidance issued by the Scottish Government, declaring both to be of no legal effect.

For Women Scotland v The Scottish Ministers (FWS2) [2022] CSOH 90

Following Lady Dorrian's decision in FWS1, The Scottish Government produced revised guidance stating that:

> "There is no definition of "woman" set out in the Act with effect from 19 April 2022 following decisions of the Court of 18 February2 and 22 March 2022. Therefore 'woman' in the Act has the meaning under section 11 and section 212(1) of the Equality Act 2010. In addition, in terms of section 9(1) of the Gender Recognition Act 2004, 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, and where a full 3 gender recognition certificate has been issued to a person that their acquired gender is male, the person's sex becomes that of a man."[31]

The definition of woman in the Equality Act is a female of any age. Here, the Scottish Government argue that this should be subject to s.9(1) of the

30. *For Women Scotland v The Lord Advocate* [2022] CSIH 4, [39]-[40].
31. Gender Representation On Public Boards (Scotland) Act: Statutory Guidance, [2.12].

Gender Recognition Act such that female here includes any male with a GRC stating that they are female and excludes biological females with a GRC stating they are male.

In contrast, For Women Scotland argued that s.9(1) of the Gender Recognition Act is subject to s.9(3) of the same Act which qualifies the 'for all purposes' provision, making s.9(1) subject to the provisions of any other Act. Their contention is that s.9(1) does not qualify s.212, but the reverse. The Equality Act, properly understood, defines woman by reference to the female sex. In their view, that is the only way to make coherent sense of the Equality Act as a whole and "any attempt to conflate that concept with that of a person who has an acquired gender of female in terms of a gender recognition certificate ("GRC") issued under the Gender Recognition Act 2004 ("the 2004 Act") is impermissible, as well as defeating the purpose and undermining the policy of the 2018 Act".[32] Their view is that legislation intended to advance the representation of women on company boards must have been intended to advance the position of biological women as compared to biological men. Indeed, this was the view of Lady Dorrian in FWS1:

> Section 11(b) indicates that when one speaks of individuals sharing the protected characteristic of sex, one is taken to be referring to one or other sex, either male or female. Thus an exception which allows the Scottish Parliament to take steps relating to the inclusion of women, as having a protected characteristic of sex, is limited to allowing provision to be made in respect of a "female of any age". Provisions in favour of women, in this context, by definition exclude those who are biologically male.[33]

It is clear that Lady Dorrian was of the view that the protected characteristic of sex in the Equality Act was confined to biological sex. Lady Haldane disagreed, arguing that sex in the Equality Act must include GRC holders and that Lady Dorrian's decision cannot be seen as authority for the opposite proposition.[34]

Thus, we can see how contestable the interaction between the Gender Recognition Act and the Equality Act actually is. Both of these opposing position are legally plausible. Importantly however, it appears as though the Scottish government advanced *both* of them at different times and in different contexts. When attempting to downplay the legal significance of their proposed Bill, Ministers present the results of obtaining a GRC as a mere formality, of no wider legal significance. In contrast, when arguing as respondents in FWS2, the Scottish government argued that possession of the GRC has profound legal consequences, particularly in the context of equal opportunities and positive measures taken to advance the position of disadvantaged groups.

If FWS2 is correct, and it is the most authoritative, direct judicial statement on this question that we have, then this will have profound implications for the effects of the Gender Recognition Reform Bill on the

32. *For Women Scotland v The Scottish Ministers* [2022] CSOH 90 [4]
33. *For Women Scotland v The Lord Advocate* [2022] CSIH 4, [36]
34. *For Women Scotland v The Scottish Ministers* [2022] CSOH 90 [44].

operation of UK wide Equality Law.

For the purposes of the Equality Act you are either male or female, but cannot be both. This is so even if you might be protected from discrimination based on what you are perceived to be in some contexts. For example, a man may be discriminated against because someone perceived him to be Muslim, even if he is not. In such a case, he will have suffered unlawful religious discrimination, but the law will not consider him to actually be Muslim for other purposes. He will not be able to claim a religious exception if he is not actually Muslim, even if he might be perceived to be. Similarly, a trans man (a biological female who identifies as a man) might be discriminated against because he is perceived to be a woman even if legally he is a man. This does not mean that he exists in some liminal space within the Equality Act, he is not both male and female for the purposes of the Act. This same rule could apply to a butch looking non-trans woman who is mistaken for a man and is wrongfully discriminated against as a result.

A GRC, if it changes one's sex for the purposes of the Equality Act, must do so by excluding that person's biological characteristics when assessing their legal sex under the Act. Whether a GRC holding legal woman has a penis is irrelevant for determining their legal sex in this context. As such, a biological woman who obtains a GRC will, on this reading, lose any protections within the Equality Act which are targeted specifically at women. This exposes fault lines within the Equality Act where sex can only have been intended to track biology. For example, s.18 protects "a woman" from discrimination on the basis of her being pregnant. It is unclear what the position of a biological female who holds a GRC stating he is a man is in relation to this provision. On Lady Haldane's reading it would presumably exclude such a person because that person is legally a man for all purposes under the Equality Act.

Similarly, on this reading the protected characteristic of sexual orientation is almost nonsensical. According to s.12 of the Equality Act, sexual orientation concerns "sexual orientation towards – (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex". It is hard to see how this could be referencing anything other than biological sex. As Komorowski notes;

> a lawyer would normally expect the same term to mean the same thing when used throughout the same Act. Where "sex" is used in the Act to describe the object of sexual orientation (s 7), it must be describing something closer to the notion of [biological] sex at common law simpliciter, rather than sex subject to the Gender Recognition Act 2004. Sexual orientation concerns attraction to sexed attributes, rather than a legal status. And whether sexual orientation is concerned with attraction to members of one sex by reason of one's belief of them being of that sex … or attraction merely to the apparent physical attributes of that sex, a person does not

> become or cease to be the potential object of attraction from any given person because of being granted a GRC.[35]

If, instead, only certain provisions in the Equality Act are altered by a GRC depending on where biology is relevant, that raises more questions than it resolves. Approaching the Equality Act in that manner might seem like a good way to have the best of both worlds; recognition of a GRC where it will make no difference but recognition of biology where biology is relevant. But there are two reasons why this is not workable. The first is that the Equality Act provides a definition of woman and a definition of man and as Lady Haldane notes, it does not differentiate between biological and legal women or men. The presumption is that this definition is unitary and that there are not two different categories of women or of men. Either this definition pertains to biology or it pertains to the different category of legal sex, which necessarily excludes those biological males/females who hold a GRC. The definition cannot change depending on the provision, it is a definition for the Act as a whole.

