

# Gender Recognition Reform (Scotland) Bill and the UK

This paper, prepared by Sex Matters, considers whether the Gender Recognition Reform (Scotland) Bill (GRR Bill) is within the competence of the Scottish Parliament, examines the bill's potential adverse effects and sets out considerations for a challenge under Section 33 or Section 35 of the Scotland Act.

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## The legal framework

### The Gender Recognition Act

1. The Gender Recognition Act 2004 (GRA) provides for the acquisition of a certificate changing a person's sex for all [legal] purposes, as provided in Section 9(1), GRA 2004:

“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).”

It provides protection, backed by criminal sanctions, against disclosure of information about a person who has applied for or received a Gender Recognition Certificate (GRC). It also has effects on existing marriages.

2. The GRA was enacted after the ECHR cases of *Goodwin v UK* and *I v UK [2002]* in which the UK was found to have breached Article 8 and Article 12 of the European Convention on Human Rights (the right to respect for private life and the right to marry) in relation to post-operative transsexuals. The explicit intention of the GRA, as set out in the government's policy document at the time, was to remedy the wrongs identified in the Goodwin case:

“Many transsexual people want to keep their past life in their birth gender private, and object to having to produce a birth certificate in their former name and gender. They want to be recognised legally in their new gender – for example, for State pension purposes; to enjoy, so far as possible, privacy and protection from identification in their original gender; and some wish to marry in the acquired gender. It is these rights, currently unavailable to transsexual people in the United Kingdom, which the Government's proposals will address.”<sup>1</sup>

3. “Sex” (and related concepts including same-sex and opposite-sex) are integral to many laws in the UK. This was recognised by the House of Lords at the time of passing of the GRA. Explaining the “for all purposes” clause (GRA 2004 s.9), Lord Filkin recognised that there were thousands of laws referring to sex and said:

“My Lords, I sought to set out in Committee that the Bill's basic principle is that the issue of a gender recognition certificate by the judicial panel would mean that a person's gender becomes for all purposes in law the acquired gender. That is in truth the absolute heart of the Bill; **in essence, after the process of inquiry and testing, which we have discussed at length today, when or if the panel comes to**

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<sup>1</sup> Department for Constitutional Affairs (2003). *Government Policy concerning Transsexual People*.

that conclusion that the tests set out in the Bill have been met, the person's gender in law becomes for all purposes the gender as granted by the Act. That is the central thrust of the Bill."<sup>2</sup>

4. The GRA 2004 has the effect of changing who falls within the categories of male/man and female/woman in any particular legislation in which sex is relevant (subject to specific exclusions).<sup>3</sup> Three areas of legislation explicitly included in the effects of the GRA are birth certificates, pensions and marriage. A court has recently ruled that the GRA also applies to the Equality Act, although this may still be appealed at the time of writing.
5. The broad effect of the GRA on other legislation, together with its implications, was acknowledged in a statement to Parliament on 23rd May 2022 by Lord True and Mark Spencer MP, following a review of the use of sex-specific terms in drafting legislation.<sup>4</sup> The statement sets out key principles:
  - **Each bill that refers to sex, man/woman, male/female is passed on its own merits** to achieve a policy goal.
  - **Fulfilment of policy intent, through legal clarity**, is the objective of legal drafting.
  - **Section 9 GRA changes the meaning of words in other legislation:**

“The effect of section 9 of the Gender Recognition Act 2004 is that a reference to a ‘woman’ in legislation, without more, will include someone who is a woman by virtue of a Certificate and will not include someone who is a man by virtue of a Certificate. In some cases, this might be the desired result but in others it might not.”<sup>5</sup>
6. The statement recognises that in some cases this interpretation may mean that legislative effect does not match with policy goals. It noted that legislators could rectify this by provisions displacing or expressly disappling s.9(1) GRA 2004 to other pieces of legislation, as is envisaged in and provided for by s.9(3).<sup>6</sup>

<sup>2</sup> Lord Filkin, House of Lords, Hansard, 29th January 2004, column 410.

<sup>3</sup> Until 2004 the definition of sex for all legal purposes was established in common law as fixed at birth reflecting chromosomes, genitals and gonads, and not changeable by medical or surgical means. This was held in *Corbett v Corbett* [1971], *R v Tan* [1983] and *Bellinger v Bellinger* [2003]: “The distinction between male and female exists throughout the animal world. It corresponds to the different roles played in the reproductive process.... It confers a legal status, in that legal as well as practical consequences follow from the recognition of a person as male or female. The legal consequences affect many areas of life, from marriage and family law to gender-specific crime and competitive sport.”

<sup>4</sup> Spencer and True (2022). *Review of legislative drafting: Statement made on 23rd May 2022*.

<sup>5</sup> This is the approach followed by Lady Haldane in *For Women Scotland's application for Judicial Review [2022] CSOH 90*.

<sup>6</sup> Sex Matters is currently proposing that the UK Government take this approach in relation to amending the Equality Act.

7. The GRA 2004 was narrowly targeted at a strictly limited group: people diagnosed with transsexualism or “gender dysphoria”. This was described as “a widely recognised medical condition that the Government’s Chief Medical Officer has confirmed may properly be treated under the National Health Service as well as privately”. The process had also been described in the case of *Bellinger v Bellinger* [2003] 2 AC 467.

“Gender Surgery of this nature is the last step in what are typically four steps of treatment. The four steps are 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 finally, in suitable cases, gender reassignment surgery.”

8. The UK government’s policy document in 2003/4 recognised that “not all are able to have surgery, for medical and other reasons”, but envisaged gender reassignment as a set of stages under medical supervision. As Lord Filkin said in the House of Lords:

“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.”<sup>7</sup>

9. The House of Lords in *Bellinger v Bellinger* [2003] UKHL 21 noted the distinction between a transsexual and a transvestite: “A transvestite is a person who, usually for the purpose of his or her sexual gratification, enjoys dressing in the clothes of the opposite sex.” The policy document for the GRA 2004 also stated explicitly that “transsexualism is not transvestism or cross-dressing for sexual thrill, psychological comfort or compulsion.”<sup>8</sup>

10. The GRA 2004 thus enables GRCs to be granted to a defined and limited group of applicants on the basis that they satisfy the conditions set out in Section 2 of that Act that they:

- have or had gender dysphoria
- have lived in the acquired gender throughout the period of two years ending with the date on which the application is made
- intend to continue to live in the acquired gender until death.

