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ORIGINAL ARTICLE

Amelioration, inclusion, and legal recognition: On sex, gender, and the UK's Gender Recognition Act

Mary Leng

Philosophy, University of York, York, UK

Correspondence: Mary Leng, Philosophy, University of York, Heslington, York YO10 5DD, UK. Email: mary.leng@york.ac.uk

Philosophers engaged in projects of 'ameliorative inquiry' offer accounts of social categories, such as those of race and gender, that set aside the descriptive question of understanding those categories as they currently exist in favour of developing accounts of how we ought to think of those categories given our political goals. For feminists whose goal is to combat gender injustice, the dictionary definition of 'woman' as 'adult human female' has, on the face of it, little to offer. If we see gender injustice as arising primarily out of the system of patriarchal oppression, then understanding 'women' and 'girls' as the classes of people who are the primary targets of that oppression might seem appropriate, even if it turns out that these classes exclude some human females and include some human males. And if we see gender injustice as also involving an unjust imposition of gendered expectations and gender categories on people regardless of their own gendered understanding of their selves, then an account of 'women' as 'adult human females' might appear even to *exacerbate* this kind of gender injustice, by forcing people into gendered categories that are contrary to their identities. As a result, the consequence of ameliorative inquiry is often to recommend that we revise our accounts of existing concepts so as to better serve our political ends.

But what should we do if, having engaged in an ameliorative inquiry, we come to the conclusion that our concepts need to be amended? Concepts and definitions have a life outside of philosophy, and presumably those convinced that revisions are needed should have something to say about what should change in our use of our concepts outside of discussions taking place in philosophy journals. In the case of gender concepts and terms such as 'woman' and 'girl', these terms have existing legal meanings and uses. The natural consequence of ameliorative inquiry should then presumably be proposals to amend our existing legal categories to better represent the targets of our inquiry. Indeed, in recent years, many jurisdictions have been grappling with the

question of whether to amend the ways in which sex and/or gender are recognized in law; and so an opportunity presents itself for those involved in ameliorative inquiry into gender concepts to offer some practical proposals for legal changes.

The recent interest in the question of how or whether to change the way sex and/or gender is recognized in law has been prompted, in particular, by considerations of transgender rights and considerations of best practice in relation to the recognition of transgender identities. What is currently considered international 'best practice' in this area is set out in the Yogyakarta Principles, a set of human rights principles relating to sexual orientation and gender identity, originally agreed by a group of human rights experts at a meeting in Yogyakarta, Indonesia, in 2006. In November 2017, the original 29 principles were supplemented by 10 further principles (YP + 10), which included the following principle (Principle 31) concerning legal recognition of sex and gender identity:

> *The Right to Legal Recognition*. Everyone has the right to legal recognition without reference to, or requiring assignment or disclosure of, sex, gender, sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to change gendered information in such documents while gendered information is included in them.
>
> *STATES SHALL:*
>
> A Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;
> B Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;
> C While sex or gender continues to be registered:
> i. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity;
> ii. Make available a multiplicity of gender marker options;
> iii. Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or

parental status, or any other third party opinion, shall be a prerequisite to change one's name, legal sex or gender;

iv. Ensure that a person's criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.[1]

While no state has formally signed up to be bound by the Yogyakarta Principles, they are taken very seriously as a guide to best practice. It is against the backdrop of Principle 31 that we can understand recent proposals in the UK (both in England and Wales as consulted on in 2018 by the UK government, and in Scotland as passed by the Scottish government in December 2022) to amend the 2004 Gender Recognition Act (GRA) to move to a system of self-determination of gender (self-ID) in line with Part C of Principle 31.

What, then, should those involved in offering ameliorative definitions of 'woman' say about legal proposals around the recognition of legal sex or gender? In part, of course, that will depend on one's ameliorative account. This article will take the ameliorative proposal of Katharine Jenkins[2] as a starting point, and consider the question of what someone convinced by Jenkins's ameliorative approach should conclude about the legal recognition of sex or gender. Given that this is currently a live issue in UK political debate, the article takes the UK legislative framework[3] as its central case study, and considers how existing legislation (including the 2004 GRA and the 2010 Equality Act (EA)) currently serves to protect the interests of the target groups of Jenkins's ameliorative definitions of 'woman', and how best to amend this legislation if we wish to promote gender justice in line with Jenkins's analysis. However, given the broader context of international moves to implement Yogyakarta 31, the lessons of this case study in the UK setting should have implications elsewhere too.

Jenkins's proposal is of particular interest, because the result of her ameliorative inquiry is to deliver *two* separate target gender concepts, and hence two separate (albeit overlapping) concepts of 'woman', which she takes to be *equally* important if our aim is to oppose gender-based injustice, and thus deserving of 'equal status within feminist theory'.[4] Jenkins's target concepts are *being classed as a woman* and *having a female gender identity*. What makes Jenkins's proposal of particular interest in relation to recent political debates over gender recognition is that it has typically been the case that opposing sides have argued for the primacy of one notion of

[1]Yogyakarta Principles plus 10 2017.

[2]Jenkins 2016.

[3]Talk of the UK legislative framework and UK domestic jurisdiction hides some complexities regarding the interaction between UK legislation and legislation within the devolved administrations of Scotland, Wales, and Northern Ireland. For simplicity I will confine myself primarily to discussion of the UK government's recent proposals for amendments to the 2004 GRA that would apply in England and Wales (currently shelved), and of the Scottish Government's Gender Recognition Reform (Scotland) Bill (GRRB) that was passed by the Scottish parliament on 22 December 2022.

[4]Jenkins 2016, p. 416.

gender over another (that is, for a broadly sex-class-based notion of woman over a broadly gender-identity based notion, or vice versa). A starting point that sees both notions as of equal importance is of interest if it can deliver concrete proposals that preserve the interests of both groups (or, at the very least, provide a framework within which the interests of both groups can be recognized, and balanced where they conflict).

Even if there are many on either side of the debate who would reject Jenkins's position that both notions of 'woman' are equally important, to the extent that their interest is in ensuring that 'women' in their preferred sense are adequately catered for in legislation, a legal proposal that shows how the interests of both categories can be protected and balanced in law might offer a compromise for single-account views of 'woman'. Such a proposal would be grounded in principles of toleration of alternative accounts of gender even if these accounts are not accepted, insofar as the main interest on both sides is in a legal framework that protects women in whichever sense they take to be important.

We will start then with a reminder (in Section I) of the two notions of 'woman' that Jenkins takes to have equal importance in the feminist fight against gender injustices, before (in Sections II and III) considering how each of them is represented in the current UK legislative framework (particularly via the 2004 GRA and the 2010 EA). I argue in Section II that, given that the EA outlaws discrimination on grounds of perceived, as well as actual, possession of a protected characteristic, the protected characteristic of sex in the EA adequately protects the interests of women in Jenkins's class-based sense (that is, those who are observed or imagined to be female), even though not everyone who counts as a 'woman' in this class-based sense is counted as female according to the EA's understanding of this category.

Section III notes, by contrast, that current provision for gender recognition in UK law only recognizes the gender identities of a small subset of people who identify as women, and that it is also ill suited for recognizing non-binary gender identities. Section IV considers how a move to amend the 2004 GRA to introduce gender self-ID (as consulted on by the UK government and as recently enacted by the Scottish parliament) might, while improving the situation vis-à-vis legal recognition for those who identify as women, nevertheless weakens existing protections in the UK EA for those classed as women (in Jenkins's sense).[5] Section V offers an alternative route to legal recognition of gender identity that is both in line with Jenkins's aim of treating both notions of 'woman' as equally important, and also preferable to the current 'self-identification' proposal in offering a straightforward route to the recognition of non-binary gender identities and to the protection of all transgender people against discrimination on grounds of a transgender identity.

[5]In this regard, the findings of this article are broadly in line with the UK government's contention that the Scottish GRRB has an adverse effect on UK-wide equalities legislation (which are a reserved matter), and are thus grounds for its triggering (in January 2023) of section 35 of the Scotland Act, preventing the bill becoming law.