Secondly, provisions changing the meaning of a protected characteristic when biology is relevant opens up a whole host of questions concerning when, if ever, biological sex is not relevant for the purposes of anti-discrimination and equality law. The point of the *FWS*2 case was precisely this.

The Scottish government has repeatedly stated that "The Bill does not make changes to public policy or to the 2010 Equality Act".[36] The Cabinet Secretary for Social Justice, Housing, and Local Government, Shone Robison, has stated that "It does not change public policy or prevent single-sex services being offered where appropriate. It does not change rules or conventions in place, and in place for years under the current system".[37] The view – advanced by the Scottish government - that a GRC is just a formality with no additional legal effects is no longer sustainable in light of the *FWS*2 decision and the arguments advanced therein - by the Scottish government. The Scottish Parliament did not allow new amendments to the GRR Bill to be tabled after this decision was made. This is very difficult to justify, given the profound implication that it will have for the legal effect of the Bill and its interaction with the Equality Act.

It is entirely possible that FWS2 will be appealed within the Scottish legal system and might eventually make its way to the UK Supreme Court. It is also possible that, should this not occur, another case will come along and give the judiciary the chance to clarify the law in this area. It is also open to the UK government to legislate to clarify the precise impact that holding a GRC has for the purposes of equality law. Until then, however, we are left with considerable uncertainty.

Returning to the tests set out in s.35 of the Scotland Act, the UK government is permitted to intervene if the GRR Bill modifies the law relating to equal opportunities and if there are reasonable grounds to believe that this will have an adverse effect on the law relating to equal opportunities. The extent to which this Bill meets these tests depends on the answers to two legal questions which are plagued by significant

35. Julius Komorowski, "Sex and the Equality Act" (2020) 65(1) Journal of the Law Society of Scotland, available: https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-01/sex-and-the-equality-act/.
36. Scottish Government (2022) Gender Recognition Reform (Scotland) Bill: more information, available: https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-more-information/
37. Scottish Government (2022) Gender Recognition Reform (Scotland) Bill: more information, available: https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-more-information/

uncertainty at present:

1. Do GRCs issued under the 2004 Act change sex for the purposes of the Equality Act?
2. Will GRCs issued under this Bill have the same legal effect as those issued by UK authorities under the 2004 Act?

We know that the Scottish government position in relation to both of these questions is in the affirmative. We also know that the most authoritative statement in relation to the first question is that a GRC does change sex for the Equality Act. It is therefore clear that, whatever is the right way to resolve the lack of clarity, a GRC under the new Scottish Bill does potentially affect both reserved matters in within Scotland and the operation of the law of jurisdictions outside of Scotland.

If this is true, then the second question to be answered is whether the Bill will have an *adverse* impact on the operation of the Equality Act. The answer to that question depends both on its impact on reserved matters (viz equality law) in the law of Scotland but also on its potential to impact on the law relating to those matters in the rest of the UK. In what follows, this report will set out the ways in which the GRR Bill, if enacted, will affect the operation of the Equality Act across the UK. The uncertainty that these changes will bring for the operation and administration of equality law may be enough to ground a reasonable belief that these changes are adverse. But there are also significant concerns which can be – and have been – raised that extend beyond coherence and into the substantive impact this Bill will have on equality law in general.

Changes to Protected Characteristics

Cabinet Secretary Shona Robison has stated that

> "Central to the proposed reforms is removing the medical element of the process. We propose that GRCs be issued on the basis of statutory declaration made by the applicant, rather than on a judgement by a tribunal based on a diagnosis of gender dysphoria."[38]

What this means is that the legal tests for inclusion within the protected characteristic of gender reassignment is to be changed. The characteristic of gender reassignment covers anyone who is undergoing, proposes to undergo, or has undergone the process of changing their sex. Prior to this Bill that included anyone who intends to change physiological or other aspects of their sex. Beyond medical intervention, other aspects of sex could include how one dresses, presents oneself, or even what pronouns one uses.[39] It is very broadly construed and can include someone who merely intends to change one of these things. Where that includes a change to the legal aspects of sex, it includes anyone who intends to be or has been diagnosed with gender dysphoria. But under the GRR Bill, it includes anyone who intends to make or who has made a statutory declaration. These are not the same as a matter of law and can be vulnerable to abuse in a way that the 2004 Act is not.

The protected characteristic of gender reassignment applies to anyone who is proposing to change *any* aspect of sex and it is sufficient to only wish to change one of them. Given that, under this Bill, one can change legal sex by statutory declaration, proposing to make such a declaration will now include you within the category of gender reassignment, even if you have no intention of changing any other aspect of your sex. Although the statutory language indicates that one must be at least proposing to go through a process of sex change, courts have been willing to include anyone who identifies as trans or even non-binary within this protection.[40] But even on this very capacious reading, a change in *legal* sex would, as a matter of law, need to correspond with a medically supervised period of social transition.

The GRR Bill removes this requirement. Now it is possible to propose to change legal sex with no intention to do anything else. So if, hypothetically, there was a biological male who had no intention to socially or medically transition but did propose to change his legal sex, he will now, as a matter

38. Shona Robison (2022) Gender Recognition Reform (Scotland) Bill: Cabinet Secretary's statement, available: https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-cabinet-secretarys-statement/

39. See; Taylor v Jaguar Land Rover [2020] ET 1304471/2018.

40. See; Taylor v Jaguar Land Rover [2020] ET 1304471/2018.

of law, be included under gender reassignment, even if he does not have a trans identity. This might seem implausible, but it is a legal possibility and may be more likely to occur in contexts where a change in legal sex produces a significant material advantage. If, for example, prison policy was such that a GRC would be sufficient to move a male prisoner from a male prison to a female prison, it is not inconceivable that a man with no trans identity would make a strategic decision to change legal sex in order to move prisons. This need not be done because this man wishes to prey upon female prisoners, it could simply be motivated by a desire to get out of the harsh, and often dangerous, context of a male prison. Such an example could happen anywhere in the UK, if this was the prison policy and the male seeking to be moved was born in Scotland.