11. Care was taken to avoid these criteria being undermined by jurisdictions with weaker standards. The GRA 2004 at s.21(1) states that a person’s gender is not to be regarded as having changed by reason only that it has changed under the law of a country or territory outside the United Kingdom. The law provides for people to obtain UK GRCs if they have

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<sup>7</sup> Lord Filkin, House of Lords, Hansard, 29th January 2004, column 376.

<sup>8</sup> Department for Constitutional Affairs (2003). *Government Policy concerning Transsexual People*.

changed legal gender using the laws of a limited list of approved countries or territories. As Lord Filkin stated in the House of Lords at the time:

“Clause 21(1) provides that a person will not be regarded as having changed gender solely by virtue of having changed gender under the law of another country or territory. This is necessary because standards for recognition are not uniform throughout the world, and we wish to ensure that the UK grants recognition only to those individuals who have recognition in a country or territory with criteria at least as rigorous as our own.

“Where other countries’ criteria are as rigorous as our own, people in that position should receive recognition under a simpler process, and this is provided in Clause 1(1)(b). Conversely, if the recognition is from a country or territory with criteria that do not meet our standards, we believe that, to gain recognition in this country, an individual should have to apply in the standard way, with the gender recognition panels scrutinising a full set of evidence.”<sup>9</sup>

12. The last time this list was updated was 2011 and the Justice Minister again emphasised to parliament that the aim was to provide a streamlined system of gender recognition for people who had undergone overseas gender recognition processes “equivalent to our own”

“The intention of the overseas application process is to minimise bureaucracy without compromising the integrity of the criteria set out in the Act. When the Act was passed, Parliament was mindful of the danger of creating a system which might allow transsexual people who could not meet the criteria in the Act to effectively sidestep those criteria. Such people might travel overseas to obtain gender recognition in a country with weaker criteria and then obtain legal recognition in the UK by virtue of that overseas recognition. This would have undermined the robust criteria in the Act agreed by Parliament.”<sup>10</sup>

## Reserved and devolved aspects

13. It is often stated that Gender Recognition is a devolved function. This is not accurate. Rather, it has both devolved and reserved aspects.
14. During the passage of the Scotland Act, it was established that it would be the convention of the UK Parliament that it would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament (the “Sewel convention”). Sewel

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<sup>9</sup> Lord Filkin, House of Lords, Hansard, 8th June 2004, column 150.

<sup>10</sup> Lord McNally, House of Lords, Hansard, volume 728: debated on Monday 27th June 2011.

motions are the means whereby the Scottish Executive obtains the Parliament's consent to UK legislation on devolved matters.

15. The Sewel motion that was passed by the Scottish Parliament in January 2004 (S2M-813) stated:

“Gender Recognition Bill – UK Legislation – That the Parliament endorses the principle of giving transsexual people legal recognition of their acquired gender and agrees that the provisions in the Gender Recognition Bill **that relate to devolved matters** should be considered by the UK Parliament thereby ensuring a consistent UK approach and early compliance with the rulings of the European Court of Human Rights with respect to the Convention rights of transsexual people under Article 8 (right to respect for private life) and Article 12 (right to marry).”

16. At that time, the Scottish Executive promoted a UK-wide approach, arguing that:

“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 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.**”

17. It also argued that:

“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.”

18. Debate and submissions around the Sewel motion identified key elements of the bill that related to devolved matters (marriage and divorce, including questions relating to age given the different minimum age of marriage in Scotland; birth certificates; sexual offences), and reserved matters including pensions and equal-opportunities legislation.

19. The extent of devolved and reserved matters was widely and commonly understood in the debate at the time. For example:

**The Equality Network:** “Some of these issues concern reserved matters – the Sex Discrimination Act, and pensions – and so do not relate to the Sewel motion. Others, such as the application fees for gender recognition, the interim arrangements on initial commencement of the legislation, and the relationship between gender recognition and marriage, are being discussed by ourselves and transgender organisations throughout the UK, on a UK basis with the UK Government. The remaining issues of concern are specifically Scottish matters that are directly the responsibility of the Scottish Executive.”<sup>11</sup>

**SPICe Briefing:** “The reserved issues relate mainly to the right to respect for private life which arose particularly in respect of employment law, national insurance, pensions and social security records.”<sup>12</sup>

20. The Scottish Executive concluded in 2004:

“Including Scottish provisions within the Gender Recognition Bill offers the swiftest, most cost-effective means of remedying the human rights breaches and delivering comprehensive legal recognition of the acquired gender of transsexual people embracing devolved and reserved policy consequences. A UK wide approach will also ensure consistency in the process of determining legal recognition and the legal consequences flowing from recognition of the acquired gender of a transsexual person thereby avoiding cross-border issues. Relevant Scottish provisions have been included within the Gender Recognition Bill to ensure that the legislation is fully workable in Scotland.”<sup>13</sup>

21. There was no suggestion that the criteria for awarding a GRC were devolved. Certainly insofar as the effect of a GRC relates to reserved matters, such as birth certificates and marriages in England, Wales and Northern Ireland, pensions, equal opportunities, and UK-wide criminal penalties for disclosure, the criteria for awarding a GRC must be reserved.

22. That the criteria for application for a GRC relate to both reserved and devolved matters is reflected in the power to specify the list of approved states. This can only be exercised by

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<sup>11</sup> Scottish Parliament (2004). *UK Gender Recognition Bill – Sewel motion, 21st January 2004*: submission to the Scottish Parliament, Justice 1 Committee, 28th January 2004 (page 30).

<sup>12</sup> Scottish Parliament (2004). *SPICe briefing, 20th November 2003*: submission to the Scottish Parliament, Justice 1 Committee, 28th January 2004 (page 84).

<sup>13</sup> Scottish Executive (2004). *Sewel Memorandum For Gender Recognition Bill J1/S2/04/4/2*.



the Secretary of State after consultation with the Scottish Ministers and the Department of Finance and Personnel in Northern Ireland.

