



# Policy statement of reasons on the decision to use section 35 powers with respect to the Gender Recognition Reform (Scotland) Bill

1. The Secretary of State considers that the Bill contains provisions which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters. The reasons for this belief are set out at Parts 2, 3 and 4.

## Part 1: The effect of the Bill

2. The Bill makes amendments to the Gender Recognition Act 2004 (the 2004 Act) for Scotland. These amendments will significantly alter how applicants can be issued with a Gender Recognition Certificate (GRC) under Scots law. People can apply if they are the subject of a Scottish birth register entry or if they are ordinarily resident in Scotland.
3. The amendments made by the Bill to the 2004 Act will make it quicker and easier for Scottish applicants to obtain a full GRC, removing a number of measures which the UK government regards as important safeguards, including:
  - the removal of the requirement for an applicant to have or have had a diagnosis of gender dysphoria (and, correspondingly, the removal of the requirement for an applicant to provide medical reports with their application)
  - a reduction in the minimum age for applicants from 18 to 16
  - a reduction in the period for which an applicant must have lived in their acquired gender before submitting an application, from 2 years to 3 months (or 6 months for applicants aged under 18), alongside the introduction of a mandatory 3 month reflection period
  - the removal of the requirement for an applicant to provide any evidence that they have lived in their acquired gender when submitting an application
  - the removal of the requirement for a Panel to be satisfied that the applicant meets the criteria, with applications instead being made to the Registrar General for Scotland.
4. Taken together, these amendments remove any requirement for third party verification or evidence from the process.
5. The Bill also amends provisions for the process by which people from overseas can obtain a GRC under Scots law. Section 1(1)(b) of the 2004 Act provides for a simpler overseas track enabling a person to apply for a GRC if their acquired gender has been legally recognised in



an approved country or territory. Instead, the Bill provides that where a person has obtained “overseas gender recognition”, the person is to be automatically treated as if the person had been issued with a full GRC by the Registrar General for Scotland, unless it is manifestly contrary to public policy. This provision does not apply to people with GRCs issued in the rest of the UK under the 2004 Act, because section 8M provides separately that they are treated as though they are full GRCs issued by the Registrar General. The Bill has an exception for circumstances in which it would be manifestly contrary to public policy to do so (for example, in a case where legal gender recognition was obtained overseas at a very young age), although the Bill does not otherwise define when this exception will apply.

## Effect on the operation of the law as it applies to reserved matters

6. The Bill will make modifications of the law as it applies to the reserved matters. Sections 2-6 and 16 of the Bill make modifications to the 2004 Act by repealing ss.1-8 (except s.4(4)) of the 2004 Act and replacing them with ss.8A to 8E; section 8 inserts a new section 8M; section 16 also amends s.25 (which contains the relevant definitions) of the 2004 Act. The Bill therefore modifies the 2004 Act.
7. The reserved matter to which that law applies is (at least primarily) “equal opportunities”<sup>1</sup>. The reserved matter is defined specifically as meaning “the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.”
8. The modified law (the 2004 Act) applies to the reserved matter (equal opportunities) through its inter-relationship with the Equality Act 2010 (the 2010 Act). The 2010 Act provides Great Britain’s legal framework to protect the rights of individuals and advance equality of opportunity for all.
9. The 2010 Act makes “sex” a protected characteristic and makes provisions about when conduct relating to that protected characteristic is unlawful. Section 9 of the 2004 Act provides that unless exceptions apply, the effect of a full GRC is that “for all purposes” the person’s sex becomes as certified. As a matter of general principle, a full GRC has the effect of changing the sex that a person has as a protected characteristic for the purposes of the 2010 Act<sup>2</sup>. This is subject to a contrary intention being established in relation to the interpretation of particular provisions of the 2010 Act.
10. The 2010 Act as a whole was carefully drafted in the light of, and reflecting, the specific limits of the 2004 Act and the relative difficulty with which a person could legally change their sex “for all purposes” (per s.9), including under the 2010 Act itself. The Bill alters that careful balance.

