

SEX AND GENDER IN LEGISLATION: THE CASE AGAINST “LEGAL SEX CHANGE”

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Executive Summary

Since the passing of the Gender Recognition Reform (Scotland) Bill at the end of December 2022, “legal sex”, and related concepts, have become established in debate, with the Gender Recognition Act 2004 (GRA2004) being described as enabling “legal sex change”. In tandem, and with the intention of protecting the sex-based rights of women and girls, there have been calls that this necessitates a qualification of the protected characteristic “sex” in the Equality Act 2010 (EA2010), amending it to “biological sex”.

However, our position is that this understanding of GRA2004 is erroneous and overstates the effect of a gender recognition certificate, that “legal sex” has been misconceptualised, and that, whilst clarification of the law is desirable, qualifying “sex” in legislation in any way is unnecessary, has undesirable consequences and carries significant risk throughout domestic legislation, as well as to sex-based rights under international law.

We argue that GRA2004 does not operate to effect a “change of legal sex”. Rather, this “Act to make provision for and in connection with change of gender” enables a qualifying individual to obtain legal recognition of their “acquired gender”, with resultant legal consequence related to that individual’s legal status. Our position is supported by a reading of GRA2004, prior case law and the wording on a full GRC.

The consequence of the legal status of an “acquired gender” is unclear, in particular where it comes into conflict with rights of men and women on the basis of sex. This lack of clarity, together with concerns about privacy have acted to obscure sex in law. In tandem, the meaning of the term “gender” in law now lacks certainty and, given the social trend to use the terms sex and gender interchangeably, requires clarification.

Whilst we agree that “legal sex” is a concept that has legal standing, our position is that an individual’s legal sex is simply the legal registration by the State of their sex as observed at birth which forms part of their legal identity. This registration is fixed and unchanging, just as sex observed at birth is immutable.

Hence, GRA2004 could not, by definition, effect a change of “legal sex”. Section 9(2) clarifies that this registration of “legal sex” remains an event unaffected by the grant of a GRC. Indeed, the operation of the exceptions to legal recognition of acquired gender in section 9(3) depends on the persistence of this “legal sex”. If a GRC holder underwent a “change of legal sex”, that individual would effectively be able to claim that they had legal recognition of both sexes, male and female, one as registered at birth and the opposite as “changed” in accordance with GRA2004. This is incoherent and legally undesirable.

When legislation refers to “sex” it is referring to the registered sex observed at birth of persons legally recognised in law via State registration. In EA2010, “sex” was not left unqualified due to error, omission or confusion. It was also not replaced with the adjacent term “gender”. Rather, there was no need to qualify what sex is in law: it is a fact registered at birth and part of a person’s registered legal identity and there is no basis in legislation for any other interpretation of “sex”.

The contrary position, with which we disagree, sees “sex” in legislation split into an unchangeable aspect (“biological sex”) and a changeable aspect (“legal sex”). Splitting sex into two separate concepts in this way means that for any individual and at any time, whilst their “biological sex” is fixed, public and (in the overwhelming majority of circumstances) known, their “legal sex” is changeable, private and, unless and until declared, unknown. This complication creates uncertainty and impacts data collection. If robust data on sex registered at birth is not being collected, it is impossible to measure and address discrimination against women on the basis of sex.

It is unnecessary to clarify that “sex” in legislation means “biological sex” and it is also undesirable because the very act of adding a prefix or qualifier implies that “sex” has been, or may be, split into separate concepts, with each prefix requiring a stable definition. In our view such a move results in more uncertainty, not less, that due to the interwoven nature of legislation and policy will have an inevitable widespread impact.

Registration and recording of sex at birth, as a key demographic statistic of significant importance for policy decisions, is a legitimate function of the State. Yet, disrupting “sex” in this way operates to break the system of sex registration at birth upon which legal protections for women are founded.

Kate Coleman

Director, Keep Prisons Single Sex
May 2023

About Keep Prisons Single Sex

Keep Prisons Single Sex campaigns for the importance of sex registered at birth to the provision of services throughout the criminal justice system, to data collection on offending, and to risk assessment and safeguarding.

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Introduction

Since the passing of the Gender Recognition Reform (Scotland) Bill¹ (the Bill) just before Christmas 2022, “legal sex” and related concepts such as “legal sex change” as a so-called “legal fiction” have become established and widespread in debate. These concepts have gained credence and achieved influence most notably through the Scottish Court of Session opinion of Lady Haldane, in what has come to be known as the FWS2 case,² and Dr Michael Foran’s paper, written for the Policy Exchange,³ discussing the case for the UK Government to use a Section 35 order of the Scotland Act 1998⁴ to prevent the Bill being put forward for Royal Assent. More recently, we have seen these, and directly related concepts such as “sex as modified by a Gender Recognition Certificate”, in the campaign group Sex Matters’ UK Parliament petition “to update the Equality Act 2010⁵ (EA2010) to make clear that the protected characteristic of “sex” means biological sex.”⁶ This petition reached over 109,000 signatures and, at the time of writing (May 2023), has been scheduled for Parliamentary debate.

In these discussions, the Gender Recognition Act 2004⁷ (GRA2004) is frequently described or framed as a legal mechanism that enables people to “change their legal sex”, effect “a legal sex change” or “acquire a sex” by going through the process to obtain a full gender recognition certificate (GRC).