The central contention of this article is that moving to a system of self-identification of gender in line with Part C of Principle 31 of the Yogyakarta Principles collapses sex and gender identity in UK law in a way that undermines important sex-based protections provided by the 2010 EA which, I argue, primarily serve to protect women as a class, as well as making it difficult to fully protect against discrimination on grounds of a transgender identity. The article argues instead for the legal recognition of two separate protected characteristics: sex (understood biologically as per existing UK case law)[6] and gender identity (determined on the basis of self-identification). Separating sex and gender identity in law allows for the recognition of non-binary gender identities, and for the proper legal recognition and protection of trans people understood as people whose gender identities do not match their sex. It also allows for clear discussions about whether a service should or could be provided on sex-based or gender-identity-based lines (as permitted by current UK Equality legislation), without requiring a one-size-fits-all approach to the provision of single-sex or single-gender services.

By advocating a proliferation of legal sex/gender-based categories in law, however, this article goes against not just Part C of Principle 31, but also against the more radical proposal of Part A: that states should altogether end the registration of sex/gender as part of an individual's legal personality. Part A has thus far seen little uptake, with transgender advocates typically focusing instead on making the legal case for self-identification of sex/gender, in line with Part C, rather than pressing for deregistration of sex/gender. Thus systems of gender self-identification in line with Part C have to date been adopted by 19 countries, starting with Argentina in 2012 and joined most recently by Scotland in December 2022. By contrast, there has been much less enthusiasm for adopting the recommendation of Part A, although the Australian state of Tasmania has taken some steps in this direction by no longer recording sex on birth certificates (though sex is still registered at birth).

A recent ESRC-funded project, 'The Future of Legal Gender' (FLaG), explored the pros and cons of deregistration in the UK context; in their final report the project team proposed deregistration of sex/gender along with merging the protected characteristics of 'sex' and 'gender reassignment' in the UK's EA into a single protected characteristic of 'gender'.[7] While the FLaG team's eliminativist proposal of removing sex/gender entirely as part of an individual's legal personality is an intriguing one, it is not a route I advocate here, in part because it seems to me to carry similar dangers of 'merging' two important and importantly distinct categories in need of protection to those carried by the more standard proposal of continuing to record sex, but doing so on the basis of self-identification. For those, though, tempted by eliminativism, the contention of this article can be read as conditional: if states *are* in the business of legally recognizing sex/gender, they should do so by recognizing these as two separate categories (one biological

[6]Corbett *v.* Corbett 1971.

[7]Cooper et al. 2022, p. 37.

and one a matter of self-identification), rather than stopping at the inadequate half-way house we currently have (which stands between complete deregistration on the one hand and full and separate recognition of both sex and gender identity on the other) of recognizing gender identity only by *conflating* gender identity with sex.

I | ONE WORD, TWO CONCEPTS: JENKINS ON THE AMELIORATION OF 'WOMAN'

Katharine Jenkins identifies two target concepts of 'woman', a class-based concept and a gender-identity based concept,[8] arguing that both are equally necessary for feminist aims. I will briefly review these two concepts here.

I.I | Haslanger and jenkins's 'class-based' account of 'woman' (women_{CL})

Jenkins's 'class-based' account of 'woman' takes its cue from the work of Sally Haslanger,[9] who offers an account of gender that is grounded in, as she puts it,

> the recognition that males and females do not only differ physically, but also systematically differ in their social positions. What is of concern, to put it simply, is that societies, on the whole, privilege individuals with male bodies.[10]

Recognizing this hierarchical structure of oppression of one class of people by another, Haslanger's ameliorative proposal is to define *woman* in terms of membership of the subordinated class in this structure.

Importantly, for Haslanger, this allows some people who are not biologically female (on one or other way of drawing the male/female divide) still to be classed as 'woman' for politically important purposes: given that anyone who is regularly perceived[11] as female in a patriarchal society will be placed in the subordinate role and suffer from patriarchal oppression, the politically relevant category is not identical with the biological one. A person with Complete Androgen Insensitivity Syndrome (CAIS), for example, will on most biologically based classifications be

[8]Jenkins 2016.

[9]Haslanger 2000.

[10]Ibid., p. 38.

[11]I follow Jenkins (2016) here in using 'perceived' where Haslanger would use 'observed or imagined'. Thus, as Jenkins uses the term, 'to perceive' is not a success verb: one can 'perceive' someone as female even if they are not female (by forming the belief that they are female on the basis of observation of their bodily features). Jenkins's use of 'perceived as', as roughly synonymous with 'believed/taken to be', is in line with the 2010 Equality Act's offence of 'perceptive discrimination' as discrimination on the grounds of someone's being perceived to be in possession of a protected characteristic (even if this perception is mistaken).

classed as male on account of having XY chromosomes and (internal, undescended) testes, but they will typically be entirely female in outward appearance and, as such, their experiences under conditions of patriarchy will be just like those biologically classed as female. The same goes for trans women to the extent that they are perceived as female. It also recognizes that trans men may successfully transition out of oppression and into a dominant social role to the extent that they are perceived as male. So by defining women as those on the receiving end of patriarchal oppression on the grounds of being perceived as female, Haslanger's account has it that being an adult human female is neither necessary nor sufficient for being classed as a woman.

Jenkins thus offers the following account of what it is to be classed as a woman in a context, where this is a condensed version of Haslanger's definition of 'woman':

> S is classed as a woman within a context C iff S is marked in C as a target for subordination on the basis of actual or imagined bodily features presumed to be evidence of a female's role in biological reproduction.[12]

Although Haslanger offers her account as an ameliorative definition of 'woman', she doesn't think a great deal hangs on whether to use the terms 'woman' and 'man' to pick out members of the subordinate and dominant classes in the system of patriarchy, so long as the needs of the subordinate class are recognized as politically important. For the sake of clarity, we will use the term 'women$_{CL}$' to pick out 'women' in Haslanger's sense—that is, the class of so-called 'sexually-marked subordinates'—and reserve 'women$_{ID}$' to pick out 'women' in Jenkins's second, identity-based sense—that is, the class of people with a female gender identity. Regardless of their choice of terms, both Haslanger and Jenkins agree that an important feminist aim is to improve the lot of women$_{CL}$.

I.II | Jenkins's identity-based concept of 'woman': women$_{ID}$

As well as recognizing the class of women$_{CL}$ as a target of concern for feminist activism, Jenkins argues that feminism should be equally concerned with the needs of those with a female gender identity: that is, 'women$_{ID}$'. In her 2016 article, Jenkins sketches an account of gender identity, from which an identity-based account of 'woman' can be derived. Jenkins' account,[13] is targeted at respecting the gender identity claims of trans people, as well as serving their needs in the struggle against gender-based oppression, while avoiding the pitfalls of some common accounts (including worries about circularity that are raised against 'popular' definitions of

[12]Jenkins 2016, p. 408.

[13]Developed in more detail in Jenkins 2018.

'woman' as 'anyone who identifies as a woman'). Jenkins's 'norm-relevancy' account of gender identity is as follows:

> S has a gender identity of X iff S's internal 'map' is formed to guide someone classed as a member of X gender through the social or material realities that are, in that context, characteristic of Xs as a class.[14]

This yields the following account of what it is to have a female gender identity:

> S has a female gender identity iff S's internal 'map' is formed to guide someone classed as a woman through the social or material realities that are, in that context, characteristic of women as a class.[15]

To avoid circularity, Jenkins's norm-based account of internal 'maps' appeals to the different gender norms that exist to enforce the class-based oppression of women_{CL} by coercively imposing different social roles on those perceived as male from those imposed on those perceived as female. The presence of these different social roles, Jenkins hypothesizes, gives rise to internal mental maps that help to guide individuals through a sexist society by reminding them of the sex-based expectations that apply to them in various contexts. Jenkins further hypothesizes that, in the case of transgender individuals, their internal maps have somehow developed differently from those expected of them, so that someone assigned male at birth and socialized as male, for example, may nevertheless develop a mental map that corresponds to the norms typically expected of females. In other (non-binary) cases, individuals may have no stable social map corresponding to either of the typical 'male' or 'female' maps. Importantly, for Jenkins, the internal map account explains how people may have a male or female gender identity despite having deep misgivings about the norms expected of them, and despite being extremely gender non-conforming in their behaviour as a result of these misgivings. Insofar as a female person recognizes the typical female norms as applying to her, even if she consciously and deliberately transgresses these norms in her behaviour and presentation, she can correctly be counted as having a female gender identity.