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<sup>1</sup> See §L2 of Schedule 5 to the 1998 Act

<sup>2</sup> For *Women Scotland Ltd v Lord Advocate* 2022 CSOH 90 - note that the Petitioners are seeking leave to appeal



11. The Bill also has practical consequences on the operation of the law as it applies to other reserved matters. The most notable example is the administration of tax, benefit and State pensions managed by integrated systems across the UK that span reserved and devolved functions. The reserved matters to which the law applies are “fiscal policy” and “social security”<sup>3</sup>.
12. The Secretary of State believes that the modifications to the 2004 Act as it applies to reserved matters would have an adverse effect on the operation of the law as it applies to reserved matters.
13. These adverse effects can be grouped into 3 overall areas of concern set out the in following sections of this document:
  - Part 2: The impacts of the creation of 2 parallel and very different regimes for issuing and interpreting GRCs within the UK.
  - Part 3: The impacts that removing safeguards could have on safety, in particular that of women and girls, given the significantly increased potential for fraudulent applications to be successful.
  - Part 4: The impacts on the operation of the Equality Act 2010 that result from the fact that a GRC changes a person’s protected characteristic of sex for the purposes of the 2010 Act , *and* the expansion of the cohort of people able to obtain a GRC. This includes (a) the exacerbation of issues that already exist under the current GRC regime, and (b) the creation of new ones.

## Part 2: Adverse effects of different GRC regimes across the UK

14. The first category of adverse effects created by the Bill comes from the substantive modifications it makes to the basis upon which a GRC is obtained, so as to diverge Scots law from the law in the rest of the UK i.e. it creates 2 parallel and very different regimes for issuing and interpreting GRCs.
15. The Bill does not purport to require that a Scottish GRC issued under its terms would have any legal effect other than in Scots law; it could not, within legislative competence, have done so. It is highly problematic both in principle and practically for a citizen of the UK to have a different gender, and legal sex (including for the purposes of the 2010 Act), depending upon where they happen to be within the UK, and which system of law applies to them. It is practically and legally undesirable for all, including in particular the individual holder of the GRC, that a person will have one legal sex in Scotland and a different one in England, Wales and Northern Ireland.
16. The legislative consent motion that was passed by the Scottish Parliament alongside the GRA 2004 recognised, at that time, the desirability of having a single coherent regime for obtaining a GRC which applied uniformly across the UK. That desirability has not changed.

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<sup>3</sup> See §A1 and §F1 of Schedule 5 to the 1998 Act



17. It is clear that there are a number of specific adverse effects caused by the creation of a dual system, as outlined below, as well as the overall adverse effect created by a general lack of clarity both for GRC holders and service providers, employers etc for whom it may be unclear what status a Scottish or UK-wide GRC has in different contexts, and to what extent and in what circumstances the restrictions on disclosure of information (about someone's GRC status or history) imposed by s.22 of the 2004 Act will apply.
18. These adverse effects include, but are not limited to, the examples of impacts on the operation of the Equality Act 2010 set out in more detail below, including:
- single-sex clubs or associations: a UK wide, single-sex club or association could have different membership in different parts of the UK
  - the public sector equality duty (PSED): a cross-border public authority would have to apply the PSED differently as regards Scotland than in England and Wales
  - equal pay: a UK wide employer would have employees who could not use a colleague as a comparator in an equal pay claim if it were brought in Scotland, but could do so in England (and vice versa)
19. The application of the Bill in the context of s.22 of the 2004 Act would be likely to exacerbate employers' and providers' increased concerns arising from the new cohort: the increased numbers of GRC holders meaning these issues and constraints would be encountered more often; and there being additional considerations for 16 and 17 year old GRC holders who were not envisaged when the 2004 Act was devised. Section 22 makes it a criminal offence for someone who has received protected information in an official capacity to disclose the information to someone else. This is subject to exceptions, including where the person consents to the disclosure. Protected information is the fact of a person's application for a GRC and, once they have legally changed their sex, information that they have a GRC, or information concerning their biological sex (and therefore previous identity). The scope of s.22 is broad. It makes it difficult to ask or record an individual's legal sex including in a professional context, since changes in records of someone's legal sex over time could reveal that they have a GRC, which is protected information.
20. There are also a number of areas in which the creation of a dual-system has serious adverse (and in some cases potentially unmanageable) practical consequences on the operation of the law as it applies to other reserved matters. The most notable example is the administration of tax, benefit and State pensions which are managed by integrated systems across the UK that span reserved and devolved functions, operating for both the UK and Scottish governments. Existing IT infrastructure only allows one legal sex on any record and cannot change the marker for 16 to 17 year olds. Those responsible for these systems consider that it may be unmanageable, even with considerable time and expense<sup>4</sup>, to build