What that means is that, as a matter of law, there will be no requirement in Scotland for a legal sex change to correspond with trans identity, nor will this new system require proof of trans identity. If this Bill is enacted, one is only required to intend to change legal sex and to do so permanently. That can, legally speaking, be done by someone who does not identify as a member of the opposite sex, so long as they intend to live as a (legal) woman or man. In the rest of the UK, changing legal sex involves a medically supervised period of social transition and a diagnosis of gender dysphoria. There, living in the acquired gender corresponds with this medically supervised social transition. In Scotland it is unclear what the requirement will entail in practice, but it will have changed from the rest of the UK and will certainly change and broaden the category of persons who can obtain a GRC. Absent a medical diagnosis and period of supervised social transition, the intention to live as a legal woman or man does not necessarily imply that one intends to change any biological features or to present one's physical appearance in any particular way.

Under the GRA 2004, one could only change sex if one was diagnosed with gender dysphoria and then went through a period of medically supervised social transition. Given that legal sex falls under the umbrella of "other attributes of sex", changing the criteria to change legal sex changes the criteria for being included within the protected characteristic of gender reassignment for the purposes of the Equality Act. Removing substantive – not merely procedural – conditions to change sex widens this category and thus substantively alters the operation of the Equality Act throughout the UK.

In response to this, one might say that this is not a change to protected characteristics because the tests in the Equality Act do not change. But to claim that there will be no change in the operation of the Equality Act is to focus on form and ignore substance. To illustrate this, imagine the following hypothetical scenario.

> The Scottish Parliament has decided either that sex is entirely a social construct or that it wishes to provide a mechanism by which non-binary people can receive legal recognition. In both cases it concludes that there must be a way for people to

> move between legal sexes as and how their identity changes day to day. It therefore makes alterations to the GRA 2004 and issues every person resident within Scotland with two GRCs, one stating they are legally male and one stating they are legally female. Guidance is issued telling people that both of these are valid and they can be used as an when an individual feels it is appropriate.

In this scenario, the formal definitions of gender reassignment and sex within the Equality Act will remain unaltered, but the substantive nature of both categories, especially for the purposes of group-based and equal pay provisions, will have completely changed. This bill undeniably modifies the operation of the Equality Act with regards to the legal test for inclusion within the protected characteristic of gender reassignment. It also changes the method by which someone can change the nature of their protected characteristic of sex and consequently the makeup of that group for the purposes of other provisions within the Act.

The Bill does not just shorten the length of time needed to obtain a GRC, it changes the substantive criteria for obtaining one, lowering the minimum age and removing the requirement of a diagnoses of gender dysphoria. This will affect the operation of the Equality Act by creating disparities between how each group is constituted in substance. This will expand – for the whole of the UK – the protected category of women to include 16-17 year old biological males as well as adult biological males with no diagnosis of gender dysphoria. That is a substantive change to the category of sex for the purposes of UK wide equality law.

If the GRR Bill retained the requirement of a diagnosis of gender dysphoria but simply reduced the time needed to secure a GRC, then, with the notable exception of the change in age requirement, this could fairly be described as nothing more than a procedural modification. As such, it would not alter the substantive law of the Equality Act. But the Bill as it currently stands substantively changes the law in relation to the protected characteristics of gender reassignment and sex by changing what it means to go through a process of changing one's legal sex.

As such, the Bill meets the first test under s.35(1)(b) because changes the substantive nature of protected characteristics in the Equality Act, altering who is protected by a given provision, who the appropriate comparator is for direct discrimination, and how an assessment of indirect discrimination determines impact upon persons who share a protected characteristic. This alone may be sufficient to demonstrate that the GRR Bill is outwith the Scottish Parliament's legislative competence, given the conclusion of Lady Dorrian that, "Changing the definitions of protected characteristic, even for the purpose of achieving the GRO [gender recognition objective], is not permitted and … is outwith legislative competence".[41] I do not want to make any sustained arguments relating to legislative competence, except to note firstly that it is certainly possible that this Bill is outwith competence and secondly, as has been stated above, the test for "relating to a reserved matter" for the purposes of legislative competence, is higher

41. *For Women Scotland v The Lord Advocate* [2022] CSIH 4, [40].

and more stringent than the test for "relating to a reserved matter" for the purposes of a s.35 order. Thus, if Lady Dorrian is right and if the above analysis is correct, then the GRR Bill does change the law relating to protected characteristics and is arguably sufficient to meet the standard set out in s.35. It would be entirely reasonable for the UK government to conclude that this change has an adverse effect on the operation of the Equality Act, for reasons relating to coherency, but also because these changes cut against the grain of the Equality Act as initially envisaged and the government would prefer for the Act to operate as it did since 2010, where gender reassignment does not cover those who are not trans but who nevertheless wish to change legal sex.

Statutory Declaration

To make a statutory declaration, one is required to "live in the acquired gender" and to intend to continue doing so. But acquired gender is a legal term and is not defined in the Bill except by reference to legal sex. Under the GRA 2004 this corresponded with a period of medically supervised social transition following a diagnosis of gender dysphoria. This is important. Those provisions were connected in the eyes of both the UK government and the House of Lords in *Bellinger* such that this was seen to be part of a four-step process involving "psychiatric assessment, hormonal treatment, a period of living as a member of the opposite sex subject to professional supervision and therapy (the 'real life experience'), and in suitable cases, gender reassignment surgery".[42]

Under the GRR Bill, this period of living in the acquired gender has been severed from the now removed requirement to be diagnosed with gender dysphoria. It is now extremely unclear what this provision requires because its substantive meaning has been changed. It presumably does not include requirements to embrace any social stereotypes relating to one's appearance, hobbies or physical presentation. It certainly does not include any physiological change. It arguably does not even include a requirement that one identifies as a member of the opposite sex. The removal of a requirement for a diagnosis of gender dysphoria means that the acquired gender simply means legal sex. One can intend to change one's legal sex without having any intention whatsoever to change anything else. Indeed, the Scottish government itself, in response to concerns that the phrase "living in the acquired gender" could lead to the reinforcing of stereotypes, stated that "the term 'acquired gender' is only used … to describe the legal change of gender, and is not used to generally described the experience of trans people".[43] If that is true, then living in the acquired gender does not correlate with the experience of being trans – it is simply a legal change in status.