Questions have been raised about whether Jenkins's account ultimately succeeds in its aims of providing a plausible and non-circular understanding of 'gender identity' that serves to meet the political needs of transgender people while including everyone in the appropriate gender identity.[16] However, I will set these aside here, and assume that, if not Jenkins's account, then some such account will be available that plays the roles that Jenkins sees as being required of an adequate ameliorative definition of gender identity. That is, I will assume that some account is available

[14]Jenkins 2016, p. 410.

[15]Ibid.

[16]See, e.g., Bettcher 2017; Bogardus 2020; Barnes 2022.

that supports the central claims that gender identity is an important enough feature of individuals to be worthy of political recognition and protection (especially in cases where gender identity does not match sex), and that while having a given gender identity is not simply a matter of believing oneself to identify as a man, woman, or non-binary, nevertheless individuals are best placed to know their own gender identity, so that in practice individuals should be presumed to be authoritative with respect to questions of their own gender identity. If this is so, then there is a class of individuals with a female gender identity, women_{ID}, who face certain forms of gender-based injustices, and whose interests are therefore, according to Jenkins, equally important as those of the (overlapping) class of women_{CL}, when it comes to the feminist fight against gender-based injustices. Furthermore, on this view, the best way of determining membership of this class is through sincere self-identification.

If we follow Jenkins in thinking that ameliorative inquiry into the politically relevant concept of 'woman' delivers two separate (albeit overlapping) classes, women_{CL} and women_{ID}, both of whom are on the receiving end of gender-based injustices, the next question to ask is how to protect the interests of these groups in legislation, and whether legal protections for 'women' need to be clarified or amended so that it is clear that they apply to one or other of these groups (or indeed both). I will first consider women_{CL}, and then women_{ID}, as these groups are reflected in existing UK legislation, and ask the question of whether recognition of Jenkins's two senses of 'woman' would require changes to the use of the term 'woman' in legislation as it stands. I will then consider the question of how proposed changes to UK legislation around gender identity (particularly the 2004 GRA) may interact with protections for these two groups.

II | WOMEN_{CL} AND THE UK LEGISLATIVE FRAMEWORK

What legal and political mechanisms are in place that help to improve the lot of women_{CL}? In the UK, a significant piece of legislation protecting historically marginalized groups is the 2010 Equality Act (EA), which brought together over 116 separate pieces of previous equalities legislation stretching back to the 1970 Equal Pay Act. The EA identifies nine protected characteristics: *age*; *disability*; *gender reassignment*; *marriage and civil partnership*; *pregnancy and maternity*; *race*; *religion or belief*; *sex*; *sexual orientation*. The Act places duties on public bodies to take these protected characteristics into account in policies and practices, including making reasonable adjustments for those in possession of a protected characteristic, and outlaws direct or indirect discrimination on the basis of possession of a protected characteristic except in circumstances where it can be argued that discrimination is 'a proportionate means to a legitimate aim' (for example, in the provision of separate services for the sexes (section 26) and single-sex services (section 27), or sex-segregated sporting competition (section 195)). The Act also

includes requirements to monitor potential discrimination on grounds of protected characteristics.

The Explanatory Notes to the EA clarify that 'references in the Act to people having the protected characteristic of sex are to mean being a man or a woman, and that men share this characteristic with other men, and women with other women', where 'man' is understood to mean 'a male of any age', and 'woman' is understood to mean 'a female of any age'.[17] The sex-based terminology (male/female) might suggest that a traditional understanding of woman as '(adult) human female' is at work in the EA (with the 'adult' qualifier being removed in this case for simplicity to ensure that references to sex in the Act also cover children).

This understanding would be in line with English case law, which established a legal understanding of 'sex' in biological terms to mean the state of being male or female.[18] This is complicated somewhat, however, by the provisions of the 2004 GRA, which enable some people, in specifically defined circumstances, to obtain a 'Gender Recognition Certificate' (GRC) and change their legal sex so that it no longer reflects their biological sex. Until recently, it has been unclear whether sex in the EA is to be understood as biological sex or legal sex—that is, whether to include as male (female) someone whose acquired gender is male (female) as a result of obtaining a gender recognition certificate. However, the recent (13 December 2022) decision in the judicial review case brought by For Women Scotland clarifies that 'sex' in the EA is to be read as legal sex rather than biological sex: that is, to include those in possession of a GRC in line with their acquired sex.[19]

As of May 2021 (latest available figures), fewer than 6,000 people in the UK are in possession of a GRC, in line with estimates of the likely 'small number of people' wishing to take up the provisions of the Act as discussed in parliament.[20] This means that, despite the recent clarification that 'sex' for EA purposes means 'legal sex', aside from this very small number of exceptional cases, 'sex' in the EA overwhelmingly tracks biological sex. This would change, of course, if changes to the GRA resulted in

[17]Equality Act 2010, c. 15.

[18]Corbett *v.* Corbett 1971. 'Sex' on this understanding will typically align with legal sex as recorded on birth certificates. In the UK, it is legally required to register a birth within 42 days (in England, Wales, and Northern Ireland), or 21 days (in Scotland). Sex is required to be declared at registration. There is currently no provision in law for registering sex as anything other than male or female. In the very small number of cases of babies born with differences of sexual development (DSDs) that make it hard to determine sex (this is a small fraction of people with DSDs, as in most cases determination of sex remains relatively straightforward), a delay to the registration date can be applied for pending further medical investigations/expert medical advice. Where sex has been incorrectly registered at birth, there are processes in place that allow for a correction to be made based on medical evidence that the gonads, chromosomes, and genitals (the three 'biological' markers of sex referenced in Corbett *v.* Corbett) align with the sex opposite to that recorded at birth; Government Equalities Office (GEO) 2019. As noted below, the 2004 GRA also allows another route to change of legal sex as recorded on birth certificates for a small number of transgender individuals, subject to a medical diagnosis of dysphoria.

[19]For Women Scotland Judicial Review 2022.

[20]Hansard 2004, 23 Feb., §58, §60. A figure of 5,000 was given as an estimate of the number of 'transexuals' then living in the UK who would be likely to be eligible for a GRC.

many more people obtaining a GRC. (Indeed, this is one of the reasons why proposed amendments to the 2004 GRA to introduce self-ID, and particularly the recently passed Gender Recognition (Scotland) Bill, have been so contentious. I discuss this further in Section IV.) For now, though, let us work on the assumption that 'sex' in the EA closely tracks biological sex, returning later to the question of the effects of opening up gender recognition on the basis of self-identification on this.

If we follow Jenkins in adopting Haslanger's ameliorative account of 'woman$_{CL}$' as 'sexually marked subordinate', we might think that the natural upshot of this should be to advocate a change in the protected characteristic of 'woman' in the EA, so that, rather than picking out those who are female, it instead picks out those who are regularly, or for the most part, *perceived* as female. This, however, would be impractical, cruel, wrongheaded, and, given the nature of the protections provided by the EA, which outlaws 'discrimination by perception', unnecessary, as I will explain below.

Speaking practically, making a legally protected category dependent on whether someone 'passes' or not as a given sex raises questions about how this is to be determined. Should the protected characteristic apply to those who are treated as female often enough? By whom, and how often? These questions should make clear also the cruel nature of a proposal to place people in a legal category on the basis of whether they 'pass' as a particular sex. It was in fact envisaged that the provisions to change sex of the 2004 GRA would be taken up primarily by individuals (described in the 2004 discussions as 'transexuals') who do 'pass' in their acquired gender, with the privacy needs of individuals not to have to disclose their cross-gender history being a key pillar in the motivation offered when presenting the Gender Recognition Bill, which includes provision for changing the sex marker on birth certificates so that people will no longer be required to 'out' themselves as having transitioned when proving their identity for a variety of purposes.[21] Nevertheless, the Act quite rightly places no requirement on 'passing' for gender recognition. Aside from the cruel consequences of making 'passing' a requirement for transgender people to be legally recognized in their acquired gender, amending the EA so that the protected category is those perceived as female would also be problematic for female people who identify as female, but who are not regularly perceived as such. Certainly no one thinks that gender-nonconforming females who are regularly mistaken for males should not be counted as 'women' for the purposes of the 2010 EA.