However, it is an established scientific fact that sex is immutable, determined at conception and coded into every cell of our bodies. No human can actually change sex. But, that said, questions arise: is the concept “legal sex change” via a GRC supported by UK law? What is an individual’s “legal sex” and how is this referred to in relevant law? What evidence is there to support the proposition that legal gender recognition under GRA2004 amounts to a “change of legal sex”? Should “sex” in EA2010 be clarified to mean “biological sex”?

1 <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-recognition-reform-scotland-bill/stage-3/bill-as-passed.pdf>

2 https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csoh90.pdf?sfvrsn=8eee302c_1

3 <https://policyexchange.org.uk/publication/the-scottish-gender-recognition-reform-bill/>

4 <https://www.legislation.gov.uk/ukpga/1998/46/contents>

5 <https://www.legislation.gov.uk/ukpga/2010/15/contents>

6 <https://petition.parliament.uk/petitions/623243>

7 <https://www.legislation.gov.uk/ukpga/2004/7/contents>

What is an individual's "legal sex"?

The first question is: what does "legal sex" mean?

Article 6 of the Universal Declaration of Human Rights states that everyone has a right to legal recognition as a person before the law. A person's birth registration by the State creates that individual's legal identity. This is defined by the UN Statistics Division as:

*the basic characteristics of an individual's identity. e.g., name, sex, place and date of birth conferred through registration and the issuance of a certificate by an authorized civil registration authority following the occurrence of birth.*⁸

The material reality of sex is observed at birth and legally registered by the State shortly after birth. This registration is the first instance when the law recognises an individual's existence and their identity, which includes their sex, their date and place of birth and their parentage.

When a child's birth is registered, it is the observed sex of the baby at birth that is recorded. The facts certified must be truthful, by which we mean objectively verifiable as fact. Sex is rarely complicated and overwhelmingly easily observed with accuracy. Human beings fall into two observable, sexed body types: male and female. The importance of sex registration at birth is not in dispute, nor should it be. Recording the sex of individuals at birth is part of the State's legitimate function to capture core data about its citizens: whether you are male or female, man or woman, this matters in life, in society and in law.

Therefore, "legal sex" is just sex as recognised by the law and recorded shortly after birth. It is an attribute that everyone whose birth is registered has.⁹ It coincides with the common usage of the word sex as a personal attribute. Thus, when laws refer to "sex", they are referring to the registered (unchanged and unchanging) sex observed at birth of persons legally recognised in law via State registration. Hence, we contend (as expanded upon below) that the proposition that this registered "legal sex" is changed by the GRA2004 is incorrect.

Until the recent debates around gender reassignment and legal gender recognition, commentators did not suggest any need to qualify "sex" in legislation or policy with descriptors such as "legal" or "biological". It is notable that the EA2010 simply refers to "sex": the characteristic recognised as a basis for discrimination against women in the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁰ and as referenced in the original UK anti-discrimination legislation, the now repealed Sex Discrimination Act 1975.¹¹ "Sex" in EA2010 was not left unqualified due to error, omission, or confusion. Rather "sex" is simply "sex" because there is no need to qualify what sex is in law. It is a fact registered at birth and part of a person's registered legal identity.

8 <https://unstats.un.org/legal-identity-agenda/>

9 Note: globally, not all births are registered or legally recognised.

10 <https://www.ohchr.org/sites/default/files/cedaw.pdf>

11 https://www.legislation.gov.uk/ukpga/1975/65/pdfs/ukga_19750065_en.pdf

Background to the Gender Recognition Act 2004

The purpose of GRA2004 was to promptly legislate for the privacy rights of transsexual people in the light of a series of prior cases in the European Courts.¹² The Act primarily dealt with the relationship between the GRC holder, the State and their employer (not service providers or fellow citizens). As was noted in the Parliamentary debates of the Bill,¹³ GRA2004 was never intended to be an anti-discrimination law extending to the provision of goods and services.¹⁴ It was recognised during the passage of the Gender Recognition Bill through Parliament that a further EU Directive relating to the equal treatment of men and women in relation to the supply of goods and services was pending¹⁵ and would be dealt with via subsequent UK non-discrimination legislation (i.e. EA2010, which did subsequently amend certain aspects of GRA2004).

The GRA2004 was passed in response to what were seen to be the legitimate needs of a small group of post-operative transsexuals, particularly their treatment with regard to employment, social security, pensions and marriage. These needs were set out in a series of legal cases brought before the European Court of Human Rights (ECtHR), most notably *Goodwin*.¹⁶

Although legal arguments brought on behalf of the Claimant(s) asserted a biological basis, where “transsexualism” was described as a diagnosable medical condition positioned as a disorder of sexual differentiation within a framework that included “inter-sex” conditions, *Goodwin* and other cases clearly support our position that GRA2004 does not operate to effect a “change of legal sex”. Rather, the mechanisms it contains recognise a qualifying individual’s legally recognised “acquired gender”, with resultant legal consequences related to a person’s legal status and recognition as a man or a woman. To give one example that is representative of the judgment in *Goodwin* as a whole, at paragraph 60 it states:

The lack of legal recognition of her changed gender had been the cause of numerous discriminatory and humiliating experiences in her everyday life.

It was this situation, resulting from an absence of legal recognition of the fact that a qualifying individual was living as the opposite gender, which the GRA2004 was intended to address.

Inherent in the judgment in *Goodwin* is the understanding that sex observed at birth (and thus legally registered sex) and acquired gender are two separate things. The court ruled that it was a breach of the Claimant’s human rights for the UK government not to legally recognise their change of gender.