## The Gender Recognition Reform (Scotland) Bill

23. The GRR (Scotland) Bill repeals and replaces the criteria that must be met for issuing a GRC, for applicants in Scotland. The new conditions apply to a different, wider group of people, **without a diagnosis** and **including children** aged over 16.

24. The policy memorandum for the bill states (at paragraph 59):

“The Bill amends the 2004 Act to introduce a new process for applying for legal gender recognition in Scotland, **and new criteria** which require to be satisfied by applicants to obtain a GRC. This reflects 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.**”<sup>14</sup>

25. The group covered by the new criteria is much larger and more heterogeneous, delineated by vague and easy-to-satisfy conditions. (The Scottish Government has suggested that evidence of asking to be referred to by the pronouns used for the opposite sex would be sufficient to demonstrate that a person is “living as” a member of the opposite sex.) 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.”<sup>15</sup> Examples include:

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

Robison then stated: “None of these individually would be a requirement but are examples of what could constitute living in the acquired gender.”

<sup>14</sup> Scottish Government (2022). *Gender Recognition Reform (Scotland) Bill – Policy Memorandum*.

<sup>15</sup> Letter from the Cabinet Secretary for Social Justice, Housing and Local Government, Shona Robison, to all Members of the Scottish Parliament regarding the Stage 3 Amendments for the Gender Recognition Reform (Scotland) Bill, 9th December 2022.

26. There is no expectation that members of this group are seeking to keep their sex private, and there are no safeguards to exclude males for whom cross-dressing is an erotic fixation or fetish. Such people would have been considered “transvestites” in the context of the development of the original GRA. Moreover, applicants are likely to include a new cohort of children, predominantly female, who are experiencing teenage-onset gender dysphoria. This is not the “widely recognised medical condition” previously identified in adult males. The epidemiology and treatment of these children are currently being investigated for NHS England by Dr Hilary Cass, an eminent paediatrician. She says in her interim report:

“At primary, secondary and specialist level, there is a lack of agreement, and in many instances a lack of open discussion, about the extent to which gender incongruence in childhood and adolescence can be an inherent and immutable phenomenon for which transition is the best option for the individual, or a more fluid and temporal response to a range of developmental, social, and psychological factors.”<sup>16</sup>

27. Additional amendments to the criteria might be made in future, such as further lowering the age of eligibility for a gender recognition certificate, or introducing new categories such as agender and non-binary.<sup>17</sup>

## The Scotland Act 1998: Section 33

28. Under Section 33 the Advocate General, the Lord Advocate or the Attorney General may refer to the Supreme Court the question of whether a bill, or any provision of a bill, would be within the legislative competence of the Scottish Parliament.

29. Section 29 (2) sets out situations in which provision is outside the bounds of legislative competence. These include where:

- a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland
- b) it relates to reserved matters
- c) it is incompatible with any of the Convention rights.

30. If a provision of an Act of the Scottish Parliament is held to be outside the legislative competence of the Parliament, section 29(1) does not render the whole Act invalid. It

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<sup>16</sup> The Cass Review (2022). *Independent review of gender identity services for children and young people: Interim report.*

<sup>17</sup> In June 2019, in a parliamentary statement on gender-recognition reform, the Cabinet Secretary for Social Security and Older People said that the Scottish Government “does not intend at this time to extend legal gender recognition to non-binary people”. However, this was not ruled out, and was raised as an ambition after the passage of the GRR Bill by MSPs.

provides only that the Act is “not law so far as” that invalid provision is concerned. A provision which is outside the legislative competence of the Parliament is “not law” and will never have been law.

## The Scotland Act 1998: Section 35

31. In certain limited circumstances the UK Government can exercise a policy control or veto over what legislation is enacted by the Scottish Parliament, even though that legislation is within the Scottish Parliament’s competence. Section 35(1)(b) allows the Secretary of State to make an order prohibiting the Presiding Officer from submitting a bill for Royal Assent if it:

“makes 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.”

## Is the GRR Bill within competence?

Considering first a challenge under Section 33, we take the three relevant grounds in Section 29 (2) of the Scotland Act in turn:

### Forming part of other countries’ laws

The GRR Bill would form part of the laws of England, Wales and Northern Ireland as they relate to sex, and in particular laws on marriage.

32. If, as the GRR Bill says on its face, it modifies the effect of Section 9 by treating Scottish-issued certificates as changing legal status “for all purposes”, the bill will form part of the law of countries of the United Kingdom other than Scotland. This would include in relation to birth certificates, marriage, divorce, annulment and death certificates in England, Wales and Northern Ireland. These matters are specifically included within the effects of the GRA 2004 and are outwith the competence of the Scottish Parliament.

33. The original Bill as introduced included provision at Section 12 that the Registrar General for Scotland would send copies of a full gender recognition certificate issued under the Scottish system to the Registrar General for England and Wales or Northern Ireland (as appropriate) if the person to whom it was issued is the subject of a UK birth register entry or a party to a marriage or a civil partnership under the law of England and Wales.

34. During the Stage 3 debates the government introduced an amendment to remove this provision. Shona Robison said:

“If the UK Government decides not to update English and Welsh birth certificates on the basis of a GRC that has been issued in Scotland, there can be no need for the requirement to send copies. Essentially, amendment 55 future proofs the bill against that possibility.”<sup>18</sup>

35. Removal of this administrative step was clearly seen as something necessary because of the risk of a challenge on the question of competence. However, it does not answer the underlying question of why the UK Parliament would legislate to change a person’s birth records in England, Wales and Northern Ireland (or misrecord their sex at death) if they do not hold a certificate that changes their sex “for all purposes” under UK legislation.
36. The Gender Recognition Reform Bill either makes an empty promise out of Section 9 that a “full gender recognition certificate” issued under the Scottish system changes a person’s sex “for all purposes” when in fact it can only change their sex for purposes that are under the competence of the Scottish Government which does not include for births, deaths and marriages in England and Wales and Northern Ireland, or else it is legislating for these jurisdictions.
37. While Section 12 was removed, Schedule 2 of the Gender Recognition Act is not amended by the Gender Recognition Bill. This section allows a marriage to be annulled in England and Wales at the request of either party, if they hold an interim GRC. Where a marriage is annulled it is legally as if it did not exist. One impact of this may be on paternity. The father (or woman treated as the female parent of a child by virtue of the Human Fertilisation and Embryology Act) will only retain parental responsibility if they were domiciled in England or Wales at the time of the birth (Legitimacy Act 1976). Any measure that makes it easy to annul a marriage with a simple declaration engages Articles 8 and 12 and should be debated by Parliament before being enacted.
38. In general if the Bill is given Royal Assent with the wording that a GRC certificate changes a person’s sex for “all purposes” this will change the meaning of “sex” in any legislation of other jurisdictions in the UK.

