



# The Gender Recognition Act: a trans-inclusive feminist approach

## Key points

- 1) **Reforming the Gender Recognition Act to allow gender self-determination is necessary to ensure the safety and dignity of trans people.**
- 2) **Self-determination reform should have no negative implications for cis (non-trans) women.**

## Background

The Gender Recognition Act 2004 (GRA) exists to enable transgender (trans) people to change the sex on their birth certificate. This is subject to the person providing evidence they have a medical diagnosis of 'gender dysphoria' and have presented socially in their identified gender for two years. These restrictions mean that the Act, though pioneering when passed, now falls short of the internationally recognised gold standard: self-determination.<sup>1</sup> Self-determination means a person can change their legal gender simply by making a formal declaration, such as a statutory declaration. Many countries use a self-determination system, including Norway, Ireland, and Malta.

**The Gender Recognition Act though pioneering when passed, now falls short of the internationally recognised gold standard: self-determination."**

The leaders of all four main parties supported reforming the GRA to enable self-determination after the 2017 election, and in October 2018 a government consultation was undertaken. The government will shortly announce its response to the consultation. This document draws on academic research in feminist philosophy, sociology and law to set out a case in favour of self-determination reform and to demonstrate that concerns that GRA reform will cause harms to cis women (i.e. women who are not trans) are unfounded.

<sup>1</sup> Ryan, RJ (2018) "Gender Identity Laws: The Legal Status of Global Sex/Gender Identity Recognition", *LGBTQ Policy Journal*, 8(1): 3-15. Köhle R, Ehart J and Recher A (2013) *Legal Gender Recognition in Europe*. Berlin: Transgender Europe.

<sup>2</sup> Barnes, E (2019). "Gender and Gender Terms", *Noûs*.

<sup>3</sup> Sandland, R (2005) "Feminism and the Gender Recognition Act 2004", *Feminist Legal Studies*, 13: 43-66.

## Framing The Question

It is tempting to think that to know how the Gender Recognition Act should work, we need to establish a state definition of what gender 'really is'. However, what we think of as 'gender' is in fact a complex cluster of things that inter-relate and interact in various ways.<sup>2</sup>

**Sex and gender are not distinct concepts in UK law."**

### Sex and gender

The common two-fold distinction between sex (a biological category), and gender (social roles and behaviours associated with physical sex) is far too simplistic. Imagine all the different ways that we could divide people up by sex/gender. Even if we limited our focus to bodies, we would have lots of options: should we focus on reproductive organs, chromosomes, or secondary sex characteristics like breasts and beards? Defining womanhood according to any of these would exclude some women: those who have had a hysterectomy or have chromosomal differences, for example. The social world is even more complicated. Society divides people by gender in ways from the overt (e.g. different workplace dress codes) to the subtle (e.g. expectations of how people should sit, stand, and walk). Both the content of these expectations and the ways in which they are applied to different individuals vary across different social situations. The absence of a clear distinction between sex and gender is accurately reflected in the current legal situation: sex and gender are not distinct concepts in UK law.<sup>3</sup>



Gender identity

Gender identity is an aspect of sex/gender commonly defined as a person’s subjective sense of being a man, woman, or non-binary, which may differ from the sex on their birth certificate. We all come into contact with gender norms and expectations, which are used by others to interpret our behaviour. Navigating society as a member of a given gender involves being seen by others as a member of that gender, and having a gender identity concerns the way of navigating gendered society that a person feels is best for them, given the available options.<sup>4</sup> For example, if someone has a female gender identity this means that they feel that navigating society as a woman is what works best for them, given the available options, even though they may well not agree with all of the expectations currently placed on women.



Gender is many things.”

A person whose gender identity differs from the way they were categorised as male or female at birth (based on their body) is trans, and a person whose gender identity aligns is cis.

Three pragmatic questions

Since gender is not one single thing, it doesn’t make sense to ask what gender really is and then build a legal framework for gender recognition to reflect that. Gender is many things.

The questions we need to ask instead are pragmatic:

- 1

What are the purposes of the Gender Recognition Act?
- 2

Which aspects of gender are relevant to these purposes?
- 3

How can these aspects of gender best be identified in individual cases?

Our case for self-determination reform takes the form of answers to these three questions.

The Case for Self-Declaration Reform

What are the purposes of the Gender Recognition Act?

The practical function of the GRA is to enable a person to change the registered sex on their birth certificate. The main implications of this have related to marriage/civil partnership and pension rights. However, marriage is now available to all couples (civil partnership will likely soon also be equalised), and pension ages have been equalised. Gender or sex markers on documents such as passports and NHS records can already be changed without invoking the GRA. In short, there are very few practical upshots of legal gender recognition in and of itself.

But the GRA is still important. If a person’s birth certificate does not match other documentation, this can ‘out’ them as trans, potentially leading to discrimination and harassment. It also limits their choices regarding how and when to share this deeply personal information. Birth certificates also represent state recognition of a person’s gender, which is important for personal dignity.

Therefore, the main functions of the GRA are:

- a) to enable a person to navigate society without being forced to disclose that they are trans.
- b) to represent the state’s recognition of a person’s gender on a symbolic level.

Which aspects of gender are relevant to these purposes?