The medicalised nature of the GRA 2004 provisions may have been perceived to be unduly cumbersome, but they acted to ground the requirement to live in the acquired gender within an identified framework and to provide suitable grounds for a rejection of a GRC application. That is no longer the case. The Bill contains provisions for punishing false applications, but it is very unclear what it will mean to make an application which is "false in a material particular" as that relates to living in the acquired gender, since that is simply a description of a legal status, on the Scottish government's own admission.

This provision will of course be relevant for the requirements

42. *Bellinger v Bellinger* [2003] UKHL 21, [9].

43. Gender Recognition Reform (Scotland) Bill: Response by the Scottish Government to the Stage 1 Report by The Equalities, Human Rights and Civil Justice Committee, [28], available: https://www.parliament.scot/-/media/files/committees/equalities-human-rights-and-civil-justice-committee/correspondence/2022/gender-recognition-reform-scotland-bill-response-by-scottish-government-to-the-stage-1-report.pdf

surrounding marriage and civil partnership, such that false statements in relation to those provisions will be punished. But a statutory declaration that one intends to live in a legally changed sex cannot include requirements to intend to dress a certain way or alter one's body. Nor can it include anything relating to gender dysphoria. The express purpose of the Bill is to remove those requirements. It arguably cannot even include a requirement to identify a certain way since the requirement is to *live* in the acquired gender, not identify with it. If the acquired gender is nothing more than a legal status, living in it is simply living.

The requirement to live in the acquired gender under the 2004 Act is coupled with the requirement of a diagnosis of gender dysphoria, a medicalised process, yes. But it is also a process which ties 'acquired gender' to the social and in some cases physiological sphere. Speaking in response to the Bill moving through stage 2, Cabinet Secretary Shona Robison stated that "The requirement is not about looking or dressing a certain way but about the ways in which a person may demonstrate their lived gender to others".[44] Examples include

- updating driving licence or passport
- updating other documents like utility bills or bank accounts
- consistently using titles and pronouns in line with the acquired gender
- describing themselves and being described by others, in written or other communication, in line with the acquired gender
- using a name that is associated with the acquired gender

All of these can be obtained before one applies for a Gender Recognition Certificate. Robison then goes on to clarify that "none of these individually would be a requirement but are examples of what could constitute living in the acquired gender".[45] The absence of any definition of gender or sex coupled with the removal of the requirement to be diagnosed with gender dysphoria means that the requirement to declare that one intends to live permanently "as a woman" or "as a man" is exceptionally unclear, beyond updating one's titles, name, or pronouns.

This is a direct consequence of not defining terms. There has been a systematic failure throughout this process to define the terms sought to be changed. This is not like failing to define an ancillary or obvious term within legislation. This is the central concept that this Bill is designed around. It can give rise to a two-year prison sentence. You are liable to be imprisoned for two years for making a declaration which is "false in a material particular". Surely, it would be imperative to define "acquired gender" more precisely than "the gender in which the person is living when the application is made". Gender is not defined. It is the most important aspect of the statutory declaration and yet it is not defined.

Liability to a two-year prison sentence has been repeatedly used to calm concerns over potential abuse of this system. There has never been a prosecution in the UK for providing false information during a process of

44. Shona Robison (2022) Gender Recognition Reform (Scotland) Bill: Letter to MSPs, available: https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-letter-to-msps/

45. Shona Robison (2022) Gender Recognition Reform (Scotland) Bill: Letter to MSPs, available: https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-letter-to-msps/

changing legal sex. Based on how the law in this area will operate, given the removal of most criteria, I cannot see how a criminal conviction could be secured in relation to someone failing to, or not intending to live "as a woman". If woman is a legal status and only a legal status, then living with a GRC stating you are a woman is living "as a woman". Indeed, anyone convicted for breach of this provision will have very strong rule of law and human rights challenges to make given how vague this criminal offence is. That alone may be sufficient to ground a reasonable belief that these changes will adversely affect the operation of equality law. What is more, it is difficult to see how a requirement to update one's driving licence or pronouns will serve as a form of protection from abuse. This is especially the case given that the declaration requires no evidence to be produced to show that one is living in their acquired gender and demands only an 'intention' to do so.

The only point where an application could be considered to be fraudulent by virtue of intention, in my view, is if one states that one has an intention to continue to live in the acquired gender (i.e. to be legally recognised as a woman or a man) permanently when one actually intends to only do so for a short period of time. How that will be policed, given that people are allowed to change their minds and can apply to revert their legal sex, is very unclear.

The change from a medically supervised process to a system of Self-ID changes the law relating to protected characteristics, as set out above. That will be sufficient to meet the first limb of the s.35 test because it modifies the law as it relates to a reserved matter. There are also reasonable grounds to believe that this modification will have an adverse effect on the operation of the Equality Act, given the difficulty with which fraudulent applications will be policed and the impact that may have on safeguarding issues. Amendments specifically designed to prevent those on the sex offenders registry to obtain a GRC via statutory declaration were rejected.[46] If, as will be established below, the possession of a GRC will have an impact upon the law relating to single sex services, associations, and schools, then the fact that someone without a trans identity could obtain a GRC via statutory declaration may be sufficient to ground a reasonable belief that this Bill will adversely affect equality law.

46. The amendment initially prohibited sex offenders from ever being eligible to change sex. This was amended to introduce a right of appeal wherein the offender could demonstrate the veracity of their case. That amendment was rejected as well.

Single-Sex Services, Associations, and Schools

One of the recurring arguments advanced around Self-ID laws is that they will undermine women's sex-based rights to exclude biological men from single-sex spaces such as changing rooms, toilets, and women's shelters. But this argument is premised upon the belief that women have a legal right to access single-sex, women-only spaces. They do not. What is provided for in the Equality Act is an exception which permits duty-bearers to create exclusive spaces if they wish and to exclude members of the opposite sex. This is only permissible where it is in accordance with the provisions of Schedule 3 of the Equality Act. The same is true for exclusion on the basis of gender-reassignment.