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<sup>4</sup> If the Bill were enacted, HMRC would need to explore whether consequential changes to IT infrastructure were possible. Changes to HMRC IT can have consequential impacts on other departments due to integrated systems.



system capability to manage a dual identity for the same individual if someone's legal sex could be different in Scots law and the law for England and Wales.

21. The Bill also creates a diverging system for overseas citizens to obtain GRCs between certificates recognised in Scotland and in the rest of the UK. As the process in Scotland will allow for any overseas GRC holder to automatically obtain a Scottish GRC (unless it is manifestly contrary to public policy), this could potentially lead to overseas citizens in the UK (from countries or territories not on the approved list) favouring applying for Scottish GRCs in order to bypass the more rigorous process of applying to the Panel on the UK standard track. Where such GRCs are then relied upon in relation to reserved matter areas – including under the 2010 Act – they will be a further aspect of the incoherent effect of the Bill on the operation of the law as it applies to reserved matters.

### Part 3: Adverse impacts resulting from increased risk of fraudulent applications

22. The amendments made by the Bill to the 2004 Act will remove a number of measures which the UK government regards as important safeguards, as set out in paragraph 3 above. Taken together, these modifications remove any requirement for third party verification or evidence from the process.
23. The Bill creates an offence of making a false statutory declaration or making a false application for gender recognition, with penalties of up to 2 years' imprisonment and an unlimited fine.
24. The Bill also requires the Chief Constable of Police Scotland to notify the Registrar General for Scotland if they make an application to the court for a sexual harm prevention order, a sexual risk order or a sexual offences prevention order, which would have the effect of preventing a person from making an application for a GRC.
25. The new threshold for applications changes the cohort of people with GRCs in 2 substantial ways: it changes the nature of people eligible to apply and, in doing so, it is likely to



significantly increase the number of people able to do so<sup>5</sup>. At present, the requirement for a diagnosis of gender dysphoria, as well as evidence of 2 years living in the acquired gender, means that there are clear limits on who is eligible to apply. By removing the need for any third party verification including for the required period of living in the acquired gender, and reducing that period to 3 months (6 months for those aged 16 to 17)<sup>6</sup>, the threshold is changed: from one that is very hard to meet and requires third party verification; to one that is far more dependent on an applicant's personal judgement. It is clear that this changes the cohort of people who might therefore hold a GRC, and thereby the category of people who are relevant for/benefit from particular sex provisions under the Equality Act 2010. The level of assurance as to the individual's likelihood of remaining committed to living in their acquired gender is also radically reduced because of the shorter initial period required, increasing the likelihood of individuals varying or wholly ending this commitment while having changed their legal sex. These changes therefore open the possibility for significantly greater heterogeneity in the cohort.

26. The change in how a GRC can be obtained under the Bill affects the circumstances in which a person can change their protected characteristic of sex under the 2010 Act. It expands the category of people who will be regarded as women<sup>7</sup> under the 2010 Act. It will no longer be a biological woman or a woman aged 18 or over who has a GRC as a result of having a diagnosed medical condition and has 2 years of lived experience; it will, in Scots law, be a biological woman or a person aged 16 or over who has self-identified as a woman for 6 (or 9

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<sup>5</sup> The Scottish Government expects the number of annual applicants to increase to 250 to 300 (based on data from Ireland which introduced a similar regime to a similarly sized population, albeit with cultural differences) from a baseline of about 30 per year (according to the National Records of Scotland in relation only to those born in Scotland) - suggesting a tenfold increase. The SG estimates are however vulnerable to significant uncertainty. They are based on historic data from other European countries which do not have equivalent systems. The closest such system in a country with a similar sized population to Scotland has seen an average of 550 applications a year, considerably exceeding the SG estimate. No rationale was given during the consultation or passage of the Bill for the relatively low SG estimates compared to the estimated population of the trans community. SG Cabinet Secretary Shona Robinson, introducing the Bill on 3 March 2022 stated: "There are around 25,000 people in the trans community in Scotland but only around 600 of them have a gender recognition certificate...far more of those 25,000 would have wanted to obtain a gender recognition certificate".