12 https://www.echr.coe.int/documents/fs_gender_identity_eng.pdf

13 Hansard, House of Lords debate 18 December 2003. Lord Filkin, Parliamentary Under Secretary of State said: *Fundamentally, however, the Gender Recognition Bill is about the legal recognition in the acquired gender and not anti-discrimination law. While the Bill amends the sex discrimination legislation in the fields of employment and vocational training, that is only to the extent necessary as a direct consequence of the provisions on recognition. The Bill does not, as a number of people said, go further than that with regard to goods and services.*

14 It is worth noting that when the Gender Recognition Bill was being debated by Parliament, discrimination against an individual on the basis of their “gender reassignment” had already been made unlawful via the Sex Discrimination (Gender Reassignment) Regulations 1999 (an amendment to the Sex Discrimination Act 1975) following a judgment of the European Court of Justice <https://www.legislation.gov.uk/uk/si/1999/1102/contents/made>. At this point in time, this protection from discrimination did not extend to third party provision of goods and services, but principally concerned public authorities and employers. The Equality Act 2010 legislated for a revised definition of “gender reassignment” and also extended non-discrimination protections for the “gender reassignment” protected characteristic to third party provision of goods and services. This was a major extension of the scope of rights with potentially greater (and unexplored) impacts on the rights and fundamental freedoms of other individuals and groups in society.

15 European Council Directive 2004/113/EC of 13 December 2004

16 <https://hudoc.echr.coe.int/fre?i=001-60596>

It is worth emphasising that the court came to this conclusion without considering the potential impact on rights and fundamental freedoms of women and the legal protections from discrimination afforded to women on the basis of their sex observed at birth.¹⁷ At paragraph 90 the decision states:

No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.

The issues that have arisen for the protection of women on the basis of their sex subsequent to GRA2004 and to EA2010, demonstrate the flaw in the court's reasoning when it assumed that there would be no hardship or detriment arising from legal recognition of acquired gender. In fact, the majority of that hardship and detriment has fallen on one protected group: women.

What is the impact of the Gender Recognition Act 2004? What assumptions does this legislation rest upon?

A GRC is a private certificate between an individual and the State, with an effect on that person's legal status. The extent and legal impact of that change of legal status has been the subject of much confusion and debate, particularly in relation to the rights of other individuals and third parties.¹⁸

Recognition of change of gender

The drafting of GRA2004 is precise: it is introduced as *An Act to make provision for and in connection with change of gender*.

Gender is not defined in the Act, but section 1(1) illuminates its meaning, as used throughout GRA2004. It states that, "a person of either

gender" can apply for a GRC on the basis of "living in the other gender." Thus, it is clear (although not defined in GRA2004) that gender is a concept linked to binary sex and the Act is predicated on the assumption that there are only two genders. Notably, the Act concerns legal recognition of a change of gender: it is not described as legislation concerning "gender" per se, nor concerning an individual changing "sex".¹⁹

Sex and gender as distinct concepts

Until GRA2004 came into force, unlike sex, gender (as a social manifestation of sex) was not the subject of primary legislation. References to "gender" in laws and policy documents, could simply be regarded as a polite way of referring to binary sex/sex differences between men and women.²⁰ Grammatically, for example in GRA2004 itself, gender is often used as a way of differentiating between sex as a characteristic and an intimate act between individuals e.g. "gender-affected sports" rather than "sex-affected sports". In UK legislation prior to GRA2004 "gender" was rarely used, instead Acts of Parliament tended to refer to men and women (plain English terms) and sometimes to sex.

17 The impact of the GRA on rights of others is now apparent. We would argue that balance has not been struck between the rights of transgender individuals and women. As the court said in *Goodwin*, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.

18 e.g., individuals, groups of individuals with protected characteristics and organisations who are not aware of the existence of a GRC.

19 Indeed, there is only one reference to "sex" in the sections of the legislation that describe the consequence of issue of a GRC, and that is in brackets in the much-discussed section 9(1).

20 In response to a ruling by the European Court of Justice, the since repealed Sex Discrimination Act (Gender Reassignment) Regulations 1999 extended the Act to cover direct discrimination on the ground of gender reassignment in employment and vocational training in circumstances where an individual is treated less favourably by another person on the ground that the individual intends to undergo, is undergoing or has undergone gender reassignment.

A profound and troublesome effect of GRA2004 was to cleave “sex” and “gender” in UK law by establishing a process for the recognition of a change of gender to an “acquired gender” for a minority of people suffering from gender dysphoria, a medically diagnosable condition. Legal recognition of such a change of gender is limited to those meeting specific requirements for living as the opposite gender²¹ who would otherwise suffer a breach of their right to privacy under Article 8 ECHR.²²

For most citizens who do not qualify for a GRC, sex and gender remain synonymous and the legal recognition of their sex does not engage Article 8 rights.²³ This is because sex does not change and is generally observable with an overwhelmingly high degree of accuracy. Sex is registered by the State as a key demographic statistic of significant importance for policy decisions. State registration and recording of sex is important for upholding women's rights and protections, as well as those of the minority of people whose sexual orientation is homosexual. In this sense, an individual's sex, and the recording of their sex, are not private matters.

