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Reform “under the radar”? Lessons for Scotland from development of gender self-declaration laws in Europe

Kath Murray, Lucy Hunter Blackburn and Lisa Mackenzie

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A. Introduction

Between 2014 and 2019 at least eight European jurisdictions introduced laws allowing a person to change their legal sex on the basis of self-declaration, collectively referred to by the Scottish Government as “international best practice”. This paper examines the international best practice narrative and underpinning ideas, the pace of reform, the strategies used to secure change and the implications for reform in the UK. First, the paper reviews the disagreement at the heart of the debate, followed by the current legal position in the UK and the recent proposals for reform. The main body of analysis examines the expansion of gender self-declaration laws in Europe and how change was achieved within such a short time-frame. We argue that this phenomenon may, on the available evidence, be read as indicative of policy capture¹ at a supra-national level and conclude that the international precedents should be subject to more critical scrutiny before taken as a reason to pursue reform.

B. Sex and gender identity in law

The gender self-declaration movement is of social and political significance because laws and policies based on these principles may affect other rights-holders. Notably conflict can arise when laws and policies that treat a person according to their self-declared gender identity are allowed to override sex-based rights.

In the UK, policymakers’ failure to recognise this conflict of rights has led to the introduction of policies based on gender self-identification without due consideration of the impact on women’s existing sex-based rights.² Those rights are premised on a view which holds that the physical, economic and social consequences of being born female are so significant that women require specific protections in law and policy for reasons of safety, privacy and dignity, including single-sex services and spaces. The opposing view posits that everyone

¹ OECD, Preventing Policy Capture: Integrity in Public Decision Making - OECD Public Governance Reviews (2017).

² K Murray and L Hunter Blackburn, “The unregulated introduction of gender self-identification as a case study of policy capture in Scotland” (2019) 28(3) Scottish Affairs 262.

has an innate gender identity, and that for some individuals, this may be inconsistent with their biological sex.³ From this perspective, it is asserted that a person's self-perceived gender identity should take precedence over sex in all or almost all contexts.⁴

How governments and service-providers codify these ideas in law and policy has significant implications for rights and protections accorded to women such as sex-segregated domestic violence refuges, changing rooms, hospital wards, prisons, sports and all women shortlists.⁵ As the Faculty of Advocates observes, the introduction of gender self-declaration is "a legally complex and challenging proposal, requiring careful balancing of disparate rights and interests".⁶

C. Legal recognition of gender in the UK

Conceived as a pragmatic step aimed at a very small number of people,⁷ the UK-wide Gender Recognition Act 2004 (GRA) allows a person to change their sex in law. Applicants for a Gender Recognition Certificate (GRC) must demonstrate to a Gender Recognition Panel (GRP) that they have a diagnosis of gender dysphoria and have been living in what the law terms their "acquired gender" for at least two years. Surgery or other physical interventions have never been a legal requirement. The change of sex in law is subject to some exceptions, set out in the GRA itself, and in the later Equality Act 2010, although there is disagreement as to how some of these exceptions should operate.⁸

(1) Reforming the Gender Recognition Act

Following a 2016 manifesto commitment to "review and reform gender recognition law, so it's in line with international best practice"⁹ in 2017 the Scottish Government published proposals to put the legal recognition of gender identity on a self-declared basis.¹⁰ This was followed by similar proposals from the Westminster Government in 2018. However, breaking with the international trend, both the Westminster and Scottish proposals met with public criticism, prompting both governments to pause their plans.

In December 2019 the Scottish Government consulted again, on a draft Bill proposing to remove the requirement for a diagnosis of gender dysphoria and the role of the GRP.¹¹

³ P McQueen, "Feminist and trans perspectives on identity and the UK Gender Recognition Act" (2016) 18(3) *The British Journal of Politics and International Relations* 671.

⁴ For example: "The Yogyakarta Principles plus 10" (2017).

⁵ For example: J Komorowski (2018) *UK Reform of Gender Recognition and the Commission for Equality and Human Rights*. Oxford Human Rights Hub (20 November 2018). Also n 8.