A failure to provide single-sex services on the basis of biological sex might, in some instances, amount to unlawful discrimination against women.[47] For example, a female sexual assault survivor is currently suing Brighton's Rape Crisis Centre Survivors' Network for discrimination based on its policy of not providing a women-only peer support group as determined by reference to biological sex.[48] A failure to provide biological-sex-segregated services might also amount to indirect discrimination against religious persons whose faith demands segregation on the basis of biological sex.[49]

This is particularly relevant for organisations such as Southall Black Sisters who seek to provide targeted services to specific groups.[50] Southall Black Sisters are a non-profit organisation that successfully challenged Ealing Council for threatening to withdraw their funding for black and other ethnic minority women in the borough, in order to fund services for all women regardless of ethnic background. Failure to provide specific services will, in some contexts, amount to unlawful indirect discrimination. Failure to provide such services might result in vulnerable women self-excluding from important public services, including rape crisis centres. But even here, while there might be obligations to set up certain spaces, there is no automatic right to access them.

In her statement before the Scottish Parliament, Cabinet Secretary Shona Robison claimed that "The Bill's proposals have no direct effect on single-sex spaces".[51] This is partially true regarding single-sex *services*, but it is completely false with regard to single-sex associations or schools. If the Bill does what the Scottish government intends it to do and provides a new way to obtain a UK-wide GRC and if, as the Scottish government have argued, a GRC changes sex for all purposes within the Equality Act, then possessing a GRC granted in Scotland under this scheme will directly affect the operation of single-sex spaces throughout the UK.

47. See; *Shah and Kaur v Ealing BC* [2008] EWHC 2026 (Admin).
48. See; https://www.crowdjustice.com/case/help-sarahs-legal-challenge/
49. See; Lottie Moore, 'Gender identity ideology in the NHS: NHS Trust tells patient they cannot guarantee intimate same-sex care' (2023) Policy Exchange, available: https://policyexchange.org.uk/publication/gender-identity-ideology-in-the-nhs/
50. See; *Shah and Kaur v Ealing BC* [2008] EWHC 2026 (Admin).
51. Shona Robison (2022) Gender Recognition Reform (Scotland) Bill: Cabinet Secretary's statement, available: https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-cabinet-secretarys-statement/

Single-Sex Services:

Section 29(1) of the Equality Act states that:

> A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

Schedule 3, Part 7 makes provision for the setting up on single-sex services or for the provision of separate services on the basis of sex. In doing so, the anti-discrimination requirements in s.29(1) do not apply to sex-based discrimination.

Paragraph 26 states that:

> (1) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services for persons of each sex if—
>
> (a) a joint service for persons of both sexes would be less effective, and
>
> (b) the limited provision is a proportionate means of achieving a legitimate aim.
>
> (2) A person does not contravene section 29, so far as relating to sex discrimination, by providing separate services differently for persons of each sex if—
>
> (a) a joint service for persons of both sexes would be less effective,
>
> (b) the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex, and
>
> (c) the limited provision is a proportionate means of achieving a legitimate aim.

Paragraph 27 states that:

> (1) A person does not contravene section 29, so far as relating to sex discrimination, by providing a service only to persons of one sex if—
>
> (a) any of the conditions in sub-paragraphs (2) to (7) is satisfied, and

(b) the limited provision is a proportionate means of achieving a legitimate aim.

(2) The condition is that only persons of that sex have need of the service.

(3) The condition is that—

(a) the service is also provided jointly for persons of both sexes, and

(b) the service would be insufficiently effective were it only to be provided jointly.

(4) The condition is that—

(a) a joint service for persons of both sexes would be less effective, and

(b) the extent to which the service is required by persons of each sex makes it not reasonably practicable to provide separate services.

(5) The condition is that the service is provided at a place which is, or is part of—

(a) a hospital, or

(b) another establishment for persons requiring special care, supervision or attention.

(6) The condition is that—

(a) the service is provided for, or is likely to be used by, two or more persons at the same time, and

(b) the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex.

(7) The condition is that—

(a) there is likely to be physical contact between a person (A) to whom the service is provided and another person (B), and

(b) B might reasonably object if A were not of the same sex as B.

A service in this context is defined by its public nature. Any service that is open to the public, for payment or not, will be covered by these provisions. This will include prisons[52] and hospitals[53] as well as changing rooms, toilets, and the provision of intimate care services such as grooming and massage providers.

Following the *FWS2* decision, sex for these provisions must mean legal sex, including any GRC holder of the opposite biological sex. It thus becomes very difficult to imagine how any of the above provisions could be met by reference to biological need. Lady Haldane concluded that biological sex is not mentioned in the Equality Act and so sex must mean legal sex:

> The 2010 Act does not, as it could have done, provide that "sex" in section 212 means biological sex or some other descriptor, or sex registered at birth, or explicitly exclude those who have the sex recognised in their GRC.[54]

The result is that for most instances, except for legislation "where it is clear that 'sex' means biological sex" a holder of a Gender Recognition Certificate will be legally considered to be the sex of their acquired gender.[55] The Equality Act is not such a statute according to Lady Haldane. This means that justifications for the setting up and maintenance of single-sex services cannot be grounded in the needs of biological women or men as those groups are not protected under the Equality Act. It can only be grounded in the needs of legal women or men. It is very unclear in my view what that will mean for the continued maintenance of many single-sex services which are justified by reference to biology or privacy or the prevention (or support for victims of) male violence. Indeed, if Lady Haldane is right, then there might be no way to establish any sex-segregated services at all because the tests needed to be met to justify their establishment simply cannot be met. How might one demonstrate that a joint service would be less effective than a separate one if separate services include biological males and females?

Additionally, certain provisions in para. 27 seem to have originally been envisaged to reference biological sex. For example, the condition in para. 27(2) that "only persons of that sex have need of the service". Another is subsection (7) where there is likely to be physical contact between persons and someone might reasonably object if that occurs from someone of the opposite sex. It is clear to me that here these provisions envisage sex to mean biological sex. If the category of sex is generally considered to be a legal construct, including any person who is legally recognised as falling within that category, then there are no services that only persons of one sex need. Similarly, the justification for pregnancy discrimination being direct sex discrimination (only women can become pregnant so all pregnancy discrimination is sex discrimination) is no longer coherent.