With the majority of citizens not qualifying for a GRC, it is sex (not gender) which is the universal protected characteristic set out in the primary UK non-discrimination law: EA2010. Gender is not legally recognised for the majority of citizens, instead the minority of people who fall within the protected characteristic of “gender reassignment” (set out in section 7 of EA2010) are protected from discrimination on that basis (whether or not they have a GRC granting legal recognition of their gender change).

Evolution of the distinct concepts of sex and gender

In the almost two decades since GRA2004, the social landscape has changed dramatically. Alongside this, the concept “gender” has been specifically defined in international law.

In 2011, the Council of Europe Convention on combatting violence against women and domestic violence (the Istanbul Convention)²⁴ was agreed and became the first international legal convention

to contain a definition of gender²⁵ namely:

the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.

Notably, the Istanbul Convention also lists “sex”, “gender” and “gender identity” as separate potential bases of discrimination.

Faced with a reluctance by States to ratify the Istanbul Convention since it was first agreed, the Council of Europe has been required to defend criticism and rejection of the Istanbul Convention's reference to both “sex” and “gender”. In 2018 it issued a press release addressing what it regards as misconceptions about the impact of the Convention.²⁶ This said:

...the convention is certainly not about ending sexual differences between women and men. Nowhere does the convention ever imply that women and men are or should be 'the same'.

21 The legislation does not explore its assumption that it is possible to ‘change gender’ and what it means to ‘live as the opposite gender’.

22 https://www.echr.coe.int/documents/convention_eng.pdf

23 Arguably, one's sex isn't private as far as the Convention is concerned, both because the State registration system records an individual's sex as a key component of that person's legal identity and because the Convention explicitly states that there should be no discrimination on the basis of sex. To stop sex discrimination, sex cannot be hidden or private. Furthermore, it is obvious in the overwhelming majority of cases who is male and who is female, and this fact does need to be explicitly and consciously communicated in very many instances. It is extremely challenging to envisage a prescribed set of circumstances when sex is conclusively irrelevant and can definitively be kept confidential or private. Thus, there is a risk of obscuring sex discrimination if sex is pre-determined to be irrelevant. There are many examples of such circumstances highlighted in Invisible Women by Caroline Criado-Perez.

24 <https://rm.coe.int/168008482e>

25 Controversially, despite separately defining “violence against women”, “domestic violence” and “gender-based violence against women”, the Istanbul Convention only defines women as “includes girls under the age of 18”. It does not specify that woman is defined on the basis of sex. Despite its common name and being the first country to ratify the Convention, it has since attracted controversy and has been denounced by Turkey.

26 Press Release - Ending misconceptions about the Convention on Preventing and Combating Violence against Women and Domestic Violence - Ending violence against women is not about ending traditions or ending sexual differences. https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?Objec-tid=09000016808f0fb1

And:

Much has been said incorrectly about the term 'gender' in the convention in order to discredit its goal to end violence against women. Relations between women and men and their roles and attributes in society are essential to understanding why violence against women exists. This term neither replaces the biological definition of 'sex' nor the terms 'women' and 'men', but rather emphasises how much inequalities, stereotypes and – consequently – violence do not originate from biological differences, but rather from a social construct: that is to say, by attitudes and perceptions of how women and men are and should be in society.

It is not the first time the term 'gender' appears in international legal instruments. However, difficulties around the translation of the term 'gender' and its distinction from the term 'sex' in languages which do not have an exact equivalent, have sometimes been used to fuel controversies about the convention and its implications. Such difficulties should not become a pretext to rejecting the convention, or an obstacle to its implementation.

UK courts have separately considered the concept of gender post-GRA2004. In December 2021 (before the UK ratified the Istanbul Convention), the UK Supreme Court delivered its judgment in the case of *Elan Cane*, an individual who challenged the Government's policy not to issue non-gender specific "X" passports to applicants who declare themselves to be "non-gendered".²⁷ The decision was that the Government was not legally obliged to issue "X" passports and in its judgment the Supreme Court summarised the current UK law definitions of "sex" and "gender" as follows:

The term "gender" is used in this context to describe an individual's feelings or choice of sexual identity, in distinction to the concept of "sex", associated with the idea of biological differences which are generally binary and immutable.

Notably, this definition of "gender" accords with the use of the term in GRA2004 and EA2010 but is entirely different to the definition in the Istanbul Convention.

The court went on to say:

In this context, as in others, public agencies generally use the terms "gender" and "sex" interchangeably, to refer to the biological categories of male and female, subject to the inclusion of transgender persons within the category of their acquired gender.

It is clear that, despite this statement from the Supreme Court in the specific case, there are many circumstances, including those governed by EA2010 and other specific Acts of Parliament, where the terms "gender" and "sex" are not interchangeable. The reality of the sex categories of male and female (as registered at birth) matter for the correct operation of the law and are essential to uphold the fundamental rights and freedoms of everyone in society.

The *Elan Cane* case discussed international passport standards that say passports must have a sex field. The Supreme Court accepted the unchallenged assumption that this could be used to denote gender and did not consider the wider impact of the practice of issuing passports on the basis of gender rather than sex.²⁸ By discussing the law around gender recognition and gender reassignment discrimination in consideration of whether a passport can have an X marker in the "sex" field, the court gave no consideration to the fact that in the UK passports are frequently used as proof of identity. In instances where sex matters (for example, single sex spaces for the privacy and dignity of women) the false presumption that sex and gender are interchangeable fails, to the detriment of the fundamental rights and freedoms of those other than the document holder.

