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Gender Recognition Reform (Scotland) Bill: GRA Reform Tries to Rights a Wrong

Harvey Humphrey^{1,2}

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We have been here before; time in suspension

Media cries “new law” forgetting “reform”
That too was not new, born from *Goodwin & I*
and decades of work post *Corbett v Corbett*
but don’t let the *I* of the past mislead you
In this work I have never known inclusion
not in any law, nor on a census form
For in GRA reform there is no I
“condition in subsection (2) is not met”
still facing binaries in 2022

I don’t have a GRC
I can’t have a GRC
I don’t want a GRC
but it’s not all about me

GRA reform tries to rights a wrong
removal of power from medical forms,
psych reports; shift power to self to apply
and to lower minimum age requirements
but there is so much that it still does not do
Does not challenge gender care pathways prolonged
does not challenge when the media misinforms
does not challenge male/female gender binary
does not challenge “no specific detriment”
does not challenge gender critical world view

✉ Harvey Humphrey
harveyhumphrey1@outlook.com

¹ University of Strathclyde, Glasgow, UK

² Northumbria University, Newcastle, United Kingdom

And no one needs a GRC
to enter a toilet to pee
I do not need a GRC
to empty my leaky body

Time echoes here still: acquired gender lifelong
and wait two years cut to three months reflection
those known outwith Scotland as non-binary
lack recognition in this certificate
gender's frontiers and border wars continue
appeals can claim that certificates are wrong
interested parties seek revocation
"fraudulence" undermines authenticity
so much work to change a birth certificate
So much more to do; much this law does not do

Commentary

This poem offers a personal political creative reflection on the Gender Recognition Reform (Scotland) Bill (2022) [GRR Bill] which was introduced by the Scottish Government on 3 March 2022.¹ While this creative response draws on the personal reflections of the author, it is informed by a broader project addressing trans, intersex and LGBTI activist relationships across the UK, Malta and Australia (Humphrey 2021). This creative response reflects on the changes introduced from the original UK-wide Gender Recognition Act 2004 (GRA) as well as the absences from this legislation as proposed.² This summary offers an explanatory note to the creative response and further context to the legislative reform including relevant legislative history, the political context and the media reporting on this GRA reform process over the last five years.

Legal historical context

The creative response makes reference to previous UK case law³ and two European Court of Human Rights cases, *Goodwin*⁴ and *I*,⁵ to provide historical background to the current GRR Bill and challenge the notion that such legislation is new as claimed in media coverage. As noted by Sharpe (Sharpe 2002a, b, 2009), the divorce case

¹ Gender Recognition Reform (Scotland) Bill 2022.

² Gender Recognition Act (GRA) 2004.

³ *Corbett v Corbett* [1970] 2 All ER 33.

⁴ *Goodwin v UK* [2002] 35 EHRR 447.

⁵ *I v UK* [2002] 2 FCR 613.

Corbett v Corbett in 1970 set the legal precedence for the lack of transgender recognition in law across the UK.⁶ The creative response also highlights that the claims of “new” in media coverage fail to consider that the proposed GRR Bill in Scotland reforms a previous UK-wide GRA. The GRA itself was constructed due to two European Court of Human Rights (ECHR) cases⁷ known collectively as *Goodwin & I*, which is how they are referenced in the poem. While the ECHR rulings moved away from biological framings for this ruling the subsequent law offers a complex negotiation with biomedical framings. The original GRA shifted this position significantly with limited gender recognition made possible—the law allowed for a replacement birth certificate for those willing and able to comply with the restrictions of the applications process (Sharpe 2007a, b). However, this possibility of gender recognition in law in the 2004 Act was still constrained by biomedical and temporal framings (Hines 2010, 2013; Nirta 2018). For instance, evidence submitted to a Gender Recognition Panel for the purpose of obtaining a Gender Recognition Certificate (GRC) must include either “a report made by a registered medical practitioner practising in the field of gender dysphoria and a report made by another registered medical practitioner” or “a report made by a registered psychologist practising in that field and a report made by a registered medical practitioner”.⁸ This requires a trans individual to engage with biomedical framings of trans identities that cover those with gender dysphoria, but it does not include trans identities outside of this framework, or those individuals that find psychological and gender dysphoric-based inclusion of trans identities exclusionary and pathologising. In this process, legal gender recognition is offered to some trans individuals who are willing to engage with the biopolitical structures and those who can successfully negotiate the multiple medical practitioner requirements as well as the cost of an application. The proposed new legislation the poem engages with shifts these framings and expectations as noted in the creative reflection with the lines “removal of power from medical forms,/ psych reports; shift power to self to apply”.