## The GRR Bill relates to reserved matters

39. The Scotland Act does not list specific functions which are reserved. Instead it sets out matters where legislative competence has been reserved to the UK Parliament. In general, the reservations are expressed in broad terms. This approach was adopted deliberately to

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<sup>18</sup> The Scottish Parliament (2022). *Meeting of the Parliament: Wednesday, December 21, 2022. Section 12 – Copies of certificates to be given to other Registrars General.*

allow the courts to consider the intended coverage of reservations instead of taking an unduly literal approach.<sup>19</sup>

40. Reserved matters are set out in Schedule 5 Part II. “Gender recognition” is not explicitly listed as a reserved subject, but the Gender Recognition Act explicitly relates to the reserved matter of pensions (F3; which relates to the sex recorded with your national insurance number by HMRC and the Department for Work and Pensions).
41. Sections 29 (3) and (4) of the Scotland Act provide that the question of 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. It is intended to rely upon the “respectation doctrine” as articulated in *Gallagher v Lynn 1937 AC 863* at 870: “It is well established that you are to look at the ‘true nature and character of the legislation’... the ‘pith and substance of the legislation’. If, on the view of the statute as a whole, you find the substance of the legislation is within the express powers, then it is not invalidated if, incidentally, it affects matters which are outside the authorised field.” This approach was solidified in the *Imperial Tobacco* case, where the Supreme Court clarified that reserved matters will be read narrowly and devolved matters broadly.<sup>20</sup> The Court is generally deferential to devolved legislatures when assessing competence. But this does not mean that Acts or provisions which directly and substantially affect reserved matters are within competence.
42. In her judgment in *For Women Scotland [2022] CSOH 90* handed down on 13th December 2022, Lady Haldane found that the GRA 2004 changes the meaning of sex in the Equality Act so that it is “not limited to biological or birth sex, but includes those in possession of a GRC obtained in accordance with the 2004 Act stating their acquired gender, and thus their sex”.<sup>21</sup> This suggests that the impact of the GRR Bill on the Equality Act is not incidental but part of the true nature and character of the bill. Although it does not change the face of the Equality Act it seeks for Scottish GRCs to have the same effect as UK ones, and thus apply to the Equality Act.
43. We would argue that the bill relates to the reserved matter of equal opportunities (L2), particularly in light of the Haldane judgment on the *For Women Scotland* Judicial Review that the protected characteristic of sex in the Equality Act refers to sex as modified by a GRC, not biological sex. The Policy Memorandum for the bill says:

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<sup>19</sup> *Devolution Guidance Note 14 Orders made under Section 30(2) of the Scotland Act (Alterations to Legislative Competence)*.

<sup>20</sup> *Imperial Tobacco v Lord Advocate [2012] UKSC 61*.

<sup>21</sup> *Opinion of Lady Haldane in Petition of For Women Scotland for Judicial Review [2022] CSOH 90*.

“The Scottish Government aims to create a more equal Scotland where people and communities are valued, included and empowered and which **protects and promotes equality, inclusion and human rights**. The National Performance Framework sets a national outcome for human rights: ‘we respect, protect and fulfil human rights and **live free from discrimination**.’ In line with this, the policy of the Bill is to improve the process for those applying for legal gender recognition as the current system can have an adverse impact on applicants, due to the requirement for a medical diagnosis and supporting evidence and the intrusive and lengthy process.”

44. In making the case that children under 18 should be allowed to change their legal sex, it says this is based on “substantial evidence that keeping the age limit at 18 can negatively impact the wellbeing of young trans people and their ability to live dignified lives **free from discrimination**”.<sup>22</sup>

45. Similarly, Victor Madrigal-Borloz (the UN Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity, who was invited to address the Equalities, Human Rights and Civil Justice Committee of the Scottish Parliament twice) has made the case for this legislation on the basis of **non-discrimination and equal opportunities**.

46. It is clear that equal opportunities, and specifically the Equality Act, is a reserved matter (apart from where there are specific exceptions) and changing the scope and nature of the protected characteristic of sex is outwith competence. This was the conclusion of Lady Dorrian in the first FWS case:

“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.”

47. The Smith Commission emphasised that the UK should retain a unified pension system and unified equality law. Lord Dunlop, speaking for the UK government in the debate on the public boards exception (on which the FWS case focuses), stated:

“The equality provisions in the Bill relate to public sector bodies in Scotland and will enable the Scottish Parliament to make provision for the promotion and enhancement of equality in the public sector without any extension to the private sector. That is an Important point to make; I know that that issue was raised by the House of Lords Constitution Committee. **It is important to remember that the**

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<sup>22</sup> Scottish Government (2022). *Gender Recognition Reform (Scotland) Bill: child rights and wellbeing impact assessment*.

Smith Commission was explicit that the Equality Act 2010 as a whole is to remain reserved. The Government are confident that the Bill ensures that the benefits of a cohesive framework of discrimination law remains across Great Britain.”<sup>23</sup>

## The GRR Bill is incompatible with Convention rights

48. Even to the extent that the GRR Bill applies only to devolved matters, it is incompatible with the protection of rights under the European Convention on Human Rights.

## The justification for the GRA 2004: Article 8 and Article 12

49. The case of *Christine Goodwin v the United Kingdom [2002]* related to the right to marry, and to Article 8 in relation to having to disclose information about sex (for example, when dealing with a bank). The court ruled that there were “no significant factors of public interest to weigh against the interest of the applicant in obtaining legal recognition of her gender reassignment” in order to remedy these wrongs.