²⁷ *R (on the application of Elan-Cane) (Appellant) v Secretary of State for the Home Department (Respondent)* [2021] UKSC 56

²⁸ Individuals who change their gender, including by self-declaration, are able to obtain a new passport showing their new name and acquired gender in lieu of sex registered at birth.

Since the Supreme Court judgment in *Elan Cane*, the UK government ratified the Istanbul Convention (with reservations) in 2022. This has implications for UK law. On ratification of the Istanbul Convention, precise definition of, and a clear distinction in law between, sex and gender became essential. Such clarity is required so that pre-existing law, guidance and policy are compliant with both the Istanbul Convention and the other related international convention, CEDAW.²⁹ A clear distinction in law between sex and gender is required to ensure that all legislation works for women and girls on the basis of their female sex as registered at birth, as distinct from the rights of those seeking protection on the basis of their gender reassignment. The rights and protections of women and girls, on the basis of sex, must clearly be defined in law so that they can be enforced lawfully and consistently in practice.

A parallel trend outside of the law has occurred since around 2015, where activism by “gender theorists” and the emergence of identity politics have seen the social meaning of “gender” (and “gender identity”) expanded into nebulous concepts, arguably with no clear, accepted social meaning, even within the discourse of gender identity ideology. Significantly, “gender” in such contexts now often refers to a concept entirely dislocated from sex and from what it means to be male or female, man or woman. Indeed, the use of the word “gender” has expanded to the degree that in everyday usage it is arguably now a subjective term defying categorisation, undefinable and lacking in sufficient certainty to form the basis of law. This trend is clearly at odds with the developments in the legal recognition of gender in law.

Does a Gender Recognition Certificate bring about a change in the recipient’s “legal sex”?

The novel provisions of GRA2004 allowed an individual who fulfilled certain criteria to obtain legal recognition of their change of gender to the opposite “acquired gender”. This recognition is certified by a GRC and a new copy short-form birth certificate showing the individual’s newly adopted name, and their new, and now legally recognised, acquired gender in the box marked

“sex”.³⁰ (This being in lieu of, and opposite to, their sex registered at birth.)

Meanwhile, their sex observed at birth remains as a record in the Register of Births, albeit subject to enhanced individual privacy measures that exist by virtue of the fact that they applied for and/or obtained a GRC. This original record remains publicly accessible, and copies of the original entry can be requested and obtained from the General Records Office in the same way as they can in respect of individuals who have not been issued with a GRC.

Thus, GRC holders obtain the legal recognition of an “acquired gender” that is opposite to their sex registered at birth. Legal recognition is stated to be “for all purposes” save where excepted in GRA2004 itself and as specified in subsequent legislation. Nowhere in GRA2004, does the statute refer to a GRC holder’s “acquired sex”. Nor does a GRC certificate itself refer to a holder’s “acquired sex”.³¹

29 <https://www.ohchr.org/sites/default/files/Documents/Professional-Interest/cedaw.pdf>

30 In the UK, in the vast majority of cases, therefore, the sex shown on a person’s copy birth certificate(s) is their sex declared and registered at birth (save in the rare cases where an adult obtained a new copy birth certificate following the grant of a full GRC under GRA2004). Genuine errors made at the time of birth registration may be corrected. These include the sex of the child, where the child’s sex was incorrectly declared and thus incorrectly registered. This may be the case for babies born with congenital variations of sexual development. These medical conditions may occasionally result in genuine ambiguity in the child’s sex at the time of observation and subsequent diagnosis may reveal that an error was made at the point of registration of the birth. Contingent upon medical evidence, a correction may be made. The original information will remain in the register and a note will be added to the margin explaining the corrected information and when the correction was made. All full birth certificates issued after the correction will include this note in the margin. However, short form birth certificates issued thereafter will only show the new details, as corrected. In response to a Freedom of Information Access request we submitted to HM Passport Office (ref FOICR 75417/23, 13 April 2023), the General Register Office confirmed that in 2022 139 corrections were made to a birth certificate regarding the sex of an individual. However, the number of birth certificates corrected due to an observational error at the time of birth was considered to be exempt from disclosure under section 40 of the Freedom of Information Act 2000 due to “the low numbers involved.” https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1074012/Birth_Correction_Application_Form_v1.1.1.pdf; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771468/VSC_Technical_Paper_Web_Accessible.pdf; <https://www.nrscotland.gov.uk/registration/about-registration-in-scotland>

31 Notably too, amendments to pre-existing legislation as a result of GRA2004 also refer the effect of a GRA being a change of gender or obtaining an acquired gender.

The increasingly prevalent idea that GRA2004 “changes a person’s legal sex” for all purposes or that it effects “a legal sex change” is not supported by a reading of the legislation as a whole, nor by the ‘fundamental proposition’ in section 9(1), which states:

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 care with which legislation is drafted and finalised, together with the rules of statutory interpretation, require us to note the careful and particular use of words in this section:

- “male” and “female” are used to describe the individual’s acquired gender, not their sex;³²
- the only reference to “sex” appears in parenthesis by way of description (i.e. where the change of legal documentation brought about by the grant of a GRC is described);³³
- there is no mention of an individual obtaining an “acquired sex”; and
- clause 9(1) falls short of stating that a person with a female “acquired gender” becomes a woman.

Our interpretation is that the reference to “sex” here is to the field or marker on a copy birth certificate changed following grant of a full GRC. There is no “gender” field to change, only a binary sex marker. Hence the sex marker is described as becoming “that of a man” or “that of a woman”.