⁶ Faculty of Advocates, "Response from the Faculty of Advocates to the Review of the Gender Recognition Act 2004" (28 February 2018), available at <https://www.advocates.org.uk/media/2720/final-faculty-response-gender-28-february-2018.pdf>.

⁷ Currently around 30 people per year who were born or adopted in Scotland acquire a GRC. See Scottish Parliament, Official Report cols 17-18 (8 Jan 2020) (SA Somerville).

⁸ J Komorowski, "Sex and the Equality Act" (2020) 65(1) *Journal of the Law Society of Scotland* (online only), available at <https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-01/sex-and-the-equality-act/>.

⁹ Scottish National Party, "Re-elect" (*Scottish Parliament Election Manifesto*, 2016), available at https://d3n8a8pro7vhmx.cloudfront.net/thesnp/pages/5540/attachments/original/1461753756/SNP_Manifesto2016-accessible.pdf?1461753756.

¹⁰ Scottish Government, *Review of the Gender Recognition Act 2004* (2017).

¹¹ Scottish Government, *Gender Recognition Reform (Scotland) Bill - a consultation by the Scottish Government* (2019).

Applicants would now simply declare that they had lived in their “acquired gender” for three months and intended to live permanently in their “acquired gender”. What it means to live in an “acquired gender” has never been defined in law: new here is removing a third-party decision that this has been adequately demonstrated. Applications would be open to those living and/or “ordinarily resident” in Scotland. The proposed reforms remain controversial, principally in relation to the removal of the requirement to produce evidence of a diagnosis of gender dysphoria.

(2) Changing the purpose of the GRA and international best practice

While presented as a straightforward administrative reform that will not diminish women’s rights,¹² beneath the removal of medical gatekeeping lies a profound conceptual shift from the purpose of the GRA; from a limited pragmatic concession aimed at relatively small population of individuals diagnosed with gender dysphoria; to enshrining in law the right to obtain a legal change of sex based on a person’s self-description.

This incongruous combination of what is presented as simple administrative reform, and a fundamental shift in rationale is underpinned by the Scottish Government’s appeal to “international best practice”, which refers both to countries that have already introduced gender self-declaration laws, and to non-binding legal instruments premised on the idea of innate gender identity (the Yogyakarta Principles and Resolution 2048 of the Parliamentary Assembly of the Council of Europe), cited in both the 2017 and 2019 consultation papers. Taken at face-value this narrative can be understood simply as an appeal to implicitly unarguable norms. While both papers outline the application process in different countries, neither discusses *the effect* of legal gender recognition in practice, for instance how such laws interact with existing rights and protections based on sex and/or religion, and what, if any, limitations or exceptions are in place. It is also unclear what represents best practice or where this is found. For example, the minimum age for legal recognition ranges from six years (with parental consent) to 18 years. Only some jurisdictions require a standstill reflection period and there are different legal effects in areas such as marriage, succession, parenthood and eligibility for military service.¹³

The international best practice narrative might also be understood as a legitimization device or “neutralization strategy”¹⁴ that functions to soften the debate around gender reform and appease public concerns through an appeal to what is seen as the successful implementation of self-declaration laws elsewhere. As Cabinet Secretary Shirley-Anne Somerville stated in June 2019, “in reforming gender recognition law, Scotland will not in any sense be leading the way or taking action which is unprecedented”.¹⁵

¹² Scottish Parliament Official Report, cols 19-20. 8 January 2020 (SA Somerville).

¹³ Dentons, Only Adults? Good Practices in Legal Gender Recognition for Youth – A report on the current state of laws and NGO advocacy in eight countries in Europe, with a focus on rights of young people (2019), available at https://www.iglyo.com/wp-content/uploads/2019/11/IGLYO_v3-1.pdf.

¹⁴ T Mathiesen, *Prison on Trial* (2006).

¹⁵ Scottish Government, “Statement on gender recognition – statement by Cabinet Secretary for Social Security and Older People Shirley-Anne Somerville to the Scottish Parliament” (20 June 2019), available at <https://www.gov.scot/publications/statement-gender-recognition/>.