Sources for international frameworks:

[www.gov.scot/publications/review-gender-recognition-act-2004/](http://www.gov.scot/publications/review-gender-recognition-act-2004/)

[www.gov.scot/publications/gender-recognition-reform-scotland-bill-equality-impact-assessment/pages/](http://www.gov.scot/publications/gender-recognition-reform-scotland-bill-equality-impact-assessment/pages/)

Sources for SG data/estimates:

[www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-recognition-reform-scotland-bill/introduced/financial-memorandum-accessible.pdf](http://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-recognition-reform-scotland-bill/introduced/financial-memorandum-accessible.pdf) and

[www.gov.scot/publications/gender-recognition-reform-scotland-bill-business-regulatory-impact-assessment/pages/1/](http://www.gov.scot/publications/gender-recognition-reform-scotland-bill-business-regulatory-impact-assessment/pages/1/).

<sup>6</sup> The Bill requires a further 3 months' reflection period before a GRC is issued.

<sup>7</sup> The focus is on transgender women for ease of language and because, as this statement explains, that is the context for the significant practical concerns identified; this should not be taken as excluding the possibility of equivalent or similar issues arising in relation to people who are men by virtue of having a GRC.



months)<sup>8</sup>. This is a substantive change to what a ‘man’ or ‘woman’ is for the purposes of the 2010 Act.

27. The Secretary of State does not believe that the Bill retains or creates sufficient safeguards to mitigate the risk of fraudulent and/or malign applications and believes that the reformed system will be open to abuse and malicious actors. For example, as already noted, the required period for living in the acquired gender does not involve any evidence. This would undermine the operation of the Bill’s designation of sex and its interrelation with sex as a protected characteristic in the 2010 Act, eroding confidence in the latter as a credible framework to protect the rights of individuals and advance equality of opportunity for all. Similar points have been noted by the UN Special Rapporteur on Violence against Women and Girls<sup>9</sup>.
28. Adverse effects identified are of particular concern in relation to the operation of the 2010 Act’s provisions relating to sex-segregated spaces, services, competitive sports and occupational requirements. These allow for the exclusion of people with the protected characteristic of gender reassignment, including those with a GRC, where their exclusion can be objectively justified. Given the significantly increased possibility of someone with malicious intent being able to obtain a GRC and, as this risk will be widely known, there is a related risk of people no longer feeling safe in any sex-segregated setting and self-excluding from such settings even though they could significantly benefit from them.

## Part 4: Adverse effects in relation to the operation of the Equality Act 2010

### (a) Exacerbation of existing issues with the operation of the Equality Act 2010

29. The amendments made by the Bill to the 2004 Act will allow a new and significantly broader category of people, who are currently unable to obtain a full GRC, to do so. This group (the new cohort) comprises:

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<sup>8</sup> The 3 or 6 months required at point of application plus a further 3 months’ reflection period before a GRC is issued.

<sup>9</sup> Letter from UN Special Rapporteur on violence against women and girls, 29 November 2022 <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=27681>



- applicants aged 16 to 17
- applicants without a diagnosis of gender dysphoria
- applicants who have not lived for 2 years in their acquired gender

30. The UK government has assessed that the creation of this new and very different cohort of eligible applicants would adversely affect the operation of the 2010 Act, identifying 4 key areas:

- A. clubs and associations (where exceptions apply in respect of sex but not in respect of gender reassignment)
- B. the operation of the PSED
- C. equal pay
- D. provisions where exceptions apply for both sex and gender reassignment

A. Clubs and associations (where exceptions apply in respect of sex but not in respect of gender reassignment)

31. The provisions in the 2010 Act relating to associations with 25 or more members (Part 7) mean that associations are able to restrict membership to people who share a protected characteristic, so they could restrict membership to men or to women. Many forms of women's groups and clubs, including any membership-based<sup>10</sup> support groups for vulnerable women or women who have been victims of rape or sexual violence, or those designed to foster women and girls' participation in particular activities or sports, will be covered in respect of associations which have regulated their membership to be women-only. Where an individual has changed their sex for the purposes of the 2010 Act by obtaining a full GRC, the association is therefore not able to refuse membership on the grounds of their previous sex. They also cannot restrict membership to people who are not covered by the gender reassignment characteristic because an association's membership can only be based on a shared protected characteristic and not the absence of it.