This interpretation is supported by the wording on a full GRC which reads:


The above named person is, from the date of issue, of the gender shown.

...This certificate is issued in pursuance of the Gender Recognition Act 2004. By section 9 of the Gender Recognition Act, the person to whom this certificate has been issued is for all purposes the gender shown...

32 The broader implications of using the words “male” and “female” (which have specific biological meanings) to refer to gender categories causes confusion and also operates to obscure the recording and monitoring of sex-based differences.

33 Office of the Parliamentary Counsel Drafting Guidance, June 2020 suggests that the use of wording in brackets in legislation is usually by way of parenthetical description.

Figure 1: Full Gender Recognition Certificate (redacted)



GENDER RECOGNITION CERTIFICATE

1.	Name	
2.	Date of Birth	
3.	Gender	Female
4.	Date of Issue	

The above named person is, from the date of issue, of the gender shown.

CAUTION: THERE ARE OFFENCES RELATING TO MAKING OR USING A FALSE CERTIFICATE.
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Text

WARNING: A CERTIFICATE IS NOT EVIDENCE OF IDENTITY.

This certificate is issued in pursuance of the Gender Recognition Act 2004. By section 9 of the Gender Recognition Act, the person to whom this certificate has been issued is for all purposes the gender shown. Valid only if sealed or stamped by an issuing authority under the Gender Recognition Act 2004.





Figure 2: Certified Copy of an Entry of Birth (redacted)

CERTIFIED COPY OF AN ENTRY OF BIRTH



GIVEN AT THE GENERAL REGISTER OFFICE

Application Number 13365190/1

REGISTRATION DISTRICT									
BIRTH in the Sub-district of			in the						


Columns:-	1	2	3	4	5	6	7	8	9	10
No.	When and where born	Name, if any	Sex	Name and surname of father	Name, surname and maiden surname of mother	Occupation of father	Signature, description and residence of informant	When registered	Signature of registrar	Name entered after registration
			Boy							

CERTIFIED to be a true copy of an entry in the certified copy of a Register of Births in the District above mentioned.

Given at the GENERAL REGISTER OFFICE, under the Seal of the said Office, the 2nd day of December 2022

BXCJ 661526

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There is no “legal sex” or “acquired sex” stated on a GRC, only an acquired gender. The individual to whom the certificate has been issued is not described as being “for all purposes the sex shown...” nor are they described as becoming a man or a woman.

This interpretation is also supported by the wording of EA2010. This subsequent piece of non-discrimination legislation sets out the stand-alone protected characteristic of “gender reassignment” as distinct from the protected characteristic of “sex”. However, the protected characteristic of gender reassignment does not make reference to ownership of a GRC. There are no references to “legal sex” in EA2010. The only mention of the effect of a GRC in the Act are a few references to the right to refuse to marry a person who is suspected of having an “acquired gender” obtained via GRA2004.³⁴

An important point that has often been lost in discussions about the impact of GRA2004 is that the Act has no impact on the official record of an individual's sex as registered at birth (their “legal sex” as discussed above under What is an individual's “legal sex”?). A GRC enables an individual to have their acquired gender legally recognised and, for reasons related to their privacy, to represent themselves in their acquired gender for legal purposes in most, but not all circumstances. As spelled out at section 9(2) of GRA2004, the original register of sex as registered at birth is not erased by the issue of a GRC. Indeed, the operation of the exceptions to the legal recognition of an acquired gender for all purposes set out in section 9(3) of the Act, cannot work if there is no longer an official record of the GRC's holder's sex, as registered at birth, i.e. if their “legal sex” does not persist.

A 2022 decision of the ECtHR in *Y v Poland* clarified that the right of an individual under Article 8 of the Convention to have their acquired gender legally recognised (and recorded in lieu of sex registered at birth thereafter on their short-form birth certificate) did not extend to a right to remove all reference to their birth sex from their original full birth certificate.³⁵ Annotation of this original record following gender reassignment did not amount to a violation of Article 8 rights, nor to discrimination under Article 14 of the Convention. The Court stated that *it was mindful of the historical importance of original birth certificates and the need to*

guarantee the reliability of civil records.

If a GRC holder acquired a changed “legal sex”, rather than legal recognition of an “acquired gender”, that individual would effectively be able to claim that they had legal recognition of both sexes, male and female, one as registered at birth and the opposite as “changed” in accordance with the provisions of GRA2004. This is surely an incoherent and untenable position, as well as being legally undesirable. Such a position would undermine the fundamental purpose of the system of sex registration at birth, the intended purpose of the GRA2004 and specific legal protections for women on the basis of their sex as registered at birth.

Thus, we argue that a GRC does not change an individual's registered and legally recognised sex, and it cannot change their “legal sex” because an individual's legal sex is simply their sex registered at birth. Rather, a GRC changes their status in law to be regarded as a person whose change of gender is legally recognised as their “acquired gender”.³⁶ Sex registered at birth is neither overwritten nor replaced, although for reasons of their own privacy, an individual who has been issued with a GRC is facilitated to state their legally recognised acquired gender in lieu of their sex as registered at birth, including in circumstances where this privacy right impinges upon the legitimate functions of the State and the rights and fundamental freedoms of others.

34 Equality Act 2010, Schedule 3 (Services & Public Functions Exceptions), Part 6 (Marriage—Gender Reassignment) paragraphs 24 (England & Wales) and 25 (Scotland).