Leaving this issue aside for the moment, assuming that all currently existing single-sex services can continue to fall under the exception set out in Sch 3, there then remains the issue of exclusion. Sch. 3 para. 28 allows

52. See; Maureen O'Hara, *Transgenderism and policy capture in the criminal justice system: Why criminal justice policy needs to prioritise sex over 'gender identity'* (2022) Policy Exchange, available: https://policyexchange.org.uk/publication/transgenderism-and-policy-capture-in-the-criminal-justice-system/

53. See; Lottie Moore, 'Gender identity ideology in the NHS: NHS Trust tells patient they cannot guarantee intimate same-sex care' (2023) Policy Exchange, available: https://policyexchange.org.uk/publication/gender-identity-ideology-in-the-nhs/

54. *For Women Scotland v The Scottish Ministers* [2022] CSOH 90 [28]

55. *For Women Scotland v The Scottish Ministers* [2022] CSOH 90 [53].

for single-sex services to discriminate on the basis of gender reassignment so long as it is "a proportionate means of achieving a legitimate aim". Following the *FWS2* judgment this will mean that a biological male who holds a GRC stating that they are legally female who is excluded from a single-sex service will be considered to be legally female for the purposes of the Equality Act. This does not mean that they have a right of access to single-sex, women-only spaces, however. Such services can still exclude biological males on the basis of either sex, if they do not hold a GRC, or gender reassignment, if they do hold a GRC. The difference is that services can exclude on the basis of sex with no requirement of justification, except where such exclusion amounts to indirect discrimination.[56] With regards to both direct and indirect gender reassignment exclusion, such exclusion must be a proportionate means of achieving a legitimate aim.

Having said that, the possession of a GRC clearly does matter for the assessment of whether exclusion is objectively justified. More by way of justification will be needed to exclude someone with a full GRC compared to someone who is covered by the protected characteristic of gender reassignment but who does not hold a GRC. A non-GRC holding biological male seeking to access a single-sex service is covered directly by the exception set out in paras. 26 and 27. This is because the category of legal women includes all biological women who do not hold a GRC stating they are male and all biological males who hold a GRC stating they are female. Excluding a biological male without a GRC on the basis of his biological sex is direct sex discrimination. If this person is also covered under the protected characteristic of gender reassignment, they could claim indirect discrimination here. But indirect discrimination is subject to a justification test.

In contrast, a GRC holding biological male seeking to access a single-sex service is legally a woman and so cannot be excluded on the basis of the sch. 3 sex-discrimination exception. The only claim that could be brought here is one of discrimination on the grounds of gender reassignment. The test for discrimination here will be different depending on whether one holds a GRC or not. If a biological male seeking access to a women's service holds a GRC and is legally a woman, the comparator for direct discrimination is a woman who does not hold a GRC or who does not propose to change sex. That is, a biological woman with no gender reassignment characteristic. If a biological woman seeking access would not be excluded but a GRC holding male would be, then this is direct discrimination on the basis of gender reassignment. For a non-GRC holding male, the comparator would be a legal man who was not proposing to go through, currently going through, or having gone through a process of changing sex.[57] That is, a biological male with no gender reassignment characteristic. In such a case, both would be excluded and so exclusion could not be direct discrimination. It would instead be indirect discrimination, which is capable of being justified.

Direct discrimination ordinarily cannot be justified. There is, however, a justification test set out in Sch.3 para. 28 for this and its wording

56. See; *Authentic Equity Alliance v Commission for Equality and Human Rights* [2021] EQHC 1623 (Admin).

57. *R (Green) v Secretary of State for Justice* [2013] EWHC 3491 (Admin), [66-70].

is identical to that in s.19 on indirect discrimination: it must be a proportionate means of achieving a legitimate aim. But it is likely that the assessment of whether this test has been met will differ depending on whether one holds a GRC, because this would be a difference between direct and indirect discrimination. With no GRC, exclusion is direct discrimination on the basis of sex (fully excepted) and may also be indirect discrimination on the basis of gender reassignment. With a GRC it is only direct discrimination on the basis of gender reassignment. The test is ostensibly the same between direct and indirect discrimination in this context, but the fact that one is excluding a legal woman from a women's-only service may require more by way of justification than what would be needed to justify excluding a legal male. The law on this is extremely unclear but it cannot be presumed that the possession of a GRC will make no difference in such assessment.

This is especially the case if the reasons which permit the setting up of single sex services are tied to the needs of legal and not biological women. If one must demonstrate that a same-sex service is needed to cater to the specific needs of legal women in order to be permitted to exclude legal males in the first place, how can one then justify the exclusion of a legal woman?

A change in the law making it more permissible for people to obtain a GRC may have an adverse impact on the ability of single-sex service to exclude depending on the circumstances and the service in question. There is a real concern that a large expansion of those holding GRCs could lead to the self-exclusion of women who, for religious or other reasons, can only use certain services if they are segregated by biological sex.

The effect of this Bill, if enacted. will make it easier to convert what was once an indirect discrimination claim into a direct discrimination claim. For some, it will make this conversion legally possible where it otherwise would not be under the Equality Act.

The reality is that these issues are only likely to arise if someone is excluded from a single-sex service and seeks to challenge the lawfulness of their exclusion. This is because information relating to whether someone possesses a GRC is secret and its unauthorised disclosure is a criminal offence. In addition, many service providers have begun to offer single-sex services to any trans person, regardless of their possession of a GRC. Two issues therefore can bring these concerns to the fore. The first is circumstances where failure to provide biologically separate services constitutes indirect discrimination. The second is where service providers do choose to exclude on the basis of biological sex and are sued for unlawful exclusion. The GRR Bill will make these cases more likely to happen, given the impact it will have on the sheer number of people in possession of a GRC in Scotland and the extremely permeable border between Scotland and the rest of the UK.

Single-Sex Associations

The above analysis applies to single-sex services. It does not apply to single-sex associations or schools. Much of the commentary on this Bill, including the arguments advanced by the Scottish government in defence of it, have assumed that concerns relating to single-sex *spaces* are exhaustively covered by provisions within the Equality Act dealing with single-sex *services*. It is important to set out the law as it related to single-sex associations and schools as it is different to that which applies to services. Most notably, there is no exception for exclusion on the basis of gender reassignment.

Under s.107 of the Equality Act, an "association" is an association of persons which has at least 25 members and where admission to membership is regulated by the association's rules and involves a process of selection. Thus, many forms of women's groups and clubs, including any support groups for vulnerable women will be covered under provisions relating to associations, not the provision of public services, should they regulate their membership.

Section 101 of the Equality Act sets out provisions for membership within associations. Section 101(1) prohibits discrimination in the admission or terms of admission of members. Schedule 16 sets out certain exceptions to this prohibition of discrimination. Most notably, sch.16 para.1(1) states that:

> An association does not contravene section 101(1) by restricting membership to persons who share a protected characteristic.