D. The international expansion of legal gender recognition

The earliest example of the adoption of self-declaration for a change of sex in law appears to be Argentina, which in 2012 introduced legislation allowing those aged 18 years or over to acquire an amended birth certificate and new identity card based on self-declared gender identity. Argentina's Gender Identity Law was followed by multiple countries enacting similar legislation, with some variation in process and legal effects. In Europe these included Denmark (2014), Malta, Ireland (2015), Norway (2016), Belgium (2017), Luxembourg, Portugal (2018) and Iceland (2019). Non-European countries include Columbia (2015) and Chile (2018).

The international roll-out of gender self-declaration laws has several noteworthy features. Firstly, at a European level, ECtHR judgements have played no role in the expansion of legal recognition laws; as the Scottish Government has confirmed, the current GRA is fully compliant with ECHR rulings. Second, from a normative perspective there is a disjuncture between the progressive framing of gender identity reform in some jurisdictions, and the standard of legislation on women's sex-based reproductive rights. In Malta, Colombia, Chile and, until recently Ireland, abortion was either illegal or severely restricted. Lastly, the swift pace of international reform raises the question as to how change has happened so quickly. As the Faculty of Advocates noted in its 2017 submission: "changes to the regime in Ireland were only made in 2015. We are also conscious that self-identification laws in the other jurisdictions referred to are all relatively new and their operation in practice may not yet be easily assessed".¹⁶

From one perspective the international expansion of gender recognition laws based on self-identification can be understood through a policy transfer lens, which broadly refers to the ways that "knowledge about how policies, administrative arrangements, institutions and ideas in one political setting" is used to develop policy in another,¹⁷ and the factors likely to constrain or facilitate transfer.¹⁸

Applied to GRA reform, it is not clear what analysis the Scottish Government has done to consider how the detail, context and effect of policies in other jurisdictions might be relevant to their transfer to Scotland. However, the Faculty of Advocates' concern about the difficulty of obtaining evidence from other nations appears to be borne out by a recent parliamentary written answer. Asked why the draft Equality Impact Assessment did not cite international evidence to support the view that legal self-declaration was unlikely to have negative effects on single-sex services, the Scottish Government responded that its review "did not find any relevant research from these jurisdictions in relation to these statements".¹⁹

(1) Yogyakarta Principles and Council of Europe Resolution 2048

The successful transfer of legislation based on gender identity can be attributed in part to the influence of non-binding international instruments that have helped to secure a normative shift in this area. A report prepared by international law firm Dentons Europe LLP in

¹⁶ Faculty of Advocates consultation response (n 6).

¹⁷ D Dolowitz and D Marsh, "Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making" (2000) 13(1) Governance 5 at 5.

¹⁸ E Minkman, A van Buuren and V Bekkers, "Policy transfer routes: an evidence-based conceptual model to explain policy adoption" (2018) 39(2) Policy Studies 222.

¹⁹ Parliamentary Question S5W-26950, 24 January 2020 (SA Somerville).

conjunction with IGLYO, a network of 92 advocacy groups, explains how “soft law instruments” such as recommendations and resolutions can “clarify how human rights standards may apply to the kinds of abuses experienced by young trans people in the context of legal gender recognition”.²⁰ Most significant here are the “Yogyakarta Principles plus 10”, which cover a range of rights related to sexual orientation and gender identity. Principle 31 defines “gender identity” as:

each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

The Yogyakarta Principles have no official standing in international law, have not been adopted in any treaty, create no obligations on governments, nor have they been relied on in the multiple rulings in this area by the European Court of Human Rights. Nonetheless, their core tenets have influenced political debate and acted as a lever for reform. Thoreson describes how “within a matter of two years, the Principles [were] widely cited by state and non-state actors alike, despite the fact that they were formulated privately by a cadre of experts and not by any official or quasi-representative body”, which is ascribed in part to the “strategic, inventive ways that activists have framed and deployed them from multiple points of entry in the global system”.²¹ In Scotland, the Principles influenced the 2017 consultation which appeared to take as axiomatic that self-declaration represented best practice: hence, “[t]he view of the Scottish Government is that the 2004 Act requirements are unnecessarily intrusive and do not reflect the best practice now embodied in the Yogyakarta Principles and Resolution 2048”.²² This position was reiterated by the Equality and Human Rights Commission, whose response to that consultation referred to “best practice embodied by the Yogyakarta Principles, Resolution 2048 and several European states”. Other organizational responses citing the principles included the Children’s and Young People’s Commissioner, Clan Childlaw, Amnesty International, Unison, Scottish Trades Union Congress (STUC), and the Teachers Union NASUWT.²³