Aside from these issues with delineating the category, a further important reason exists for thinking it wrongheaded to replace 'sex' with 'perceived sex' as a protected characteristic, even if we recognize that much of the sex-based discrimination people face is as a result of their perceived rather than their actual sex. This reason is that not all discrimination or harms resulting from a society's devaluing of a given characteristic are due to a person's being *perceived* as being a

[21]Hansard 2004, 23 Feb., §99.

member of the devalued group. Elizabeth Barnes and Matthew Andler make the point well with reference to the example of disability. They note that there are people who successfully hide their disabilities to the extent that no one perceives them as disabled. Nevertheless, to the extent that societies continue to devalue disabled people by, for example, failing to make reasonable accommodations for disabilities, someone with a hidden disability will still be harmed by such things as a built environment that fails to take their disability into account. 'Simply put', they tell us, 'the social constraints and enablements of disability go beyond how others treat you or how you are perceived'.[22]

The same considerations apply in the case of sex. While it is true that many harms suffered by female people under conditions of patriarchy come from direct forms of discrimination that occur when people perceive them as female, society's devaluing of female people has negative effects that go beyond how individuals are treated on the basis of being perceived as female. Caroline Criado Perez offers numerous examples of how the 'default male' assumption in science and engineering has led to a built environment, technologies, and medicines that ignore the distinct needs of those with female bodies.[23] Given that the devaluing of female people under conditions of patriarchy has contributed to the so-called 'gender data gap' and failure to take female bodies into account in numerous contexts, it would seem reasonable for equalities legislation to protect the interests of all female people, not just those regularly perceived as female, to ensure that they are not disadvantaged as a class due to failings to take their bodily differences into account, for example in medicine. It would likewise seem reasonable to require that equality-impact assessments (for example) should consider effects of policy proposals on female people.

By making 'sex' a protected characteristic, the EA does just this. It also has an elegant solution for the protection of those who face discrimination on grounds of being *perceived* as female. For all protected characteristics, the EA outlaws 'discrimination by perception' that an individual possesses that characteristic. Thus, while it does not create a new legal category of 'sexually-marked subordinate' as per Haslanger's ameliorative definition of 'woman', it nevertheless does protect members of this class, by protecting against discrimination on grounds of the *perception* that one is female. So if one agrees with Haslanger that the class of those perceived as female (that is, women_{CL}) is politically important and in need of protection, then the retention of 'sex' as a protected characteristic in UK equality legislation should be welcomed. The presence of 'sex' as a protected characteristic in UK equality legislation serves to protect the needs of women_{CL} in the UK, by protecting against discrimination on grounds of both actual *and* perceived sex, so that even those members of the class of women_{CL} who are not legally female can be protected in UK equality law via the protected characteristic of sex.

[22]Barnes and Andler 2020, p. 945.

[23]Criado Perez 2019.

III | WOMEN$_{ID}$ AND THE UK LEGISLATIVE FRAMEWORK

How does equality legislation in the UK fare when it comes to the class of individuals who identify as women? As things stand, there is no legal provision for recognition of self-identified gender in England and Wales, though as of December 2022, with the passing of the Gender Recognition Reform (Scotland) Bill, the situation in Scotland is rather different. There are, however, two relevant pieces of existing UK legislation that provide recognition/protections for a subset of trans people. These are the 2004 GRA, which allows for the legal recognition of gender for transgender people where certain conditions are met, and the 2010 EA, which includes 'gender reassignment' as a protected characteristic, where

> A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.[24]

As a protected characteristic, individuals are protected against discrimination on grounds of (actual or perceived) gender reassignment.

The 2004 GRA makes provisions for some adults to be legally recognized as the gender they identify with provided that they demonstrate to a Gender Recognition Panel that they have a diagnosis of gender dysphoria; that they have lived in their acquired gender for two years prior to their application for a GRC; and that they intend to live in their acquired gender until death. Individuals in receipt of a GRC are issued with an amended birth certificate, reflecting their acquired gender, so that the sex marker on all of their legal documents can be in line with their gender identity (the sex marker on other documents, including passports, can already be changed on the basis of self-declaration alone). There is currently no provision for legal recognition of gender identities outside of the binary sex categories. There is also currently no provision for self-identification of gender: those requesting a GRC must offer evidence including a diagnosis of gender dysphoria. Hence, current provision in England and Wales allows recognition of the gender identities of only a subset of trans people: adults identifying as either male or female, with a diagnosis of gender dysphoria.[25]

In 2018, the UK government held a consultation on proposals to reform the 2004 GRA, including the proposal to move to a system of self-identification of gender (self-ID) in England and Wales, and questions on whether to recognize gender identities outside of the male/female binary. The consultation became 'a

[24]EA 2010, pt 2, ch. 1, sect. 7.

[25]The Scottish GRRB removes the requirement of a medical diagnosis, with self-identification of gender now permitted for those aged 16 and over. There remains no way of recognizing gender identities outside of the male/female binary, however, despite activist demands to take this further step.

focal point for a heated and often toxic debate'.[26] Following the consultation, in 2020, the UK government confirmed it had dropped the proposals to move to a system of self-ID, focusing instead on measures to streamline the existing gender recognition process. By contrast, as noted above, the Scottish government recently passed its own GRRB, which removes the need for a medical diagnosis and instead allows gender to be recognized on the basis of sincere self-declaration, as well as opening up gender recognition to 16–17 year-olds. The UK government's move to abandon proposed changes to the GRA has been criticized by the UK parliament's Women and Equalities Select Committee (WESC), which recommended, in its recent report on the Reform of the Gender Recognition Act, the removal of a diagnosis of gender dysphoria in order to obtain a GRC, 'moving the process closer to a system of self-declaration'.[27] Whether, and how, to amend the 2004 GRA as it applies in England and Wales remains a live and controversial issue.

If we accept Jenkins's claim that the identity-based notion of 'woman' is equally important for the goals of feminism as the class-based notion, what follows from this in relation to the legal recognition of gender? At first sight, the answer looks clear: feminists should campaign for reform of the GRA to move towards the legal recognition of individuals' self-identified gender, so that the gender identities of *all* trans people can be recognized, not just those dysphoric individuals with binary identities who meet the existing criteria for a GRC. Indeed, this is the line Jenkins herself has taken, stating in a co-authored article:

> As for the proposed reform of the GRA, this one should really be a no-brainer: its effects for cis women will be negligible, and it will make it a little easier for people to live with dignity and respect in the gender that fits their identity.[28]

However, I will argue, matters are not so simple. Indeed, feminists who take seriously Jenkins's point that feminism should advocate for both women_{CL} and women_{ID} should have serious concerns about the mechanism by which existing UK legislation recognizes gender, and the effects of extending gender recognition by this mechanism to a wider class based on self-ID. Extending the GRA so that individuals can change their legal sex (to male, female, or non-binary) on the basis of self-identification, as per recent proposals and in line with Yogyakarta Principle 31, carries a danger of eroding protections of women_{CL} as provided by the 2010 EA.

[26] Finlayson et al. 2018.

[27] WESC 2021, §96.

[28] Finlayson et al. 2018.

IV | IMPACT OF GENDER SELF-ID ON THE EQUALITY ACT INTERPRETATION OF SEX

The concern arises when we look more closely at how the GRA recognizes 'gender'. According to the GRA, when an individual is in receipt of a GRC,

> the person's gender becomes for all[29] 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).[30]

As noted above, in English law, 'sex' has historically been understood in biological terms to mean the state of being male or female. 'Gender', as introduced in the 2004 GRA, is rather confusingly used in that Act apparently interchangeably with 'sex'.[31] However, despite appearances, the 2004 GRA does not challenge the legal precedent of Corbett *v.* Corbett 1971 with its biological understanding of sex. Rather, it can be thought of as introducing a legal fiction of *legal sex*. That is, when the law says that 'the person's sex becomes that of a man', it neither means that a biological change has occurred, nor that the previous biological understanding of sex in law has been overturned, but that a person whose acquired gender is male is treated in *most* circumstances 'as if' their sex is that of a man.[32]

Given that sex and gender identity are different things, it is perhaps unfortunate that the mechanism for legal recognition of *gender identity* in law (for that subset of trans people who are eligible to have their gender identities recognized) is via the legal fiction that an individual with a GRC has changed their *sex*. This mechanism makes it difficult to recognize non-binary identities, as well as raising issues about the interaction of gender recognition with sex-based protections. The legal academic Stephen Whittle, who was involved in discussions relating to the drafting of the 2004 GRA, claims that it was no oversight, but in fact a matter of deliberate choice that the GRA conflates sex and gender, using the two terms interchangeably, to make clear that the process of *gender* recognition was indeed intended to amount to a mechanism for legal change of *sex*. Indeed, Whittle and Turner argue, in the 2004 GRA 'The sex/gender distinction, (where sex

[29]The word 'all' in the legislation is deceptive. In fact, the details of the bill indicate that there are certain specified exceptions to 'all purposes', including the inheritance of property and titles (so that a trans man cannot inherit property or titles that are intended to pass down the male line), and in gender-affected sports (where single-sex competition is required for reasons of fairness or safety).