32. The Bill's creation of a new cohort with the ability to change their legal sex will significantly change the profile and number of individuals that associations will be unable to exclude from membership on grounds of sex.

33. The 2010 Act's measures in relation to associations prevent them from denying membership to a presently small and highly defined group of people who have changed their legal sex under the 2004 Act as it currently applies. This was the context in which the 2010 Act was enacted.

34. The Bill will adversely affect the operation of the 2010 Act by changing the effect of its requirements on single-sex associations, who will be required to accept, without

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<sup>10</sup> if similar activities are not organised formally as membership-based, they would probably be considered services and providers would be able to apply the gender reassignment exception where justified.



discrimination, members from a new, larger and different cohort, who would not have met the requirements currently set out in the 2004 Act.

35. Whereas current GRC recipients have established a stable gender identity for at least 2 years, recipients under the Bill may have done so for only 6 months<sup>11</sup> and in a manner which is self-defined. Where an association had reason to exclude the opposite sex, it is reasonable to assume that a liberalisation of the process for changing legal sex will create new challenges, problems or concerns. Accommodations, adjustments and compromises that may have been reasonably provided on an exceptional basis, may not be possible for a larger number. Provisions that may have been appropriate for individuals who have lived in their acquired gender over a significant period of time may not be suitable where this is not the case.
36. The Bill therefore changes the nature and level of expectations of single-sex associations as compared to those set by the 2010 Act when enacted. In doing so, it may lead to associations, including long established associations, being at greater risk of being found to be operating unlawfully (by excluding transgender women, for example) or making decisions to cease operating because of the perceived risks. Similarly potential founders of new such associations may not proceed due to equivalent concerns. These changes could lead to the loss of this provision, undermining efforts to foster greater participation of women in a particular activity, or to the self-exclusion of women who, for religious, philosophical belief or other reasons, may only feel able to attend an association if they understand them to be segregated by biological sex and who are more likely to believe, given the increase and expansion of the cohort if the Bill is enacted, that this is unlikely.

## B. The operation of the Public Sector Equality Duty (PSED)

37. The expansion of the cohort of GRC holders is also materially problematic for the operation of the PSED (section 149). This requires public authorities and those carrying out public functions to have due regard to the need to 'advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it', amongst other measures.
38. As established above, possession of a full GRC has the effect of generally changing the sex that a person has as a protected characteristic for the purposes of the 2010 Act. As a consequence, when considering the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it, decision makers will not always be considering the impact on biological women as a distinct disadvantaged group compared to the impact on biological men, as the protected

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<sup>11</sup> The 3 or 6 months required at point of application plus a further 3 months' reflection period before a GRC is issued.



characteristic of sex is not confined to biological women<sup>12</sup>. The Bill, if enacted, will make an existing problem significantly worse because of the increased number and range of GRC holders, with significant implications for group-based equality provisions. As such, it is possible that expanding the cohort of people in possession of a GRC will have a direct impact on the application of this section of the 2010 Act. It will also become more difficult to monitor UK-wide disparities between legal women and men, or transgender and non-transgender people, if membership of those groups differs between Scotland and the rest of the UK and is changing more rapidly in Scotland than in England. Changing the membership of these groups will particularly impact more local and operational contexts where the numbers of people concerned may be quite limited and the effect of even a very small number of GRC holders could be significant.