Most people want to navigate society based on their gender identity, for which they need documentation that reflects this. When it comes to representing state recognition of a person’s gender in order to affirm their dignity, the best way to achieve this is to respond to the person’s gender identity - that is, their own sense of self.<sup>5</sup> Therefore, the aspect of gender that is relevant to the GRA is gender identity.<sup>6</sup>

How can these aspects of gender best be identified in individual cases?

Currently, the GRA requires a panel of experts to consider evidence that the person has a medical diagnosis of gender dysphoria (clinically significant distress in response to an experience of sexed and/ or gendered incongruence), and has presented themselves socially as the gender they identify with for at least two years. However, neither is an indicator of gender identity. Having a certain gender identity doesn’t mean that you necessarily want

to conform to medical models of appropriately gendered bodies or behaviours, or that you experience distress. Nor does it guarantee that you will feel able to present in accordance with that identity in all social settings, especially without full legal recognition.<sup>7</sup> Accordingly, in its present form, the GRA is not responding to gender identity, but to other aspects of gender.

Given that we ought to base legal gender recognition on gender identity, the only way of doing this is to adopt self-determination and allow people to declare their own gender identity.

Implications for Cis Women

Thinking about the function and purposes of the GRA, as set out above, helps to show that self-determination need not, as some have suggested, have negative implications for cis women.

Gender-separated spaces and services

One common concern relates to access to gender-separated spaces and services like toilets, changing rooms, and sexual violence services. However, such access is not determined by legal gender documentation. Under the Equality Act 2010, gender-separated services and spaces must be open to both trans and cis women in most cases; in the rare instances where the exclusion of trans women is legal, such exclusion applies to trans women irrespective of whether they have taken advantage of the provisions in the GRA.<sup>8</sup> So changing the basis on which legal gender documentation is issued will make no difference to who can access gender-separated services and spaces.



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Prisons

Prisons are governed by specific policy on the placement of prisoners into the male or female prison estate. Under current policy, the default practice is to place prisoners according to their

birth certificate, which means that changing the GRA may make some difference to which prisoners are placed in the female estate. However, the sex on a person’s birth certificate does not determine where they must be placed, and there are already provisions for placing prisoners differently where appropriate. In particular, any woman prisoner, whether trans or cis, who poses a risk that cannot be managed successfully in the female estate can be placed in the male estate.<sup>9</sup> Thus, current policy already includes measures to protect women prisoners from individuals who might pose a risk to their safety. Although self-determination reform may have some implications for the placement of prisoners, therefore, these should have no negative impact on cis women.



Self-determination reform need not have any indirect implications for cis women.”

Indirect impacts

As we have seen, the GRA does not make a claim about what gender ‘really is’. Rather, it pronounces on a specific aspect of gender that is relevant for a specific purpose: that is, gender identity is relevant for a change of birth certificate. Enacting self-determination reform is perfectly compatible with allowing for other aspects of gender to be considered relevant for other purposes, such as gathering sex and gender-related data of various sorts (for example, on the census).

There are genuine conversations to be had about a range of questions connected to sex/gender, but these questions can and should be separated from the question of reforming the GRA. As many women’s organisations have noted, self-determination reform is completely compatible with fashioning nuanced, evidence-based policies on these other questions.<sup>10</sup> Therefore, self-determination reform need not have any indirect implications for cis women.

<sup>4</sup> Jenkins, K (2018) “Toward an Account of Gender Identity”, *Ergo*, 5(27).

<sup>5</sup> Hines S (2013) *Gender Diversity, Recognition and Citizenship: Towards a Politics of Difference*. Palgrave Macmillan

<sup>6</sup> Since some people have gender identities that are non-binary, and people under the age of 18 can have a gender identity, this argument functions to justify self-determination for these individuals as well as adult trans women and men. See: Pearce, R and Lester CN (2016) Report: Gender Recognition - Where Next? UK Trans Info. <https://bit.ly/2Z0kE66>.

<sup>7</sup> Pearce, R (2018) *Understanding trans health: discourse, power and possibility*. Policy Press.

<sup>8</sup> Equality and Human Rights Commission (2011) “Equality Act 2010 Code of Practice” <https://bit.ly/2Ze2UEx> (accessed 5/6/19). See especially paragraph 13.57.

<sup>9</sup> National Offender Management Services (2017) “The Care and Management of Transgender Offenders”. <https://www.gov.uk/government/publications/care-and-management-of-transgender-offenders>. Accessed 5/6/19. See especially paragraph 4.7.

<sup>10</sup>Close The Gap, Engender, Equate Scotland, Rape Crisis Scotland, Scottish Women’s Aid, Women 50:50 and Zero Tolerance (2017) ‘Statement in support of the Equal Recognition Campaign and reform of the Gender Recognition Act’. <https://bit.ly/2AuvjcV>

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## Summary

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The case we have made for reforming the GRA to allow self-determination rests on three claims:



The purpose of the GRA is to change the sex marker on a person's birth certificate. This in turn enables a person to navigate society without being forced to disclose that they are trans, and represents the state's recognition of a person's gender on a symbolic level.



The aspect of sex/gender that is relevant to this purpose is gender identity, understood as how someone feels best able to navigate our gendered society.



The best - and indeed, only - method for discerning gender identity is self-determination.

We have used this case to show that self-determination reform need have no negative impact on cis women, and that it is compatible with nuanced, evidence-based policy on sex/gender distinctions.

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## About the Authors

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