[30]GRA2004, §9(1).

[31]The recent WESC report bemoans this situation, noting that 'The conflation of the terms sex and gender in both the Gender Recognition Act and Equality Act has led to widespread confusion and disagreement' and recommending that the '*GEO should work to update the language in both acts in relation to sex and gender, ensuring consistency in the definitions used. It should be clear when an Act is referring to natal sex, legal sex and gender. The Government should also aim to update all official documents that conflate the terms sex and gender*'; WESC 2021, §178.

[32]See n. 29 for some exceptions.

normatively refers to the sexed body, and gender, to social identity) is demobilised both literally and legally'.[33]

Whereas traditionally it has been thought that sex precedes and determines gender—with sex at birth (male/female) determining which social role (man/woman) one is expected to occupy—Whittle and Turner argue that the effect of the GRA is to change the meaning of 'sex' in law in a way that reverses this traditional order: 'Sex in this sense is determined by gender identity—the social role that one chooses to take'.[34]

Whittle and Turner's understanding of the GRA is controversial: the legal reading outlined above—viewing the acquired gender of a person with a GRC as their sex is a *legal fiction* that does not overturn the precedent of Corbett *v.* Corbett—is more standard. Nevertheless, I will argue, the effect of treating an individual's acquired *gender* in almost all contexts *as if* it is their sex, when combined with self-identification of gender, carries with it a clear danger of collapsing the two important categories of sex and gender identity into a single identity-based category for almost all practical purposes, as per Whittle and Turner's understanding. Given that the EA protected characteristic of *sex* as it currently stands serves to protect the interests of women_{CL}, feminists who care about protecting the interests of both women_{ID} *and* women_{CL} should be very concerned about the interaction of the GRA and the EA if a move to self-ID is accepted.

The difficulty shows itself when we look at how the GRA interacts with the EA. Bearing in mind that a person with a GRC whose acquired gender is female acquires the *legal sex* of a woman, including the right to be treated *as if* she is biologically female in almost all circumstances, the question arises as to how to determine when and whether a person whose legal sex is that of a woman should be treated just as if she *is* female, for EA purposes.

Recall that the EA allows for single-sex and separate-sex services where it can be argued that such provision is a proportionate means to a legitimate aim. The EA also places requirements on equalities monitoring in relation to the protected characteristics. And the EA provides the legal framework for assessing discrimination claims: to bring a claim of discrimination under the EA on the grounds of possession of a protected characteristic, a claimant needs to make the case that an (actual or hypothetical) individual who is comparable to them in respect to other characteristics, but who differs from them with respect to the protected characteristic in question, has been, or would be, treated more favourably then they have been. Given the recent (December 2022) clarification that 'sex' in the EA should be read as 'legal sex', what are the consequences of this judgement for the protections afforded via the EA protected characteristic of sex, if we open up gender recognition to a wider group of individuals via a move to self-identification? Should a trans woman with a GRC, whose legal sex is female, be considered female for the purposes of single- and separate-sex provision, for providing appropriate comparators for discrimination claims, and for data collection?

[33]Whittle and Turner 2007.

[34]Ibid.

IV.I | Single- and separate-sex exceptions, and gender-affected sports

Consider first the single- and separate-sex exceptions, and sporting exceptions, in the EA, which permit services to discriminate on grounds of sex by offering single-sex or separate-sex provisions both in gender-affected sports, and in provision of services,[35] including changing rooms where privacy concerns mean that a case can be made that separate-sex provision is a proportionate means to a legitimate end. If an individual has acquired the legal sex 'female' having gone through the gender recognition process, does this mean that they should be treated as female for the purpose of determining access to single-sex or separate-sex services? And does this mean that their ability to access single-sex services in their acquired gender is any different from that of individuals with the protected characteristic of gender reassignment who have not gone through the gender recognition process to change their legal sex?

There has been an unfortunate lack of clarity in guidance on how the single-sex exceptions in the EA are to be applied. The body responsible for upholding the EA, the Equality and Human Rights Commission (EHRC), has changed its guidance on single-sex spaces from stating (in 2018) that those whose acquired gender is female must be treated as female in *all* contexts, including where single-sex services have been determined to be proportionate/legitimate, to a more ambiguous statement that, while 'transexual' people (that is, in EA terms, people with the protected characteristic of gender reassignment) should normally be treated in line with their preferred gender, they can be treated differently if the proportionate/legitimate test is met (with the decision being made on a *case-by-case basis*, balancing the needs of the transexual person against the needs of other service users).[36]

Given that people with the protected characteristic of gender reassignment include *both* those who have changed their legal sex via acquisition of a GRC *and* people without a GRC whose legal sex remains their birth sex, it remains rather unclear in this guidance whether it is permitted to exclude those with a GRC from single-sex services matching their legal sex. However, consensus now seems to be that it would be legally permissible to exclude even a trans woman with a GRC from a single-sex provision reserved for females, where this can be shown to be proportionate/legitimate.[37] However, what remains unclear in the guidance, and untested in case law, is how high the bar is for the proportionate/legitimate test to be met, and indeed whether this bar

[35]In discussing single-sex exceptions in this section, my focus will be on single-sex services. However, as Michael Foran points out, the single-sex exceptions in the EA as they apply to service provision do not apply similarly in the case of *associations* or *schools*, which are not permitted to discriminate on grounds of gender reassignment; Foran 2023. Foran argues that a single-sex girl's school, for example, cannot exclude an individual whose acquired gender is female. As the Scottish GRRB lowers the age at which one can receive a GRC to 16, this would have consequences for single-sex schools, whose entry conditions would be on grounds of legal sex rather than birth sex.

[36]Equality and Human Rights Commission 2021.

[37]This is the reading the recent WESC report offers of the interaction between the GRA and the EA; §147. However, the report also recognizes the long-standing lack of clarity on how these exceptions can be applied and the need for clearer guidance with worked examples and case studies; §158.

should be different depending on whether an individual has a GRC (as perhaps it may be, given that *all* legal documents of such an individual will record their legal sex, not their birth sex, and that for privacy reasons the GRA places substantial restrictions on when an individual can be expected to disclose that they are in possession of a GRC).

The presence of a GRC means that the nature of the case made for excluding a trans woman with a GRC from a single-sex provision will at the very least be *different* from that made for excluding a trans woman without a GRC. In the latter case, as the legal sex of the individual in question will be male, so long as a case has been made for excluding males from the service, this case will cover exclusion of a trans woman without a GRC (although such an individual could raise a complaint of *indirect* discrimination on grounds of gender reassignment, which might be successful if the service provider does not seek to provide alternative accommodation that would enable trans women who would be uncomfortable with, for example, being required to use male facilities, to use the service).