50. This does not mean that other people’s rights are not engaged by changing a person’s recorded sex. However, the GRA was developed with careful criteria to apply to an extremely limited group of people understood, in the main, to be post-operative transsexuals. It was developed to comply with the Goodwin ruling with the intention of avoiding disproportionate incursions on other people’s rights, characterised as “third parties” by Lord Filkin when he said in the House of Lords:

“The Bill is focused primarily on providing transsexual people with rights guaranteed by European human rights law. That primary purpose must be what guides us. However, central to all human rights legislation is the balance between rights and responsibilities.”<sup>24</sup>

51. Other rights that are relevant include the rights of a transitioning person’s spouse and the rights of other people under Article 10 freedom of expression and Article 9 freedom to hold and manifest beliefs (both constrained by the privacy protections in s.22), and Articles 8 and 3 in relation to other people’s personal privacy, including access to single-sex services with clear sex-based rules.

52. It has recently been confirmed in a judicial review in Northern Ireland (JR111 [2021] NIQB 48) that the UK scheme remains compliant with Article 8:

<sup>23</sup> Lord Dunlop, House of Lords, Hansard, 13th January 2004, column 673.

<sup>24</sup> Lord Filkin, House of Lords, Hansard, volume 657: debated on 13th January 2004, column GC35.

“Parliament’s determination that an applicant for a gender recognition certificate must provide a report with specialist medical input in support of their application strikes a fair balance between [the applicant’s] interests and those of the community having regard to the discretionary area of judgement available to Parliament on this issue and the aims which the requirement is designed to pursue.”<sup>25</sup>

53. Opening up the effects of a GRC to a wider group of people, with different characteristics from those for whom it was originally intended, interferes with that balance to the disproportionate detriment of the interests of the wider community.
54. The day after the GRR Bill was passed, Reem Alsalem, UN special rapporteur on Violence against Women, intervened publicly to express concerns over the impacts on safeguarding. She wrote: “We know that human rights are indivisible, interrelated and interdependent. Scotland had the opportunity to set an example on how to address and resolve the tension between rights and manage risks in an effective manner. Yesterday the Scottish Parliament decided to bypass that opportunity.” These concerns merit full and detailed consideration.
55. For brevity, we use an illustrative scenario to demonstrate one of the many problematic situations that will arise if the Bill becomes law, and consider its implications for Convention rights.

#### **Illustrative scenario**

Andrew is a teacher and the safeguarding lead at St Bernard’s, a mixed-sex secondary school. Andrew has access to school records that show him the name, age and sex of every child in the school. He has that information in an official capacity, and can use it freely for enforcing rules, talking to parents and other professionals, planning school trips, etc.

Chris, a male 16-year-old at the school, has recently been granted a GRC. Chris is a hormonally and physiologically normal adolescent male. The fact of Chris’s biologically male sex is now protected information under s.22 of the GRA. Andrew has acquired that information in an official capacity, so he may not disclose it to any other person, on pain of criminal prosecution and a £5,000 fine, unless one of the exceptions at s.22(4) applies. (Those exceptions are limited, and none of them is likely to apply.)

Deirdre is planning a school trip for Chris’s class, which she will be teaching from next term. She allocates pupils from her class list to single-sex sleeping

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<sup>25</sup> Queen’s Bench Division: *Application by JR111 for judicial review SCO11509 [2021] NIQB 48.*



accommodation for the trip. Chris is shown on the list as female, and so is allocated by Deirdre to share a tent with Emma, a 16-year-old female pupil.

Andrew sees Deirdre's risk assessment for the trip, together with her accommodation list, in his role as safeguarding lead. Deirdre's risk assessment for the trip does not acknowledge that Chris is male and has been allocated to share a tent with a female classmate. In order to perform his safeguarding function, Andrew wants to discuss this problem with Deirdre, his head teacher, and both Chris's and Elizabeth's parents. He cannot do so without incurring criminal liability under s.22.

The other children know that Chris is male because most have been in class together since childhood, and because Chris has the build and voice of an adolescent male. In fact Andrew and all of the class know that Chris is male, but the teachers are unable to discuss this and record it in a risk assessment.

## Article 10: the right to give and impart information

56. This situation gives rise to a violation of Andrew's **Article 10** right to freedom of expression, which includes the right to impart information. The fact that Andrew wishes to impart information to a limited number of individuals for a specific purpose does not detract from that: see for example *Open Door Counselling Ltd v Ireland (A/246) (1993) 15 E.H.R.R. 244*.
57. If – as seems inevitable – Andrew is unable in this situation to perform his safeguarding function, this situation will also give rise to a violation of Elizabeth's **Article 8** right to respect for her private life and the risk at least of a violation of her **Article 3** right not to be subjected to inhuman or degrading treatment. Elizabeth's parents' rights under **Article 8** to private and family life, under **Article 10** to receive information, and under **Article 2 of the First Protocol** to ensure that Elizabeth's education and teaching are in conformity with their own religious and philosophical convictions, are all also at least engaged, and may be violated.
58. Article 10 rights are qualified, and may be restricted as necessary "in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".
59. In 2004 legislators considered that the restrictions set out in s.22 created a reasonable balance because the legislation was for a very small group of adults who were considered to have undergone an "enormously difficult and traumatic process" requiring "an initial diagnosis which is likely to involve psychotherapy, psychological tests and other medical

tests”.<sup>26</sup> The purpose was to keep information about that tiny number of adults’ sex secret when those individuals had taken significant steps in order that their sex could conceivably be kept secret.

60. In order to sustain a justification for restricting freedom of expression based on the maintenance of secrecy, information must have the character of secrecy in the first place; see *Sunday Times v United Kingdom No. 2 [1991]*. The GRR Bill extends the category of people who may be covered by the protected-information regime to include those who have taken only superficial measures to conceal their true sex, or none at all. Criminal sanctions against the disclosure of information which is not and cannot be kept secret are disproportionate, unworkable and unjust.

### Article 3: freedom from degrading treatment

61. Article 3 of the Convention enshrines one of the most fundamental values of democratic societies: the prohibition of torture and inhuman or degrading treatment or punishment. This prohibition is absolute.

#### Illustrative scenario

Jasmine is a 24-year-old who was raped by an acquaintance while on a night out with friends. The assault was deeply traumatising, and she found herself unable to request immediate medical attention, or to report the rape to police.