As noted, the Scottish Government’s case for reform also draws on Resolution 2048 of the Parliamentary Assembly of the Council of Europe as part of its appeal to international principles. Passed in 2015, Resolution 2048 asserts a strongly held belief in the existence of gender identity as a “deeply felt internal and individual experience”.²⁴ Specifically it calls on Member States to: “develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards ... and other similar documents”. Although such Resolutions are political or symbolic in status and create no legally binding obligations on member states, the

²⁰ Dentons (n 13) 14.

²¹ RR Thoreson, “Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name” (2009) 8(4) *Journal of Human Rights* 323, 324-326.

²² Scottish Government, 2017 Consultation (n 10) para 3.10.

²³ Scottish Government, *Review of GRA: Published responses from organisations* (2018).

²⁴ Council of Europe: Parliamentary Assembly, *Discrimination against transgender people in Europe* (Doc 13724, April 2 2015) para 6, available at <https://www.refworld.org/docid/55b241e24.html>.

2017 Scottish Government consultation paper referred to “ensuring our compliance” with Resolution 2048²⁵ (this phrasing was removed in the 2019 consultation).

Neither Resolution 2048 nor the Yogyakarta Principles contain any discussion of the policy implications for any other protected characteristics. Indeed, it would be difficult to do so in relation to sex, as both are based on a belief that gender identity overrides physical sex. This by default sidesteps the necessary “balancing of disparate rights and interests” advised by the Faculty of Advocates.²⁶

(2) “Under the radar”

Whereas the Yogyakarta Principles and Resolution 2048 sought to mainstream gender identity beliefs via a normative shift, other strategies deployed by those advocating for self-declaration sought to minimize public engagement and awareness of the legislative process. The Dentons report offers the clearest available first-hand account of this as a systematic international approach. Drawing on eight European jurisdictions, the report sets out strategies successfully used by activists to bring about reform, including targeting youth politicians, “de-medicalising” campaigns and intervening early in the legislative process to shape the government agenda. The report also recommends avoiding excessive press coverage and exposure, which is ascribed to the divisiveness around legal gender recognition in the UK. Specifically, the report advises trying to pass legislation “under the radar”:

In Ireland, Denmark and Norway, changes to the law on legal gender recognition were put through at the same time as other more popular reforms such as marriage equality legislation. This provided a veil of protection, particularly in Ireland, where marriage equality was strongly supported, but gender identity remained a more difficult issue to win public support for.

...The most important lesson from the Irish experience is arguably that trans advocates can possibly be much more strategic by trying to pass legislation “under the radar” by latching trans rights legislation onto more popular legal reforms (e.g. marriage equality), rather taking more combative, public facing, approaches.²⁷

Indicative of this approach, in Denmark a closed consultation took place with 28 organisations, which elicited 9 responses (we were unable to find evidence of a public consultation).²⁸ Public consultations took place in Ireland and Malta but had very low response rates. In Ireland a pre-legislative consultation in 2010 secured 40 responses,²⁹ while the Maltese consultation in 2014 received 26 responses.³⁰ By contrast, the Scottish

²⁵ Scottish Government consultation responses (n 10) para 3.26.

²⁶ Faculty of Advocates consultation response (n 4).

²⁷ Supra (n 11) 20, 55.

²⁸ Folketinget, Consultation note and consultation response from the Minister of Finance and the Interior (2014) L 182 Annex I, available at <https://www.ft.dk/samling/20131/lovforslag/L182/bilag.htm>.

²⁹ Gender Recognition Advisory Group, *Report of the Gender Recognition Advisory Group* (2011) 13.