On the other hand, a trans woman with a GRC cannot be lawfully excluded from a single-sex provision for females on grounds of her *sex* (as her legal sex is female). Instead, a separate case for exclusion would have to be made to permit direct discrimination on the basis of gender reassignment (so that the service would be clarified as being not just restricted to females, but to females whose status as female is not as the result of having undergone gender reassignment). If the bar for the application of the proportionate/legitimate test in cases such as these turns out to be so high that it is rarely, or never, applied in cases of individuals whose acquired legal sex is female, then an effect of self-ID would be that single-sex exceptions in the EA would apply on the basis of gender self-identity rather than sex.[38] In the absence of case law in this area, women's concerns that changes to the GRA that remove barriers to receiving a GRC might lead to changes in the application of the single-sex exceptions permitted by the EA do not seem unfounded.[39]

[38]The Ministry of Justice's current Transgender Prisoner policy clearly takes the view that the bar for permitted discrimination on grounds of gender reassignment is set too high to discriminate against transgender women with a GRC when it comes to location in the prison estate, stating that 'The Gender Recognition Act 2004 section 9 says that when a full GRC is issued to a person, the person's gender becomes, for all purposes, their acquired gender. This means that transgender women prisoners with GRCs must be treated in the same way as biological women for all purposes. Transgender women with GRCs must be placed in the women's estate/AP unless there are exceptional circumstances, as would be the case for biological women'; Ministry of Justice 2020, §4.64. A legal challenge to the transgender prisoner policy, brought by a claimant who alleged assault by a trans woman with a GRC while imprisoned at HMP Bronzefield in 2017, failed in 2021. The judge in the case argued that, while it would be legally *permissible* to apply the EA single-sex exceptions to exclude trans women with a GRC from the female estate, there was no legal requirement on the Ministry of Justice to do so. In January 2023, the UK government announced their intention to change the presumption in this policy that trans women with a GRC should be held in the female estate unless there are exceptional circumstances to require that (except for in exceptional circumstances) trans women who have male genitalia or who have been convicted of sexual offences, will *not* serve their sentences in the general female estate; Ministry of Justice et al. 2023.

[39]It's worth noting in this regard that in its 2015 submission to the WESC Inquiry on Transgender Equality, Stonewall recommended not only reform of the GRA to introduce self-ID, but also 'A review of the Equality Act 2010 to include "gender identity" rather than "gender reassignment" as a protected characteristic and to remove exemptions, such as access to single-sex spaces'; Stonewall 2015.

IV.II | Appropriate comparators in discrimination cases

The EA allows claimants to bring cases of both direct and indirect discrimination. In both cases, the claimant is required to show that they have been, or would be, treated less favourably than a comparator individual who is similar to them in most respects, but differs from them in relation to one of the protected characteristics. For example, to make a claim of direct discrimination on grounds of sex, a woman would have to show that she has been treated less favourably than a man who is similar enough to her in other respects. The comparator in such cases can be a real person or a hypothetical one, but in the latter case the claim has to be made on the basis of evidence of how an actual person with those characteristics would have been treated in the situation in question.

Suppose a woman wishes to bring an equal pay case on grounds of sex discrimination. Such claims require an actual, rather than hypothetical, comparator individual: someone in the same organization with equivalent qualifications and experience, in an equivalent role, who is paid more, and differs from the claimant only in virtue of their sex. What happens to such a case if it turns out that, although the claimant is correct in her assessment that a biologically male colleague with the same role and responsibilities is being paid more than her, that colleague is in possession of a GRC, and so is legally female? In that case, given that it is legal sex that is operative in the EA, the two individuals will share the protected characteristic of sex, and so this individual cannot be cited as a comparator in making her pay discrimination case.

Yet plausibly (especially bearing in mind that under self-ID someone can acquire a legal sex of female at any point without making *any* outward changes to their appearance, and indeed without making it widely known that their legal sex has changed), in such a case the woman bringing the case might be quite correct in her assessment that she has been paid less than this individual because she is not merely legally, but also biologically, female. Changing the GRA so that many more people can obtain a GRC, and with it a change of legal sex, might thus have the indirect effect of eroding discrimination protections for women_{CL} by treating more individuals who are women_{ID} but not women_{CL} (on account of being recognized as male-bodied) as being comparable to them when it comes to the protected characteristic of sex.

Indeed, the structure of UK equality law in relation to discrimination claims means that, surprisingly, Stonewall's own proposal to change the protected characteristic of 'gender reassignment' to one of 'gender identity',[40] when coupled with a reading of 'sex' as 'legal sex', would actually make it *harder* for transgender claimants with a GRC to press discrimination claims on grounds of their transgender status. Suppose a trans woman with a GRC suspects that she has been treated less favourably than another woman. Using the existing protected characteristic of gender reassignment, she can make a case for discrimination on grounds of gender reassignment,

[40]See n. 39.

citing possession of that protected characteristic as the relevant difference between her and the woman who she believes has been treated more favourably. If 'gender reassignment' were to be replaced by 'gender identity', however, it is unclear how a case could be made: as a GRC holder, the trans woman is the same legal sex as the woman she is citing as comparator. But if gender identity is understood along the lines Jenkins has in mind (as something that everyone has), then it looks like her gender identity would *also* be the same as the woman in question (both would be women_{ID}, in Jenkins's terms).

Transgender discrimination arises not because of sex alone or because of gender identity alone, but because of the perceived incongruence between gender identity and sex. The move to gender self-ID makes legal sex a matter of self-identification. In light of this, following Stonewall's further recommendation of replacing the protected characteristic of 'gender reassignment' with 'gender identity' would—at least if gender identity is genuinely understood as referring to individuals' gender identity rather than to a status of having undergone or proposed to undergo a change of legal sex (which might appropriately be labelled 'gender reassignment')—merely serve to duplicate the protected characteristic of sex. This would leave no recourse for transgender individuals to make claims for discrimination on grounds of their transgender status (which is standardly understood as involving a *difference* between their gender identity and their sex). Making legal sex a matter of self-identification, if coupled with Stonewall's proposed change of the protected characteristic of gender reassignment to one of gender identity, is thus arguably not in the interest of transgender individuals to the extent that the discrimination they face arises out of the incongruence between their gender identity and their sex.[41]

[41]The structure of UK equality law and the need to cite comparators to prove discrimination cases means that it would also be unwise to reinterpret current protected characteristic of sexual orientation (which can be homosexual, heterosexual, or bisexual) in line with another ameliorative proposal. Robin Dembroff offers an account of sexual orientation they call 'Bidimensional Dispositionalism', 'according to which sexual orientation concerns what sex[es] and gender[s] of persons one is disposed to sexually engage, and makes no reference to one's own sex and gender'; Dembroff 2016, p. 1. On Dembroff's account, anyone who is sexually attracted to males has the same sexual orientation as anyone else who is sexually attracted to males. If 'sexual orientation' in the EA were reinterpreted along these lines, a gay male could no longer point to a heterosexual female as a relevant comparator in making a claim that he has been treated less favourably on the basis of his sexual orientation, as both would now count as having the same sexual orientation. A more convoluted case could perhaps be made on the basis of sex discrimination (the male person attracted to males has been treated less favourably than a female person attracted to males on the grounds of his sex). Indeed, in US equality law, where separate protections against discrimination on grounds of sexual orientation do not currently exist, it might make sense to view this as a case of sex discrimination (Dembroff recommends this approach in the US context, citing Supreme Court Chief Justice John Roberts's oral argument in the case of Henry *v.* Hodges on same-sex marriage: 'I'm not sure it's necessary to get into sexual orientation to resolve this case … I mean, if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can't. And the difference is based on their different sex. Why isn't that a straightforward question of sexual discrimination?'; Liptak 2015, cited in Dembroff 2016, p. 20). However, things become complicated again if we allow for non-binary gender identities to be recorded as legal sex, as per Stonewall's proposed reforms to the GRA. Suppose that both individuals in this case identify as non-binary and have both gone through a process of gender recognition so that their legal sex is non-binary. Then in the UK context both would share the protected characteristic of sex, as well as (if Dembroff's ameliorative proposal for the understanding of sexual orientation were adopted) sharing the protected characteristic of sexual orientation. In such a case it would be hard to see how a case for discrimination on grounds of sexual orientation could get off the ground.