39. It is also noted that the dimension of sex is relevant in the context of all other protected characteristics and an understanding of equalities impacts for a certain issue may require consideration of combinations of protected characteristics – for example, the impact for ethnic minority women. The greater ease with which people in Scotland will be able to change their legal sex will make it more difficult to clearly assess the impacts of policy in respect of all protected characteristics, and thus the PSED will be more difficult to apply, as a result of the Bill.
40. Equality impact assessments should make use of available data and evidence. In that context, it is noted that even small numbers of transgender people's inclusion in analysis can have a disproportionate impact, as it is unlikely that transgender people will be evenly distributed in the intersection with other protected characteristics and/or their locality. Looking at how groups are impacted in specific situations, rather than at a national level, will mean that the inclusion of transgender people within sex-segregated groups could have a disproportionate impact on the interpretation of the data.

### C. Equal pay

41. The issues here may arise infrequently but could be significant in specific instances - the adverse effect is therefore qualitative rather than quantitative. The 2010 Act provides that when a claimant brings equal pay claims under Chapter 3 of Part 5, they must show that they have been paid less than a person of the opposite sex employed on equal work (a 'comparator').
42. A full GRC has the effect of changing the sex that a person has as a protected characteristic for the purposes of the 2010 Act, meaning that transgender women with a GRC are legally considered as female claimants and comparators, and transgender men as male claimants and comparators.

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<sup>12</sup> Some decision-makers may not presently be aware of the distinction between biological and legal sex but, where they are, these considerations are unlikely to be a routine part of PSED assessments currently: the data and evidence available may limit what analysis is possible; and/or the nature of the decision in hand may mean a differentiation between legal and biological sex isn't material.



43. Where an equal pay claim is brought by a claimant with a GRC, or a comparator with a GRC is used in the claim, an individual may have been treated as the opposite to their current legal sex for a significant proportion of their career with better or worse terms during this time than the comparator or claimant respectively. This may lead to the comparator test identifying an equal pay issue where one does not properly exist, or indeed failing to identify such an issue due to an individual's status as the holder of a GRC.
44. Where a claimant may deem a colleague to be the most appropriate comparator of the opposite sex, but that colleague then receives a GRC, the 2010 Act would not enable them to be cited as the comparator in the claim. This could prevent the comparator test from accurately identifying what might otherwise have been deemed unlawful.
45. As the criteria for being issued with a GRC under the 2004 Act presently mean GRCs can only be issued to a small group who have lived in their acquired gender for at least 2 years, the effect of this on equal pay provisions is significantly limited.
46. However, the Bill will allow a new and significantly broader category of people to change their legal sex. As more individuals are eligible to change their legal sex, the adverse effect on the operation of the 2010 Act's equal pay provisions grows. In particular, an individual's ability to gain a full GRC after living in their acquired gender for 6 or 9 months would increase the likelihood of equal pay claims involving individuals who had started and completed the gender recognition process only relatively recently or who obtained a GRC while a claim was ongoing.
47. In principle, the same issues may arise in the context of a direct discrimination claim based upon sex. However, in such claims a hypothetical comparator may be relied upon, and that possibility will mean that a situation in which an adverse effect arises as a result of the Bill will be rare. Hypothetical comparators are not generally used in equal pay claims.

#### D. Provisions where exceptions apply for both sex and gender reassignment

48. The 2010 Act provisions for sex-segregated services, competitive sports and occupational requirements allow for the exclusion of people with the protected characteristic of gender reassignment, where their exclusion can be objectively justified. Anyone holding a GRC would be protected by the characteristic of gender reassignment, but this is not reliant on having a GRC.
49. The existence of the current system of legal gender recognition means that problems relating to these provisions already exist. Firstly, someone who is transgender (i.e. has the protected characteristic of gender reassignment) but does not have a GRC could be subject to a blanket exclusion from these services, settings and roles on the basis of their legal sex; whereas someone who is transgender with a GRC cannot be excluded on the basis of their legal sex, but can be excluded on the basis of gender reassignment if there is objective justification for doing so. The expansion of the cohort of GRC holders would therefore result in more case-by-case decisions being made. It may also be that providers find it more



difficult to justify excluding increased numbers of people with GRCs or worry about an increased risk of operational and/or legal challenges. This could lead to an increase in the number of transgender people accessing single-sex services, spaces and roles, and a potential chilling effect on existing and prospective providers, in effect disincentivising such provision.