A week after the rape, she plucks up her courage and decides she needs medical attention to check for internal injuries, STDs and pregnancy. She phones her GP practice and asks to be seen by a female doctor.

Gloria is a GP at Jasmine’s practice who is a biological male in possession of a GRC. Gloria has had extensive surgical and hormonal treatment and normally passes reasonably well as female in casual social and professional interactions. Gloria’s voice has not been surgically modified, but Gloria makes an effort to use a higher vocal range and tone when speaking. Gloria has not given the managers at the practice consent to reveal Gloria’s true sex to patients or colleagues.

Jasmine is given an appointment to see Gloria. During the appointment, she initially sees no reason to doubt that Gloria is female. Gloria asks to conduct an internal investigation and offers a chaperone. Believing Gloria to be female, Jasmine declines.

During the internal investigation, Gloria’s usually good vocal control falters, and Jasmine momentarily hears what is to her ears an unmistakably male voice. She

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<sup>26</sup> Lord Filkin, House of Lords, Hansard, 29th January 2004, column 379.

looks at Gloria more closely, and becomes convinced – while Gloria’s fingers are still inside her vagina – that Gloria is male.

Jasmine is deeply shocked by this encounter, which she experiences as a serious sexual assault further compounding the trauma of her rape.

62. This is something which could plausibly occur anywhere in the UK under the GRA as it stands.<sup>27</sup> That alone raises serious concerns over the compatibility of the Gender Recognition Act with the ECHR. This problem could be compounded by the GRR Bill dramatically increasing the likelihood of cases such as this arising, given the ease with which one can acquire a GRC. Now imagine a different scenario which could only occur if the GRR Bill becomes law:

Jasmine attends her GP practice requesting that she be seen by a female doctor. Max is a biologically male GP in this practice who is in possession of a Scottish GRC. Max uses female pronouns but has made no visible alterations to dress or appearance and does not have a diagnosis of gender dysphoria. Max has a deep voice and a beard. Jasmine has been given an appointment to see Max. When Max enters the room, Jasmine states that she requested to be seen by a woman. Max responds: “I am a woman”. Jasmine is confused and distressed. She is worried about being perceived as a bigot and potentially removed as a patient of this practice if she does not allow Max to examine her. She begins to experience flashbacks to her assault and becomes paralysed with fear. She does not voice any further protest to examination by Max, even though she does not consent to it.

63. Degrading treatment includes treatment that arouses feelings of fear, anguish and humiliation. States are required to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals.

64. Humiliating treatment can include being made to undress, and in particular being made to undress in front of members of the opposite sex. Treatment found to breach Article 3 has included strip-searching in front of an officer of the opposite sex (*Valašinas v Lithuania*, 2001, § 117). The court has also found that treatment that had failed to reach the minimum level of severity under Article 3 breached Article 8, for example in a case of lack of courtesy by prison officers when strip-searching visitors in prison (*Wainwright v the United Kingdom*, 2006, §§ 44–49).

65. The policy of allocating male transgender prisoners to the female estate was held to engage Articles 3, 8 and 14 in *R (FDJ) v Secretary of State for Justice* [2021]. The court found that the

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<sup>27</sup> Maya Forstater (2020). ‘Trans healthcare professionals and patient consent’.

prison’s policies balanced the rights of transgender males (with and without GRCs) and females lawfully in the circumstances.<sup>28</sup> The GRR Bill’s removal of the safeguards of the current GRA regime disturbs that balance, and would reopen the question of the lawfulness of UK prison allocation policies which default to allocating males with GRCs to the female estate. Different considerations apply to the policy – currently under review – of the Scottish Prison Service, in which primary allocation depends not on “legal sex” but on “social gender”. However, it is likely that having a GRC would be interpreted as having transitioned.

66. While the definition of the protected characteristic of sex in the Equality Act does not absolutely determine how organisations manage sex-segregated services (there are exceptions available which allow exclusions based on gender reassignment), organisations’ policies are shaped by perceptions of legal risk and perceptions of equality. The Public Sector Equality Duty requires public bodies to consider the impact of policies on groups that share protected characteristics.
67. There is considerable uncertainty around the interaction of the GRA and GRR Bill with the Equality Act. The For Women Scotland judgment may be successfully appealed; the UK government may amend the Equality Act to make clear that sex means biological sex; or the GRR Bill may be judged to be *ultra vires* in issuing certificates that purport to change a person’s sex for the purposes of the Equality Act. If none of these things happens, the GRR Bill will have significant negative impacts on the protection of rights under Articles 3, 8 and 14. “Sex” will be defined as a category that does not depend on biological sex, but instead on a certificate, and the Scottish Government will be able to give out certificates that do not attest to any medical diagnosis. Thus it will become accepted in law that the category of “women” can include biological males who look like men and who may not have gender dysphoria. Organisations will increasingly – out of fear, confusion or compliance – adopt policies that deny women the right to decide whether they will be examined or searched by or undress alongside someone male, in case that male person has the requisite certificate. But failure to use the single-sex exceptions will result in the human-rights abuses we have shown in the illustrative examples. We predict that organisations will decide not to provide a single-sex service when faced with larger numbers of people who can say that they are the opposite sex in law; no criteria for determining who belongs in which sex category; and the “two sexes” becoming mixed-sex categories, which means that organisations can no longer confidently objectively justify their policy, as is necessary in order to provide a lawful single-sex service.

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<sup>28</sup> FDJ is a decision of a powerful division of the High Court, but is a troubling judgment in various ways and is not, of course, binding on the Supreme Court.

68. More broadly, the GRR Bill will undermine the definition of terms that permit the effective operation of single-sex spaces, the loss of which will engage Articles 3 and 8 together with Article 14, particularly for women and girls in Scotland. Being able to correctly identify a person's sex, and to gate-keep access to services and spaces, is necessary for the operation of systems that protect people from being subjected to the inhumane treatment of being forced to undress with members of the opposite sex, or surprised by the presence of members of the opposite sex in situations such as hospital wards, night shelters, prisons, internal medical examinations and intimate searching in police stations.