IV.III | Equalities monitoring and data collection

When it comes to equalities monitoring and data collection, the EA guidance itself offers little clarification on how data relating to the protected characteristic of sex should be gathered and, in particular, whether this should be a matter of legal sex. However, in the run-up to the 2021 UK census (covering England, Wales, and Northern Ireland), this issue came to a head with a legal challenge brought by the campaign group Fair Play for Women against the Office for National Statistics' census guidance, which was originally designed to instruct people to answer the question 'What is your sex?' by reference to 'one of your legal documents such as birth certificate, gender recognition certificate, or passport'. As the sex marker on passports in the UK can be altered on the basis of self-declaration alone, Fair Play for Women argued to the effect that this brought self-identification of sex in through the back door (the census also included, for the first time, a separate, optional, gender identity question, which was not contested). The challenge succeeded and the High Court ordered that the guidance be changed to make clear that respondents should only use the *sex recorded on their birth certificate or GRC*: that is, legal sex rather than self-identified sex, in answering this question.[42]

As a result of this legal case, we have some clarity that *legal sex* takes precedence over birth sex in ONS data collection for the census. Changes to the GRA to allow for self-identification of legal sex would thus result in the important category of 'sex' in the census becoming a matter of self-identity, and if the ONS approach is followed elsewhere in collecting data with respect to the protected characteristics, the upshot will be that equalities monitoring of *sex* discrimination would also be collected on the basis of gender identity rather than sex.[43]

For data gathering at least, the upshot of amending the 2004 GRA to allow for gender self-identification would have the effect that, statistically, equalities monitoring of the protected characteristic of 'sex' would actually monitor self-identified gender identity. As such, following a shift to gender self-ID, attempts to track statistical inequalities in relation to sex would actually track instead inequalities in relation to gender identity. Collecting information on inequalities as they relate to the class of women_{ID} is in line with Jenkins's contention that women_{ID} and women_{CL} are equally important for feminist purposes. Yet it does not seem compatible with the claim that the two classes are of equal importance that we adopt a legal change that has the effect that equalities-monitoring processes

[42]Topping 2021. In Scotland, which has its own legal system, a similar challenge failed, so that the Scottish government was permitted to issue guidance for its 2022 census for people to answer the question 'what is your sex?' by reference to their gender identity (provided that this is male or female), regardless of whether they held a GRC. As with the UK census, the Scottish census also included an optional additional question on gender identity, where people could answer according to a range of options beyond the sex binary.

[43]There is evidence that a self-identification approach to equalities monitoring is already widespread in advance of any move to self-ID of gender. For example, the GEO currently recommends that employers collect gender pay gap statistics on the basis of employees' self-declared gender, leaving out any employees who identify as non-binary from official figures completely; GEO 2020.

become unable to track inequalities as they relate to the biological sex differences that are most relevant to women_{CL}.

Collapsing 'sex' into 'gender identity' in statistics monitoring also makes it harder to track inequalities as they relate to trans status. The 2021 UK census provided the opportunity for the first time to gather accurate statistics on transgender status by including separate questions pertaining to sex and to gender identity, but as 'sex' in the census is understood as covering legal sex rather than birth sex, the statistical information available from the census is unhelpful. The optional gender identity question asks, 'is the gender you identify with the same as your sex registered at birth?'. Given that the 'sex' question on the census is to be answered with reference to legal sex, this makes it difficult to recover statistics about how many trans-identified respondents identify as male or as female (a trans man without a GRC, and a trans woman with a GRC, will *both* record 'female' as an answer to the 'sex' question, and 'no' as an answer to the gender identity question).

By contrast, Statistics Canada in their 2021 census sensibly asked two distinct questions about sex and gender identity, as follows:

> **2.** What was your *sex at birth*?
> Sex refers to sex assigned at birth.
>
> - Male
> - Female
>
> **3.** What is your *gender*?
> Refers to current gender which may be different from sex assigned at birth and may be different from what is indicated on legal documents.
>
> - Male
> - Female
> - Or please specify your gender.[44]

This made Canada the first country to provide census data on transgender and non-binary people, which it did without compromising on data continuity with historic data gathered on the basis of biological sex.[45] In the UK, by contrast, if 'sex' statistics continue to be collected on the basis of legal sex, then if GRA reforms have the consequence that legal sex becomes a matter of gender self-identification, this will make it difficult to compare future census data around 'sex' with historic data, as well as presenting challenges for accurately representing transgender identities in the census.

[44]Statistics Canada 2021, 3A.

[45]Statistics Canada 2022.

IV.IV | How much does this matter?

The interactions between the 2004 GRA and the 2010 EA already exist, insofar as the GRA offers a means to change legal sex and to be treated for (almost) all purposes as if one's acquired gender is one's sex. So why worry now about proposed amendments to the GRA, given that its provisions seem to have not made any significant erosions in the way equalities legislation in the UK protects women_{CL} (which, since 2010, has been via the EA protected characteristic of sex)?

The issue is primarily, though not exclusively, one of numbers.[46] As noted above, in the case of the original 2004 GRA, it was envisaged that there would only be a 'a very small group of people', estimated at around 5,000, who felt 'driven to live in the opposite gender' (as a way of managing the medical condition of gender dysphoria) applying for a GRC, normally for privacy reasons and (in 2004 before marriage equality in the UK) to have the legal right to marry as a person of their acquired gender.[47] It was assumed that the majority would undergo full medical transition, though some may not be able to do so for medical reasons.[48] On this understanding of the scope of the legislation, one might reasonably expect that including trans women with a GRC as female in equalities monitoring would have a minimal effect on sex-related statistics, and indeed, given that a large proportion of this group might reasonably be expected regularly to 'pass' as female, and thus to count as members of the category woman_{CL}, arguably collecting data based on legal sex might do better in this regard than collecting data based on biological sex in tracking inequalities as they relate to this category.

However, increasing numbers are identifying as transgender in the UK (Stonewall recently estimated this at 1 per cent of the UK population, or around 600,000 people, an 11,900 per cent increase on the numbers envisaged in the GRA discussions, though since the 2021 England and Wales census this estimate has been halved), and

[46]One issue that isn't to do with numbers is that of the potential for abuse of the legislation if safeguards such as a medical diagnosis of dysphoria are removed. For example, the British Association of Gender Identity Specialists, in their written submission to the UK Government's Transgender Equality Inquiry, warned that self-identification of gender is open to abuse by prisoners who are not trans, noting 'the ever-increasing tide of referrals of patients in prison serving long or indeterminate sentences for serious sexual offences. These vastly outnumber the number of prisoners incarcerated for more ordinary, non-sexual, offences. It has been rather naïvely suggested that nobody would seek to pretend transsexual status in prison if this were not actually the case. There are, to those of us who actually interview the prisoners, in fact very many reasons why people might pretend this. These vary from the opportunity to have trips out of prison through to a desire for a transfer to the female estate (to the same prison as a co-defendant) through to the idea that a parole board will perceive somebody who is female as being less dangerous through to a [false] belief that hormone treatment will actually render one less dangerous through to wanting a special or protected status within the prison system and even (in one very well evidenced case that a highly concerned Prison Governor brought particularly to my attention) a plethora of prison intelligence information suggesting that the driving force was a desire to make subsequent sexual offending very much easier, females being generally perceived as low risk in this regard'; Barrett 2015.

[47]Hansard 2004, 23 Feb., §52, §55, §59. The requirement for a law of this sort was made clear by the judgement of the European Court of Human Rights in the case of Goodwin *v.* UK, that 'a system for recognising transexual people in their acquired gender must exist and that transexual people must be granted the rights under article 8, the right to respect for private life, and article 21, the right to marry'; ibid., §52.

[48]Ibid., §65.

there is no expectation, in self-ID proposals, of any medical or social transition. This, together with the inclusion in proposed changes to the GRA of the option to declare a gender identity outside of the male/female binary, means that there is a real concern that if inequalities monitoring tracks only self-identified gender and not sex, we will lose track in the data of important information concerning sex differences and sex discrimination.[49]

Far from being a 'no brainer', as Finlayson et al. suggest, then, on the face of it at least, any shift to self-identification, while *arguably* working well to support the needs of women_{ID},[50] does not serve the needs of women_{CL}. If we accept Jenkins's position to the effect that these two distinct groups deserve equal status within feminist theory and activism, then it is hard to avoid the conclusion that feminists should resist any proposed move towards a system of self-identification of gender if the category that individuals are allowed to self-identify into is that of legal *sex*.