³⁰ Government of Malta, Gender Identity, Gender Expression and Sex Characteristics Act – Submissions Report (2015) (2015), available at https://meae.gov.mt/en/Public_Consultations/MSDC/Pages/Consultations/GIGESC.aspx.

and Westminster consultations secured over 15,600 and 100,000 responses respectively. In Denmark, the first European country to introduce gender self-declaration, the Bill passed through Parliament in 43 days,³¹ prompting some members of the Gender Equality Committee to express disquiet at the legislative pace.³² The Irish Bill passed in around seven months, with an amendment to remove the original requirement for a medical report accepted in the final weeks. Some undiscussed practical implications of such an approach now appear to be emerging. For example, in 2019 the Chair of the Law Society Criminal Law Committee, Robert Purcell, stated that the 2015 Act had placed the Prison Service and Courts in a difficult position with regard to transgender prisoners (in this case, the placement of a transwoman prisoner with a GRC in Limerick women's prison) and that "the law that was enacted in 2015 did not envisage this situation".³³

E. Discussion

From 2012, a set of distinctive ideas on the nature of sex and gender identity successfully transferred into legislation across multiple jurisdictions. Such laws can have significant implications for those with other protected characteristics, most obviously sex. In Scotland self-declaration principles have become part of an international best practice narrative that seeks to put the legitimacy of reform beyond question and downplay its controversial aspects. Yet based on the evidence now coming to light it is reasonable to argue that the pace of transfer in Europe can at least in part be credited to the strategies used by groups advocating for reform, and attempts to keep the legislative process "under the radar". As what appears to be an authentic insider account of the strategies used to achieve legal reform in this area, the Dentons report offers unexpectedly frank insights into how change has happened so rapidly, through a process of attachment to other issues, mobilising youth representatives, and minimising scrutiny and public discussion. It may be an indication of a measure of reputational concern around these strategies, that in January 2020 the Law Society Gazette³⁴ reported that Dentons had removed the report and accompanying press release from its website.

While lobbying in good faith on behalf of a particular interest group is a legitimate activity in a democracy, government must avoid being captured by particular interests by weighing up and balancing the needs and concerns of all interest groups, and fostering good relationships between those with different protected characteristics. That the rapid adoption of these changes in Europe has mostly to date taken place in smaller jurisdictions raises the further question of whether smaller polities may be more open to the combined dynamics of policy capture and policy transfer. In a study of clientelism in Malta Veenendaal argues that

³¹ Folketinget, Proposal for a law amending the Central Person Register Act – time schedule (2014) L 182, available at <https://www.ft.dk/samling/20131/lovforslag/L182/tidsplan.htm>.

³² Folketinget Equality Committee, Report by the Equality Committee (28 May 2014), available at <https://www.ft.dk/samling/20131/lovforslag/L182/betaenkninger.htm>.

³³ Law Society Gazette Ireland, "Male-bodied transgender inmate housed with women" (18 October 2019), available at <https://www.lawsociety.ie/gazette/top-stories/male-bodied-transgender-inmate-housed-with-women-prisoners/>.

³⁴ Law Society Gazette, "Dentons goes bashful over transgender children campaign" (3 January 2020), available at <https://www.lawgazette.co.uk/obiter/dentons-goes-bashful-over-transgender-children-campaign/5102607.article>.

state size is a potential explanatory variable. Looking at Malta alongside a number of other small jurisdictions, Veenendaal identifies “dense social networks, overlapping public and private roles, and constant direct contact” as relevant “size-related” features.³⁵ Recognizable in Scotland, these characteristics might be expected to make a jurisdiction more susceptible to the processes described in the Dentons’ report.

Examining the process by which a group of European countries have adopted laws enshrining self-declared gender identity raises questions about the pace and visibility of these changes, and the strategies used to achieve reform. The Dentons report in particular should prompt Scottish policy makers and legislators to look more critically at the precedents legislated for in other countries and how gender self-declaration laws have gained traction across multiple jurisdictions, particularly within such a limited time-frame, before following the same path.

³⁵ W Veenendaal, “How Smallness Fosters Clientelism: A Case Study of Malta” (2019) 67(4) Political Studies 1034, 1048.