This means that single-sex associations are free to discriminate on the basis of sex but not on the basis of any other protected characteristic, including gender reassignment. Drawing upon the analysis set out above, if Lady Haldane is correct, we can conclude that female-only associations can exclude all legal males, be they biological males or GRC holding biological females, subject to justification texts. But they cannot exclude a GRC holding biological male.

This is because, exclusion of a non-GRC holding male is direct discrimination on the basis of sex and indirect discrimination on the basis of gender reassignment. The comparator here for the purpose of sex discrimination is a legal woman who does not hold a GRC – a biological woman. There is no justification test required here because there is an absolute exception. For indirect discrimination, there is a justification test which can be met. In contrast, exclusion of a GRC holding male – a legal woman – constitutes direct discrimination on the basis of gender reassignment which cannot be justified and so is always unlawful. If a single-sex, women-only association would permit a biological woman to join but would not permit a biological male with a GRC to join then this is direct discrimination on the basis of gender reassignment and is unlawful.

Crucially, unlike Sch. 3, Sch. 16 does not contain any exception permitting discrimination on the basis of gender reassignment if it can be objectively justified as a proportionate means of achieving a legitimate aim.

As such, the ordinary rules relating to gender reassignment discrimination apply. Given that exclusion here amounts to direct discrimination, there is no legal justification for it. The result of the *FWS2* decision is that single-sex, women-only associations are not permitted to exclude GRC holding males. The Gender Recognition Reform Bill, while not changing any of the provisions within the Equality Act, will nevertheless make it practically much harder for single-sex associations across the UK to exclude. The Cabinet Secretary's statement that the Bill's proposals "have no direct effect on single-sex spaces" is simply false with regards to single-sex associations. The arguments advanced by the Scottish government in relation to single-sex spaces have all focused on the exceptions associated with public services where justification tests are built in for exclusion on the basis of gender reassignment. Nowhere was it recognised that the law relating to single-sex associations and schools is different and that the Sch.3 exceptions do not apply.

Single-Sex Schools

The Scottish government has stated that "The Bill makes no changes in public policy including schools."[58] This is simply not true in light of the *FWS2* decision and the arguments advanced therein by the Scottish government itself. By lowering the age at which someone can obtain a GRC, this Bill provides new rights of inclusion to single-sex schools to those 16-18-year-olds who obtain one.

Specifically, s. 85(1) of the Equality Act provides that:

> The responsible body of a school to which this section applies must not discriminate against a person—
>
> (a) in the arrangements it makes for deciding who is offered admission as a pupil;
>
> (b) as to the terms on which it offers to admit the person as a pupil;
>
> (c) by not admitting the person as a pupil.

Similar to associations, the Equality Act permits the establishment and maintenance of single-sex schools throughout the UK. In Sch. 11, single-sex schools are excluded from the s.85(1) prohibition on discrimination but only "so far as relating to sex". There is similarly no exception to gender reassignment discrimination. Following the Scottish government's argument, accepted in *FWS2*, that sex in the Equality Act means legal sex, we must conclude that single-sex girls' schools are permitted to exclude non-GRC holding biological males should they meet a justification test but cannot lawfully exclude GRC holding biological males in any context. To do so would be to directly discriminate on the basis of gender reassignment and there is no exemption for that regarding the admission to schools. Single-sex schools will still be able to provide single-sex services which

58. Scottish Government (2022) Gender Recognition Reform (Scotland) Bill: more information, available: https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-more-information/

can discriminate on the basis of gender reassignment, but they cannot refuse admission on the same basis.

The lowering of the age limit to obtain a GRC means that this Bill not only changes public policy and law regarding schools, it also generates new rights where they previously did not exist. 16-18-year-olds in Scotland will now have a legal power to seek a GRC where they previously did not and, should they obtain one, access to a heightened – and distinct – form of gender reassignment protection. No non-GRC holding biological male between 16-18 can demand access to a girls-only school as of right. To refuse admission in this context would be direct discrimination on the basis of sex, which is excluded under sch. 11, or indirect discrimination on the basis of gender reassignment which can be justified. The possession of a GRC converts the direct basis of exclusion from one's sex to one's gender reassignment, as per the analysis of appropriate comparators set out above. The result will be that there will now be a mechanism open to biological males between the ages of 16 and 18 to change their legal sex and gain a right of admission to girls' schools in the UK. More specifically, this child will gain the right not to be excluded from any such school on the basis of their gender reassignment. Legally these children will be female and exclusion on the basis that they are biologically male will be unlawful. This is a substantial change to the operation of the Equality Act as it pertains to single-sex schools throughout the UK.

Positive Measures

So far, the focus of this paper has been on the individual rights that derive from the protected characteristics of sex and gender reassignment. That forms an important aspect of equality law: individual rights not to be subject to wrongful discrimination. There is however another aspect of equality law: the s.149 public sector equality duty, establishing positive obligations to advance equal opportunities by taking into account the need to close advantage gaps which exist between various social groups.

Section 149 imposes upon public authorities in the exercise of their functions the requirement to have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under the Act; to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

These are group-based provisions, not individual ones. If the manner in which those protected characteristics are constituted is changed, the legal meaning and effect of this provision is changed as well. The Gender Recognition Reform Bill changes how the protected characteristics of both sex and gender reassignment are constituted and so substantively alters the meaning and effect of the Equality Act as it pertains to equal opportunities and positive measures.

In this context we could see a tension between sex-based interests and gender-based interests. If the requirements of equal opportunities demands that biological women as a group be afforded this attention and consideration, then a legislative scheme which greatly eases the ability of persons to move in and out of the legal category of women and thus benefit from those provisions runs the risk of obscuring or even excluding intended beneficiaries. Whether those with a GRC are considered legally women for the purposes of their individual rights is one thing. It is another thing entirely for this to mean that the principle of equality of opportunity no longer covers biological women as a distinct disadvantaged group relevant to biological men. If we follow the implications of Lady Haldane's judgment, this is already a feature of the Equality Act itself. If this represents an interpretation of the Act which the UK government considers to be a mistake that warrants legal intervention, then the GRR Bill, if enacted, will make an existing problem significantly worse. A change to the GRA such as is proposed with the GRR Bill will have significant implications for group-based equality provisions within the Equality Act.