The current bill: Gender Recognition Reform (Scotland) Bill

The creative reflection moves from the historical context, “the *I* of the past”, to the current GRR Bill and the ongoing lack of non-binary recognition in the proposed GRR Bill and the previous GRA law reflecting the importance of non-binary recognition to be the “*I*” of the non-binary author. References are made to the lack of non-binary inclusion in current UK law and state processes including the census recently released in Scotland and in England in 2021.⁹ The line in the poem “condition in

⁶ *Supra*

⁷ *Supra Supra* and n5.

⁸ s 3(1) Gender Recognition Act 2004.

⁹ The Scottish census includes a gender question with an open text box. However, the required sex question offered only the options “male” and “female”. For current census data in England and Wales, see the Office for National Statistics: <https://www.ons.gov.uk/census>. For current census data in Scotland, see Scotland’s Census: <https://www.scotlandscensus.gov.uk/>. For more on non-binary inclusion in censuses and a discussion of non-binary census options in Scotland, see Guyan (2022).

subsection (2) is not met” comes directly from the text of the GRR Bill, which requires conditions in subsection (2) to be met.¹⁰ The condition in subsection (2) refers to “either gender”, implying a gender binary throughout the GRR Bill.¹¹ The lack of legal and social non-binary recognition across the UK context is highlighted by sociologist, psychologist and activist scholars (Bergman and Barker 2017; Vincent 2020). The GRR Bill does nothing to counter this current situation. The subsequent stanza’s reference to “no specific detriment” refers to a 2015 UK Ministry of Justice (MOJ) response to a petition calling for binary and non-binary self-definition of gender (Ministry of Justice, 2015). This response revealed that the MOJ would not consider non-binary recognition because of the low numbers of individuals, and the MOJ claimed they were unaware of any “specific detriment” such individuals might face. This wording inspired social media posts and research relating to the “specific detriment” faced by non-binary people (Bergman and Barker 2017; Barker et al. 2018).

The final stanza of the creative response highlights the absence of non-binary recognition for those otherwise recognised as non-binary in other countries, be they countries of origin or as citizens, with the lines “those known outwith Scotland as non-binary/ lack recognition in this certificate”. Malta, Argentina and certain states and territories in Australia (Australian Capital Territory, Tasmania and South Australia) offer non-binary recognition to their citizens.¹² The status of such persons upon entering Scotland and interacting with the state apparatus remains unclear in the proposed GRR Bill without non-binary recognition offered. The subsequent line of the poem “gender’s frontiers and border wars continue” makes reference to the frontiers and borders of countries and the lack of international non-binary recognition while also speaking back to the historical “border wars” which is a reference to Halberstam and Hale’s 1990s texts on transmasculine identities and relationships between trans men and butches (Halberstam 1998; Hale 1998). Halberstam and Hale both draw on this term “border wars” to discuss the complex relationships between “butch” and “FTM”¹³ as identity terms and terms used to foster community. Hale and Halberstam discuss the embodied masculinities available in such linguistic expression of identity terms and community acceptance with the use of “butch” and “FTM” in the 1990s focusing on the United States of America, but there is contemporary relevance outside of those locations that speaks to contemporary experiences of feeling “not trans enough” in locations including the UK, USA, Australia and Malta (Catalano, 2015; Vincent, 2020; Humphrey, 2021). These references highlight that “borders” can relate to countries and genders and link broadly to the “borders”

¹⁰ s 7 Gender Recognition Reform (Scotland) Bill 2022.

¹¹ s 2 Gender Recognition Reform (Scotland) Bill 2022.