50. An increase in the number of GRC holders means that people's perception of whether a setting is likely to be biologically sex-segregated will alter, and they may be more likely to self-exclude as a result of their perception that people of the other biological sex will be more likely to be present. Furthermore, the nature of the new and very different cohort of GRC holders makes it more likely that people will encounter others who do not conform to their expectations of someone they would expect to find in a single-sex service, space or role, which could result in their feeling uncomfortable, or even traumatised, and undermining the purpose of making these sex-segregated. The Bill exacerbates this issue and will likely cause a chilling effect that could be just as harmful in practice as a legal effect.

## (b) New issues

51. While a number of the adverse effects arising from the Bill increase the significance of existing issues in the operation of the 2010 Act, the impact on the operation of the 2010 Act with regard to schools is of special significance in that it creates a difficulty that schools have generally not previously needed to contend with.
52. The provisions in the 2010 Act relating to schools (in Part 6) are excepted from the 2010 Act's sex discrimination provisions for the purposes of single-sex school admissions. Single-sex schools are therefore able to put in place lawful admissions policies that discriminate on the basis of prospective pupils' sex. There is no corresponding exception for direct gender reassignment discrimination. Where an individual has changed their legal sex for the purposes of the 2010 Act by obtaining a full GRC, a school's refusal to admit that child due to their gender reassignment would be direct gender reassignment discrimination.
53. As the 2004 Act sets a minimum age of application at 18, it is not possible for the vast majority of school pupils to change their legal sex prior to leaving school. The UK Department for Education, responsible for the school system in England, is not aware of any examples in practice either in England or anywhere in the UK. This was the context in which the 2010 Act was enacted. Therefore, currently single-sex schools can be largely assumed to be providing for a single biological sex. If the Bill is enacted and such schools sought to exclude from admission those within the new cohort who had changed their legal sex so that it no longer corresponded with the school provision, this would be unlawful.
54. The 2010 Act does allow<sup>13</sup> single-sex schools to exceptionally admit pupils of the other sex or admit a comparatively small number of pupils of the other sex and confine those pupils to particular classes or courses. Single-sex schools are currently therefore granted in effect a

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<sup>13</sup> This provision was developed in the 2010 Act to facilitate prioritisation of school staff's children, of either sex, in admissions to any particular school; it was not designed with transgender pupils in mind.



level of discretion under the Act in relation to admissions decisions which they can use for transgender pupils, whose legal sex (in almost all instances) will not have changed.

55. The Bill will adversely affect the operation of the 2010 Act by curtailing the discretion it affords schools in Scotland: enabling a new cohort of transgender pupils aged 16 to 17 to change their legal sex in Scotland will mean that single-sex schools will not be able to deny them admission on the grounds of their sex. If a single-sex school in Scotland were to deny admission on the basis of a pupil's gender reassignment (rather than their sex), it could constitute unlawful direct discrimination on the basis of gender reassignment. With only a very small number of single sex schools in Scotland, single-sex provision is already very limited. Providers establishing new single-sex schools to meet any increase in future demand would equally be prohibited from refusing admission to pupils from the new cohort of transgender pupils aged 16 to 17 because they have changed their legal sex. It is possible that such constraints arising from the Bill on single-sex schools in Scotland could contribute to individual schools deciding to become co-educational. That would have an adverse effect for current and future parents and students who would prefer a single-sex school, perhaps in particular where they consider that such a setting is less likely than a co-educational school to generate problems with sexual harassment.
56. The Bill's creation of a new cohort of 16 to 17 year olds born in Scotland with the ability to change their birth certificate and thus legal sex would also adversely affect the operation of the 2010 Act in schools in England, particularly those near the border with a higher percentage of students born or living in Scotland. This could create doubts about whether birth certificates issued by the Registrar General for Scotland could be relied on as documentary evidence of a person's legal sex in England and Wales for 16 and 17 year olds. This would leave schools uncertain as to how to confirm a person's legal sex through reference to such documentation if they were born or living in Scotland and aged above 16.
57. With such doubts about how to confirm someone's legal sex, the Bill if enacted could make it more difficult for some single-sex schools in England to operate. Uncertainty or unawareness of pupils' transgender status (something that is likely to arise more often due to the increased size of the cohort in Scotland) could also mean that schools do not have the information they need to assess safeguarding risks, including how best to support transgender pupils.