## Adverse effects: section 35 order

69. 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 if it is within the Parliament's competence, where the Secretary of State has reasonable grounds to believe the enacted legislation would have an adverse effect on the operation of the law as it applies to reserved matters.

70. Leaving aside the question of whether the whole bill may be judged to be incompatible with Convention Rights, if it is determined that the bill is *ultra vires* in relation to:

- laws of other countries (including recording of sex as part of a person's foundational identity recorded on the birth register, recorded in relation to death, and relevant to the nullification of marriage in England, Wales and Northern Ireland)
- direct purposes in relation to reserved matters (including pensions and the Equality Act across the UK)

this will create a fragmented situation where a person who has a Scottish GRC may have:

- a) a changed or unchanged entry on the birth register and birth certificate (depending on whether or not they were born in Scotland)
- b) an unchanged sex record in relation to national insurance/pensions
- c) different legal rights depending on which jurisdiction they fall under (i.e. generally: where they live).

71. The question of whether the secrecy protection (s.22) provided by a Scottish GRC extends to criminal law outside Scotland also needs to be resolved as a question of competence.

*Impact of Scottish and UK GRCs on different people in different places*

<b>Birthplace</b>	<b>Scotland</b>	<b>Other UK</b>	<b>Scotland</b>	<b>Other UK</b>	<b>Scotland</b>	<b>Other UK</b>
<b>Current jurisdiction</b>	<b>Scotland</b>	<b>Scotland</b>	<b>Other UK</b>	<b>Other UK</b>	<b>Anywhere in UK</b>	<b>Anywhere in UK</b>
<b>GRC from</b>	<b>Scotland</b>	<b>Scotland</b>	<b>Scotland</b>	<b>Scotland</b>	<b>UK</b>	<b>UK</b>
Entry on the birth register or birth certificate	Changed	Unchanged	Changed	Unchanged	Changed	Changed
Legal status under reserved UK laws	Unchanged	Unchanged	Unchanged	Unchanged	Changed	Changed
Sex recorded by HMRC	Unchanged	Unchanged	Unchanged	Unchanged	Changed	Changed
Legal status under local laws	Changed	Changed	Unchanged	Unchanged	Changed	Changed
Secrecy protection under s.22	Yes	Yes	No?	No?	Yes	Yes

72. This fragmented regime does not meet the Scottish Government’s policy goal of providing a new route whereby people can obtain “a GRC and the rights and responsibilities which a person has on obtaining legal gender recognition”. What it has done is fragment the meaning of the term “sex”, its recording in official documents, and its associated rights and responsibilities, so that all are incomprehensible.

73. There are numerous respects in which it is reasonable to believe that a bill that creates such a chaotic legal landscape will have an adverse effect on the operation of the law as it relates to reserved matters, justifying an order under Section 35 of the Scotland Act.

74. As the Secretary of State successfully argued in *R (Elan-Cane) v Secretary of State for the Home Department [2021] UKSC56* on “X Passports”, the need for an administratively coherent system for the recognition of sex has rightly been accepted as a legitimate aim. It is not merely an administrative convenience but also underpins the ability of the state to protect human rights by acting in a manner that is foreseeable and consistent.

75. In the Elan-Cane case, the Government argued that it is entitled to consider any change to be made (and its appropriateness) having regard to the scheme of administration and law as a whole. It noted that:

“Sex is used in a variety of ways in the exercise of Government functions, or the provision of services, for example: (a) female prisoners are normally kept separate from male prisoners (see rule 12(1) of the Prison Rules 1999); (b) hospitals may have wards where patients must be of a specific sex (see §27 of Sched. 3 to the Equality Act 2010 (the EA 2010)), (c) children and young people may attend single sex schools (see §1 of Sched. 11 to the EA 2010), and (d) sporting activities (after children reach a certain age) may be organised along sex lines (see s.195 of the EA 2010).”<sup>29</sup>

76. The government argued that addressing these legislative issues “would require a well thought through and coherent approach”, and that further thought would need to be given to the impacts on administrative systems (for example, how public services collect and use data).<sup>30</sup>

77. In argument, the Government referred back to the House of Lords judgment in *Bellinger v Bellinger*, which recognised the need for coherence:

“The recognition of gender reassignment for the purposes of marriage is part of a wider problem which should be considered as a whole and not dealt with in a piecemeal fashion. There should be a clear, coherent policy. The decision regarding recognition of gender reassignment for the purpose of marriage cannot sensibly be made in isolation from a decision on the like problem in other areas where a distinction is drawn between people on the basis of gender [sex]. These areas include education, child care, occupational qualifications, criminal law (gender-specific offences), prison regulations, sport, the needs of decency, and birth certificates.”

78. While there are many areas where incoherence is likely to have adverse effects, we highlight four:

- a) operation of the GRA
- b) integrity of personal identity
- c) data protection law and compliance with s.22

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<sup>29</sup> Elan-Cane (UKSC/2020/0081): *Written case on behalf of the Secretary of State*.

<sup>30</sup> As above.

- d) adverse effect on the operation of the law relating to single-sex and separate-sex services, to the particular detriment of women and girls.

## Operation of the GRA

- 79. Fragmentation will have an adverse impact on the operation of the GRA itself, making it impossible to explain what having a GRC means, as the Scottish and UK certificates will be incommensurate.
- 80. Scottish-born people with UK GRCs will be harmed, as their legal status will become confused. They will have a changed birth certificate, but it will not be clear to others what this means, since Scottish-born people with Scottish GRCs will also have changed birth certificates, but with different legal consequences.
- 81. To take one example, reporting the particulars of a death is a statutory responsibility that must be undertaken by a qualified person (such as the next of kin). They are asked to provide particulars and to confirm the accuracy of the information with their signature. If a person who has changed their sex for the purpose of Scottish law, but not English law, dies in England, they should be registered in their birth sex.
- 82. A person might also transition with a UK GRC and then (partially) detransition with a Scottish GRC. The implications of this have not been considered.