35 European Court of Human Rights Judgment in the case of *Y v Poland*

36 The GRA2004 itself does not elaborate on the legal status of an acquired gender vs sex registered at birth, nor does it consider instances where there is a conflict of rights arising between a GRC holder and other individual(s). However, s23 does envisage that the Act might need modification via secondary legislation in the case of unforeseen consequences arising from its novel nature.

What is the impact of legal recognition of acquired gender?

The impact of a GRC holder's legally recognised change of gender to their "acquired gender" is not clear, particularly when it comes to the rights and obligations of third parties where they do not know whether or not an individual has a GRC.³⁷ The lack of precision around the use of the terms "sex" and "gender", particularly in respect of policies and practices where sex as registered at birth matters, only adds to the confusion. It is in these areas where the unintended, discriminatory consequences of GRA2004 need addressing because these negatively impact on the ability to uphold sex-based rights under the European Convention on Human Rights (the Convention), in particular those of women, a category of people who are defined on the basis of sex, not gender.³⁸

Arguably, section 3 of the Human Rights Act 1998 obliges the UK courts to interpret GRA2004 in a manner which is compatible with women's sex-based Convention rights. This would further support our proposition that the grant of a GRC does not change an individual's "legal sex", but instead grants the certificate-holder legal recognition of their acquired gender, to the extent that such recognition is compatible with the rights and freedoms of others and the legitimate functions of the State.

What is the impact of splitting sex into changeable "legal sex" and unchangeable "biological sex"?

Contrary to arguments put forward by some, there is no need to repeatedly and continually check a person's sex for any reason: this cannot change. It is determined at the point of conception and is captured by data registered at birth.

By contrast, where the concept "sex" is split into "legal sex" and "biological sex" complication arises, which includes the need to repeatedly check what an individual's "legal sex" is. This is because this act of splitting separates "sex" into a changeable aspect ("legal sex") and an unchangeable aspect ("biological sex"). Splitting sex into two separate concepts in this way means

that for any individual and at any time, whilst their "biological sex" is fixed, public and (in the overwhelming majority of circumstances) known, their "legal sex" is changeable, private and, unless and until declared, unknown. The "legal sex" of an individual at one point in time cannot be assumed to persist, meaning that it must be requested anew at each and every data collection point. Where sex means "legal sex", this constant state of flux means that sex becomes impossible to monitor. In turn, it is impossible to take measures to address discrimination and other disadvantages that are experienced on the basis of sex, or to ensure legal protections for women are in place and being upheld.

Thus, where the confused concepts of "legal sex", "acquired sex" and "legal sex change" are used to split and disrupt the established legal meaning of sex as registered at birth, the result is that we are unable to determine sex by observation. Such uncertain and fluid concepts have no place in legislation or policy.

37 It is significant that third parties have no right to know whether an individual has been issued with a GRC, which means that the effect of a GRC in relation to their obligations is unclear. Although GRA2004 envisaged that State officials and employers could know that an individual had been issued with a GRC, this was not extended to third party service providers.

38 Article 1 of CEDAW states: For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. CEDAW was adopted in 1976 and ratified by the UK in 1986.

Our argument is that not only did legislators not intend “sex” to mean “legal sex” (as defined by Sex Matters and other commentators) it is also unnecessary and equally undesirable to clarify that “sex” in legislation means “biological sex”. It is unnecessary because “sex” in legislation is simply sex as registered at birth with no qualification required: there is no basis in legislation for any other interpretation of “sex”. Prefacing “sex” in legislation in any way, including with the prefix “biological”, is undesirable because the very act of adding a prefix or qualifier implies that “sex” has been, or may be, split into two or more separate concepts. Such a disruption brings with it the disadvantages previously discussed. The novel concept of changeable “legal sex” operates to break the system of sex registration at birth upon which legal protections for women are founded: it is arguable that any novel concept of “sex”, no matter how well intentioned, has similar effect and impact.

A review of the UK Acts of Parliament listed at legislation.gov.uk, shows that (putting aside the evolution of ‘gender-neutral’ drafting styles) UK law is more likely to differentiate between men and women than to refer to “sex” differences.

The words “man” and “woman” have always had very clear plain English meanings related to being of the male or female sex and are tied to the fundamentally important societal terms and roles of “father” and “mother”. Indeed, in EA2010 at section 212 it states that a woman means a female of any age and a man means a male of any age.

Although the law prior to GRA2004 very rarely used the term “gender”, GRA2004 saw a subsequent increase in the use of the term “gender” rather than “sex” as a differentiator between “men” and “women” (perhaps motivated by privacy concerns around section 22 GRA2004), with the terms sometimes mistakenly being considered as synonymous.

Gender ideologists have also, in the push to advocate for the rights of individuals on the basis of their “gender reassignment” or their “gender identity”, sought to socially redefine the words “man” and “woman” in terms connected to gender and divorced from sex, producing statements such as “trans women are women” and “trans men are men”. These statements can only be truthful if “man” and “woman” are no

longer defined in terms of being of the male or female sex.

This push for the societal use of “man” and “woman” to mean concepts defined in terms of gender, not sex, together with the growing use of “gender” in legislation, results in confusion where the words “men” and “women” are used in laws intended to protect on the basis of sex. This lack of clarity in law is exacerbated by the adjacent concepts of “change of gender”, “gender”, “gender identity” and “trans” status. In addition, the criminal sanctions set out in section 22 GRA2004 have the de facto effect of extending enhanced individual privacy rights to any person claiming to have reassigned their gender (whether or not their gender change has been legally recognised): this has the effect of discouraging collection of data and categorisation of men and women on the basis of sex registered at birth.