One example, and the subject of the *For Women Scotland* litigation, is the representation of women in senior positions within civil society. The specific context of representation on public boards is devolved to Scotland, but the broader issue of female representation in the workforce is reserved.

Equality of opportunities can be concerned with advancing the interests of biological women compared to biological men and the interests of trans persons compared to non-trans persons with no contradiction. But it cannot advance both the interests of biological women compared to biological men and 'legal' women compared to 'legal' men at the same time because here each category necessarily excludes the other. You can either interpret representation of women to mean representation of legal women or biological women, but it cannot mean both. The wider category of legal women in this context cuts against the conceptual purpose of equal opportunity which is to focus not on the general category but on the narrower cognate group.

The same is true for the issue of a comparator for claims in indirect sex discrimination and equal pay cases. Indeed, the issue of equal pay is more complicated because in these cases the comparator must be a real, actual person. In direct and indirect discrimination cases, a hypothetical comparator is sufficient. In equal pay cases, there must be a real comparator who is of the opposite legal sex.

If equal opportunities as it pertains to the protected characteristic of sex now focuses on addressing advantage gaps between legal women and legal men, it no longer focuses on advancing the interests of biological women as compared to biological men. There is already a duty to advance equality of opportunities between those who have the gender reassignment characteristic and those who do not. If the devolved matter of equal opportunity is concerned with the sex-based interests of biological women as against biological men, then the problems associated with the FSW2 decision will be made substantially worse with the introduction of the GRR Bill. A change in the law to alter how one obtains a GRC in Scotland will change the composition and makeup of protected groups. This is important; the public sector equality duty is not concerned with individual claimants. It's concerned with group-wide disparities. So, overall numbers matter. A dramatic change in how a group is constituted makes nation-wide monitoring and implementation much harder. This is of particular concern given that the Public Sector Equality Duty concerns the UK as a whole.

The upshot would be that measures designed to advance the representation of women in certain areas will be advancing different groups depending on whether or not the Scottish category of legal women is used. This is true even if the Equality Act in the rest of the UK relies on Lady Haldane's interpretation of women to mean legal woman. The Scottish category will differ from the rest of the UK both in terms of substance, including some who would not be eligible to be included in the rest of the UK and also in terms of overall numbers, given how much easier it will be to obtain a GRC in Scotland. This is further complicated by the fact that, in practice, those possessing Scottish GRCs will not remain territorially bound to Scotland. Indeed, some may travel to Scotland specifically to obtain a GRC with the intention of relocating once it is secured.

Conclusion

Regardless of one's views on the introduction of Self-ID as a method of changing legal sex, it is clear that the law in this area is extremely uncertain. The precise relationship between the Gender Recognition Reform Bill and the Equality Act is in serious doubt. Statements made by Scottish Ministers that this Bill will not affect the operation of equality law, including in relation to single-sex spaces and schools are, given the decision in FWS2, longer true.

Give all of this, it is worth reiterating the test for making a s.35 order in this context:

1. The Gender Recognition Reform Bill must modify the law relating to the reserved matter of equal opportunities, and
2. The Secretary of State must have reasonable grounds to believe that this modification will adversely affect the operation of the law relating to equal opportunities.

As explained above, introduction of a Self-ID system will make direct and substantive modifications to the law relating to equal opportunities. The Bill will introduce significant changes to the law of the Equality Act as it relates to the substantive content or nature of the protected characteristics of sex and gender reassignment. Changing the legal mechanism for acquiring or altering one's sex such that it becomes easier to do so makes it easier to gain the protection of two separate protected characteristics: sex and gender reassignment. This will change the law relating to anti-discrimination and also the law relating to positive measures. There is also a direct change to the law relating to single sex associations and schools. In addition, this Bill changes the Public Sector Equality Duty by changing the nature of the groups covered by it and by offering over-inclusive and insufficiently targeted support without the possibility of any alternatives, given the current legal framework.

These changes can fairly be described as a modification of the law relating to the operation of the Equality Act in both Scotland and the rest of the UK and so relates to a reserved matter. This is so, even if there has been no modification of the provisions of the Equality Act. Each of these changes is exceptionally controversial and there are reasonable grounds to conclude that they would be adverse. It is certain that a decision made by the Secretary of State in this context would not be so unreasonable that it would be unlawful. If there is a legal challenge to the making of a s.35 order – and it will certainly come if an order is made – it will be grounded

in the first limb of s.35(1)(b). The argument will be that the GRR Bill does not actually modify the operation of the Equality Act. Given the arguments set out above, that is simply not true. If, at the statutory text suggests, s.35 will determine 'modification' by reference to the effects of the Bill, rather than its purpose, and if, as the Scottish government have repeatedly argued, a Scottish GRC will have the same legal effect as UK GRCs, and if, as the Scottish government successfully argued in court, a GRC changes sex for the purposes of the Equality Act, then this Bill undoubtedly falls under the scope of s.35.

Those are some big 'ifs'. A serious amount of work needs to be done to clarify the operation of the Equality Act and its relationship to the Gender Recognition Act. That alone would warrant a s. 35 order, given the existing and future uncertainty. Introducing a new piece of devolved legislation which is arguably outwith competence but which certainly will affect the operation of equality law in Scotland, if it does what the Scottish government intend, will only destabilise a fragile balance in the law. Each of the issues set up above, including the general issue of incoherence, are likely sufficient to ground a s.35 order. Cumulatively, they are overwhelming.

The issues relating to the interaction between the GRA and the Equality Act have only recently begun to emerge. This is only the case because the number of those possessing a GRC remained relatively low. Rapidly expanding the amount of people who possess a GRC, as the GRR Bill looks set to do, without first clarifying the precise relationship between the GRA and the Equality Act will only compound these issues.

A s.35 order might seem like it is an extreme measure, given that one has never been made before. But the Scotland Act was drafted to include this power in order to deal with the precise issues raised by the GRR Bill. It is not an outright veto power, it merely prevents the Bill from receiving royal assent and in practice this opens a dialogue between the two governments to ensure that a revised version of the Bill will not affect the operation of the law relating to reserved matters in a manner unacceptable to the UK government. Given the degree of uncertainty currently within this area and the significance of the implications for equality related issues, that is a sensible course of action to take.

£10.00

Policy Exchange
1 Old Queen Street
Westminster
London SW1H 9JA

www.policyexchange.org.uk