## Unique personal identities

- 83. Several reserved areas rely on the ability to certify a unique and permanent personal identity. These include financial-services regulation, company registration and directorship, anti-money-laundering regulations, professional regulation, marriage, and the operation of the Disclosure and Barring Service. These rely on being able to track a person's identity over time. These systems are set up to accommodate people who change sex at a point in time, but not the possibility that people may change sex only for a subset of relevant UK legal purposes, and will thus be maintaining two different legal identities at the same time.
- 84. A person maintaining two legal identities, for example as a man for the purposes of pensions and national-insurance records, but as a woman for the purpose of the birth register, would be likely to set off anti-money-laundering and other fraud-detection mechanisms. This will make it difficult for them to undertake everyday activities such as banking.
- 85. A person who has transitioned via a Scottish GRC and who dies in Scotland would get a Scottish death certificate which relates to their identity in their "acquired gender", but it is



not clear how this would relate to attesting to the death of their UK legal identity still registered in their birth sex.

## Equality Act and single-sex services

86. The Bill will have an adverse effect on the *operation* of the Equality Act 2010. It will increase confusion, on the part of both service-providers and users regarding whether a service may, by law, operate on a single-sex basis. This confusion will be compounded by the way that it will extend the protected-information regime to people whose biological sex is obvious. There is already such confusion in this area that the EHRC has had to revise its guidance, but this change is likely to make that guidance more difficult to follow and have a chilling effect on the provision of single-sex services.
87. If it is accepted that Scottish GRCs change sex for the purposes of the Equality Act, it will have significant adverse effects, as discussed under the section on Article 3 in this briefing.
88. For example in relation to prisons, the policy in England and Wales is that prisoners are “allocated to the part of the estate which matches their legally recognised gender”. The operation of this policy was explored in the case of *R (FDJ) v Secretary of State for Justice*. It highlighted the way decision-making is influenced by whether or not someone has a GRC. A transgender male without a GRC would not be placed in a women’s prison “unless the particular disadvantages that could arise for relevant non-transgender women have been assessed, and to the extent necessary, addressed by measures to be put in place in the women’s prison for that purpose”. The position for prisoners with a GRC is different: the overarching rule is they “must be placed in the women’s estate... unless there are exceptional circumstances, as would be the case for biological women”. As Swift J noted: “Exceptional circumstances is a high bar”. Currently most trans-identifying male prisoners do not have GRCs and are housed in the male estate. If Scottish GRCs are accepted then males who have a certificate based on self-declaration will be housed in the women’s estate unless there are “exceptional circumstances”. The number of such people is likely to be considerable.<sup>31</sup> We consider the risk-assessment process inadequate to deal with this shift, in either volume or scope. The risk-assessment tool used for adult men convicted of sexual offences is not used for women. It would therefore not be used for convicted male sex offenders holding GRCs stating their sex as female. The government will be unable to continue to argue that its policy is objectively justified and it would be vulnerable to challenge.

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<sup>31</sup> Calculation from Fair Play For Women (2022). ‘Scottish government is forcing sex self-ID on whole of UK’.

89. Adverse effects in relation to schools and students will also be particularly acute, since there is no exception in the Equality Act available to permit children with a GRC to be excluded from a single-sex school for the opposite (literal) sex. Integrating children into school life while lying about their sex has major implications for safeguarding, and for the rights of other children.
90. Similarly, there is no exception in the Equality Act for associations that allows them to remain single-sex (or to hold to the tighter criteria established in the GRA 2004).

## Data protection and Section 22 compliance

91. If s.22 privacy protection applies to people whose change of sex is not recognised for key administrative purposes (such as pensions and national insurance), this creates a particular problem. A person's sex is not usually special-category data but is a routine part of their administrative records. No estimate has been produced of the cost to HMRC, DWP and employers of developing systems for complying with s.22 GRA 2004 in situations where a person's legal sex has changed for some purposes, but not for tax and pensions.<sup>32</sup> This cost is likely to be considerable, far outweighing the costs estimated by the Scottish Government for the bill.
92. It is worth noting how many of the reserved areas which are affected touch on employment. Employers are required to keep information on legal sex according to HMRC's requirements. They must also comply with data-protection and equal-opportunities law. The latter requires them to understand how the protected characteristics of sex and gender reassignment relate to each other, and to consider other protected characteristics such as religion and belief. They must provide adequate and safe workplace facilities, including toilets and, in some cases, showers and communal accommodation. Some will provide services that involve bodily contact with members of the public, or which involve consideration of privacy. They are required to ensure that they undertake their duty of care and safeguarding with regard to any children or vulnerable people involved in their service. If the regulations with which employers must comply relate to uncertain and differing legal meanings of the category of sex, depending on whether someone has a UK or a Scottish GRC, this will create uncertainty, cost and confusion, and undermine employers' and service-providers' ability to fulfil their legal obligations.
93. Among those likely to be harmed by this legislation are people who apply for and receive a Scottish GRC, because their legal status will be uncertain and unworkable. Some of the people taking up these certificates may be as young as 16. It should be clear to these

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<sup>32</sup> Scottish Parliament (2022). *Gender Recognition Reform (Scotland) Bill [As Amended at Stage 2]: Supplementary Financial Memorandum*.

children, and to all holders of these certificates, how they fit within legal frameworks when they decide whether to apply for a Scottish GRC or a UK one.

## Sequencing

94. Both s.33 and s.35 have a four-week deadline beginning on the day that the bill is passed, so from Thursday 22nd December there are four weeks to refer the bill to the Supreme Court or make an order stopping it being sent for Royal Assent respectively. Section 35 (3)(c) extends the deadline for an order to be issued under s.35, if the Bill is referred to the Supreme Court under s.33. This makes sense, as it allows for questions about how much of the bill is out of competence to be resolved before the adverse effects are considered.
95. A key question will be whether the effective change to the protected characteristic of sex in the Equality Act is allowed to stand. This might be resolved as a matter of competence. The UK government could also resolve this question at a national level by amending the Equality Act, using s.23 of the GRA to make clear that the GRA does not apply at all. The Haldane judgment might also be overturned on appeal. However, there could still be adverse effects on the operation of the Equality Act from this bill via the secrecy and confusion effects.
96. After the Supreme Court delivers a ruling on competence, the Secretary of State has another four weeks to make an order under Section 35. Section 36 (4A) of the Scotland Act provides for the bill to then return to the Scottish Parliament before being reconsidered for Royal Assent by the UK government.

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