¹² Malta: Gender Identity, Gender Expression and Sex Characteristics Act 2015; Argentina: Decreto 476/2021; Australian Capital Territory: Births, Deaths and Marriages Registration Act 1997; Tasmania: Births, Deaths and Marriages Registration Regulations 2019; South Australia: Births, Deaths and Marriages Registration (Gender Identity) Amendment Act (Commencement) Proclamation 2017.

¹³ FTM or F2M are acronyms for female-to-male, a term that was common in the UK and USA in the 1990s when Halberstam and Hale’s texts were published, but has since been replaced with trans men and transmasculinity within contemporary trans community spaces across those locations. For more on transmasculine discourses see Heinz (2016).

and boundaries of gendered categories and associated restrictions within the GRR Bill. Those included or excluded from such categories is complex and subject to “border politics” of those included in categories such as trans, trans woman, trans man, non-binary and genderqueer (Bornstein 1994; Halberstam 1998; Bhanji 2013).

Boundaries and borders of time

Borders and their permeability also relate to the creative submission’s engagement with time. Temporality echoes through the poem from the first to the last stanza. This reflects the importance of temporality that is experienced in relation to the borders of authenticity contained in the original GRA. For example, the GRA requires an applicant “has lived in the acquired gender throughout the period of two years ending with the date on which the application is made” and “intends to continue to live in the acquired gender until death”.¹⁴ Grabham (2010) and Nirta (2018) discuss these experiences of time in suspension through the GRA’s requirements as examples of the power relations between trans subjects, the state and society that permeate individuals’ experiences of temporality which Nirta refers to as “not-yet limbo” (Nirta 2018: 66). Trans temporality has been discussed by several scholars as a feature of trans life in relation to healthcare and legislative reform (Amin 2014; Carter 2013; Grabham 2010; Halberstam 2005; Israeli-Nevo 2017; Pearce 2018a, b; Pyne 2021). This broader relationship to trans temporality is referenced in the lines “time in suspension” and “time echoes”. This broader relationship to trans temporality is used to highlight the change in the GRR Bill which removes the requirement to evidence two years living in the acquired gender and replaces this with a three month reflection period with the lines “wait two years cut to three months reflection”. This retains a relationship to gender recognition that is bordered and bounded by time.

Absences

The poem offers a brief consideration of rights and possibilities that the GRR Bill does not and cannot do, such as toilet access, and gendered spaces (Vincent et al. 2020; Jones and Slater, 2020). There is also a brief reference to the GRR Bill’s introduction of the possibility of appeals against GRR applications and the implied fraudulence and inauthenticity. A unique feature of this proposed GRR Bill that is not reflected in international gender recognition legislation such as the Maltese Gender Identity, Gender Expression and Sex Characteristics Act 2015 (GIGESC) which is considered international best practice (Wipfler 2016; Ní Mhuirthile 2018).

¹⁴ s 2 Gender Recognition Act 2004.

The text

A brief note on the text of the poem. The five-line rhyme scheme reflects the five years since the first consultation on GRA reform opened in Scotland. This consultation closed 1 March 2018 and had opened 9 November 2017. The interruption of this rhyme scheme with the rhyme of the central lines (line C of the ABCDE rhyme scheme) is a reference to trans temporality as experienced through waiting and anticipation. The repetition of the rhyme scheme C, the third rhyming line over four lines, is a reference to the three initial consultations on GRA reform including two in Scotland and one across the UK and the final fourth Call for Views on the draft legislation introduced by the Scottish Government with options for “short survey” and “detailed consultation” responses (Scottish Government 2022). The poem is hendecasyllabic, containing 11 syllables across the main stanzas but in modern form rather than a classical metered form. While not an English or classical Sapphic poem, due to the atypical stresses and metres, the use of 11-syllable stanzas and five-syllable stanzas is a reference to the Sapphic tradition reflecting a broader history of queer poetry. The 11 beats per line represents the 11 years from the passing on the Gender Recognition Act 2004 across the UK and the 2015 opening of the Trans Inquiry from the Women and Equalities Committee considering the rights and lived experiences of trans people across the UK which led to this legislative reform at Holyrood in Scotland, and proposed reform at Westminster.

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