Conclusions and Recommendations

The system of definitions used throughout UK legislation and policy is interwoven. This means that changing the use of just one of those terms has an inevitable impact on the system as a whole. This has already occurred in respect of “gender” by virtue of GRA2004, which cleaved “sex” and “acquired gender”, giving each separate legal standing. Arguably, indeed inevitably, the extent of this impact was unknown when GRA2004 became law. The proposal to change “sex” to “biological sex” in EA2010 is a similar modification which carries similar, unknown, risk.

If the law is to balance the rights of persons who reassign their gender and/or obtain a GRC with the majority who do not, the system of definitions must operate together to ensure that no group’s rights and freedoms are disproportionately impacted. As a starting point, it is essential to be able to clearly define and categorise those who are being treated differently in law, before determining the scope of any additional protections afforded to them, the impact these might have on others and the operation of State functions for the protection of all in a democratic society. A redefinition of “sex” in legislation must not, therefore, be undertaken lightly.

UK court decisions in this area have been piecemeal and it would be naive to believe that there has been balance in the issues being brought before the courts: case law simply does not operate in that way. Partly for these reasons, there has been a failure to address the systemic effect of the changes resulting from GRA2004 and the impact of shifting societal definitions. Arguably, one result is that decisions have moved towards the unempirical idea that sex is context dependent or is changed “for all purposes” by a private certificate that third parties are not permitted to see.

We do not deny that confusion exists, and that remedy is required. Criticism of the drafting style and substance of GRA2004 is legitimate. Misinterpretation has resulted in unintended consequences for policy and practice that impact on official records of sex and the mechanism of recording and confirming individuals’ sex across society.

The practical impact of GRA2004, both from giving separate legal standing to “sex” and “acquired gender” and from misinterpretation, puts women’s sex-based Convention rights at risk. The current state of legislation, as well any proposed remedy, has an impact that extends beyond the immediate confines of the “trans debate” with clear implications for wider Convention rights. We urge a critically reflective response, rather than a reactive one.

In consideration of a remedy to bring clarity, it is important not to lose sight of the reality that there exist categories of people defined on the basis of their sex registered at birth: these people have Convention rights on the basis of their sex. Women can and must be clearly differentiated from people whose sex registered at birth is male and who “live as the opposite gender”, have reassigned their gender and/or had their acquired gender legally recognised by obtaining a GRC. Society and law must have words and definitions that differentiate between groups of people with different needs. Including the members of diverse groups under vague umbrella terms, where there is a lack of differentiation, only serves to obscure potential discrimination and prevent those groups from exercising their fundamental rights and freedoms in society. Splitting the fact of sex, rendering it no longer a single concept and introducing a multiplicity of “sex concepts”, as the Sex Matters’ proposal does, over-complicates the

issues and risks obscuring potential breaches of Convention rights.

In summary: the claim that a GRC changes “legal sex” is unsupported by the wording of the primary legislation (GRA2004), introduces additional unnecessary complexity and confusion and brings with it the potential for further unintended consequences. This claim both misstates and overstates the effect of a GRC and is predicated upon a basic misunderstanding of what “legal sex” is: “legal sex” is simply an individual’s sex registered at birth, which is fixed, unchanging and verifiable through publicly accessible records. The claim that “sex” in EA2010 must be clarified to mean “biological sex” is flawed and is unsupported by legislation. “Sex” in legislation is simply sex as registered at birth, with no further clarification required. There is no benefit to be derived from splitting sex as a legal term into different aspects, with the concomitant claim that sex is “context dependent”: in fact this carries with it significant disadvantage, that includes risk to other individuals’ Convention rights.

Recommendations

We agree that clarity is required and believe it is time to revisit the legislation passed in response to the Goodwin decision. The impact on non-State parties must be taken into account, as must the detriment to individual women and to women as a group of people defined on the basis of their sex registered at birth.

We agree that EA2010 requires clarification. The clarification required is simple: “sex” in legislation is simply sex registered at birth and there is no basis or need to redefine “sex” as something different, or to add a descriptor, qualifier or adjective. Whilst in common parlance one’s sex registered at birth is one’s biological sex, prefacing or qualifying “sex” as it occurs in legislation in any way carries risk, both because “sex” is now split into a multiplicity of concepts and because the qualifier now requires definition in a way that will assure certainty, predictability and, in this particular case, immutability. Yet, as anyone who is familiar with the “trans debate” can attest, the societal meaning of descriptors and concepts is far from immutable: the future impact on legislation of changed or competing definitions of “biological” is unknown, but may be both significant and detrimental to the

rights of women and to their protection in law, on the basis of their sex registered at birth.

We also recommend that terminology surrounding the “trans debate” requires clarification. Clarity over the meaning of “gender” and “gender reassignment” in law is required. This must also make clear that “gender” does not mean “gender identity” and that the social terms “trans” and “transgender” are not the same as the protected characteristic “gender reassignment”. Further, whilst “gender reassignment” is a protected characteristic in EA2010, which operates separately and in parallel to the protected characteristic “sex”, “gender identity” as an umbrella term, or any individual gender identity, are not.

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SEX AND GENDER IN LEGISLATION: THE CASE AGAINST “LEGAL SEX CHANGE”

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