V | LEGAL MECHANISMS TO PROTECT 'WOMEN' IN BOTH SENSES

How, then, might we legislate in a way that protects *both* women_{CL} and women_{ID} (as well as protecting trans people from discrimination)? One way of preserving protections for women_{CL}, in keeping with precedent in the existing GRA, would be to be explicit in pointing out in EA guidance that 'legal sex', as acquired by a GRC, is not the same as 'sex' as understood biologically in UK law (via Corbett *v.* Corbett), and to offer clear guidance accompanying the EA as to situations where biological sex, as opposed to 'legal sex' might reasonably be considered to be the relevant feature (for example, cases where discrimination on the grounds of gender reassignment may be permitted in order to restrict a service to females who have not become legally female via the gender recognition process). This distinction is appealed to in the specific exceptions written into the original GRA (which specify cases, such as in so-called 'gender-affected sports', where 'persons whose gender has become the acquired

[49]1% of the population identifying as trans might still sound statistically irrelevant. Sullivan (2021, p. 640) points out both that it is unpredictable how this percentage might change as acceptance of transgender identity becomes more widespread, and that even small numbers can make a difference in some statistics, such as 'violent crime, where a small number of males identifying as female can greatly skew the sex ratio', and sexual offences 'where 97 per cent of perpetrators are male'.

[50]It might, on the other hand, seem a 'no-brainer' that creating a legal category of 'women' based on self-identity alone would be precisely what would be needed to support the needs of those with a female gender identity (i.e., women_{ID}). This somewhat depends, however, on whether there may be incentives for 'bad actors' to self-identify into the legal category, even if they do not genuinely identify as women (see n. 46 above for an example). I will for the most part leave aside this complicating issue, and follow Finlayson et al. (2018) in assuming that a system that allows for self-identification of gender remains the best way of protecting the interests of women_{ID}, so long as this is combined with provisions to set the bar for being treated in accordance with self-declared gender identity higher in those cases, such as prisons, where there is an incentive for men to declare a female gender identity insincerely (see Section V for further discussion).

gender under this Act' are to be treated in line with their previous gender, rather than their acquired gender).[51]

This approach might allow specification of particular cases where sex rather than gender identity is held to be what is at issue (such as when it can be argued that distinguishing between acquired and birth sex in a particular context is a proportionate means to a legitimate aim, to use the terms of the EA), albeit, as noted above, guidance is sorely needed as to how the proportionate/legitimate test is to be applied. An example where such a case might come into play is the measure proposed by Finlayson et al. to guard against male prisoners who are not trans abusing self-ID in order to access the female estate.[52] They suggest treating those whose acquired gender is female differently from natal females in this context, by requiring that prisoners who self-identify as female 'demonstrate some history of expressing a female gender identity', as well as carrying out a risk assessment, before housing them in women's prisons.

This solution (distinguishing between birth sex and legal sex as acquired by means of the gender recognition process, with clear guidance as to when birth sex rather than legal sex takes precedence) has some merits. Nevertheless, given that all legal documents (including birth certificates) reflect the legal sex of individuals with a GRC, the solution is a messy one, and one that, given the recent clarification that 'sex' in the EA is to be read as 'legal sex', could only be applied in specific exceptional cases.

In line with the recent WESC recommendation that legislation be reworded to clearly identify when an Act is referring to natal sex, legal sex, and gender, and in keeping with Jenkins's identification of the needs of women_{CL} (which I have argued are well protected via the protected characteristic of sex) as equally important to those of women_{ID}, a neater solution would be to introduce two separate legally protected characteristics. These would be of *sex* (understood biologically as per Corbett *v.* Corbett) and *gender identity* (which, if self-ID is accepted, would be determined by sincere self-declaration). Doing so would allow for clarity in the EA exceptions, which could state clearly that while, when it comes to so-called 'single-sex' provisions, it is desirable that individuals be allowed to access provision in accordance with their gender identity, provision can be offered on the basis of sex rather than gender identity where this can be shown to meet the proportionate/legitimate test (albeit guidance remains necessary in how this test is to be applied).

Having two separate markers would also allow for accurate data collection where this is necessary to discover and track inequalities as they relate both to sex and to transgender identity (where someone is counted as having a transgender identity if their

[51]GRA 2004, §18. This clause was removed after the introduction of the 2010 EA, as it was considered dealt with by section 195 of the EA, which allows for 'transexual' people—i.e., those with the protected characteristic of gender reassignment—to be excluded from competing in gender-affected sports in line with their preferred gender, where this is necessary for fairness or safety.

[52]See n. 50.

gender identity differs from their sex), as well as allowing straightforwardly for relevant distinctions to be made between comparator individuals when it comes to discrimination cases. Moreover, separating sex from gender identity would allow for the straightforward recognition of gender identities outside of the sex binary, as well as protection against discrimination for those whose gender identity differs from their sex.

Might the proposed separation of sex from gender identity in law serve to harm transgender individuals who, after all, have previously lobbied successfully for the legal right to change their *sex*? At least two issues arise. The first concerns privacy. By keeping two separate markers of 'sex' and 'gender identity', trans people would be easily 'outed' wherever they are asked to declare both, as people whose gender identity does not match their sex. I have argued that it is important that, in statistics monitoring, trans status *should* be identifiable so that we can track inequality as it relates to trans status. But as with other sensitive personal information, privacy can be ensured by other means, for example by only requesting this information where it is considered necessary to do so, and through careful storing of individuals' personal data.

I note here also that the requirement of privacy might be a relic of outdated attitudes to being trans: why should an individual be encouraged to hide the fact that their gender identity differs from their sex? The important project of depathologizing our understanding of transgender identities (which stands behind recent moves away from requiring medical diagnoses as a route to gender recognition and towards self-identification of gender) in part involves encouraging societies to become more comfortable with the idea that an individual's gender identity might be different from their sex. With greater progress in this direction, the felt need to hide the fact that one's gender identity differs from one's sex should be reduced.

Second is the issue of access to single-sex provision. It is true that by distinguishing sex from gender identity, being recognized as the gender with which one identifies would not bring an *automatic* right to access services that are restricted to the sex that corresponds to one's gender identity. However, if the interpretation I have noted above of the EA exceptions in relation to single-sex provision is correct, then neither, in case of services at least, does the existing process by means of which gender is recognized as legal sex. The EA allows permitted discrimination to occur on the grounds of gender reassignment (even where individuals are in possession of a GRC), drawing a distinction between acquired and natal sex in the provision of services where doing so meets the proportionate/legitimate test. In practice, rights of access to spaces need not change in a system that recognizes gender identity separately from sex. We would, however, be assisted with clearer language in which to conduct discussions about whether, in a given circumstance, it is proportionate/legitimate to offer provision strictly on grounds of sex.

VI | CONCLUSION

In the UK context, I have argued that we made a wrong turn in conflating gender identity with sex in the 2004 GRA, one that had negligible impact when gender recognition

was restricted to a very small number of people, but the impact of which could be much more substantial under a system of self-identification of sex such as that recently approved by the Scottish parliament. I have argued that feminists who, like Jenkins, care about both women_{CL} and women_{ID} should resist the combination of self-ID with the existing mechanism for recognizing gender identity as legal sex. Instead, I have argued for the creation of two separate legal categories, of sex and gender identity, and for the tracking of statistics in relation to both of these categories so as to identify and respond to inequalities both as they relate to sex and to transgender status.

Insofar as mechanisms for legal recognition of gender are similar in other jurisdictions, in recognizing gender identity *as* sex, and insofar as other jurisdictions adopt gender self-identification, this example has relevance more broadly. And, in fact, although my focus has been on UK equality legislation, it is clear these conditions do apply more widely. As noted above, the push in the UK to replace sex with self-identified gender has its roots in Principle 31 of the Yogyakarta Principles, which holds that, while ideally neither sex nor gender should be part of one's legal personality, if sex or gender information *is* registered, this should be done on the basis of self-identity alone. That is, Principle 31 advocates exactly the combination of gender self-identification with the conflation of gender identity with legal sex that, I have argued, causes problems in UK legislation with protecting the rights of women_{CL}.

If Jenkins is right, then, that feminists should be equally concerned with women_{CL} and women_{ID}, it follows that feminists should resist recent proposals to combine self-identification of gender with legal systems that conflate gender identity with sex. Instead feminists who wish to recognize self-identified gender as a politically important category should support a clear separation of sex from gender identity in law. To the extent that YP + 10 is held up as the gold standard for trans rights, by advocating the conflation of legal sex with self-identified gender, Principle 31 sets trans rights in clear conflict with the rights of women_{CL}. Given that women_{CL} and trans people both suffer under conditions of patriarchy, rather than following the Yogyakarta recommendations, it would be preferable for both groups to campaign for separate recognition of sex and gender identity, and resist the conflation of these two important categories.

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