

Extract from briefing for Ministers, 26 February 2019:

A number of newly established women's campaign groups opposed to reform of the Gender Recognition Act 2004 (GRA) say that the Scottish Government and public bodies should take greater account of sex rather than gender. In particular, they suggest that references in legislation and guidance should be to sex rather than gender.

Those groups are making this point to draw a distinction between what they would call biological women (i.e. people who were born female) and transgender women (i.e. people who were born male but have transitioned). This is different to the position of mainstream feminist organisations who are trans inclusive.

The Scottish Government's starting position is one of equality and non-discrimination. However there are areas, across Ministerial portfolios, where there are potential conflicts between rights. These areas require careful consideration.

For example, questions arise about trans women in communal accommodation such as prisons (where currently in the interests of their own safety or that of other prisoners, individual trans prisoners may sometimes be treated differently from their gender identity) and domestic abuse refuges (although domestic abuse refuges in Scotland are generally trans inclusive); guidance on the treatment of trans pupils in schools; inclusion of trans people in statistics and equality monitoring; women-only political shortlists; whether trans women can be excluded from carrying out certain types of medical examinations; and the inclusion of trans women in single sex hospital wards.

There are exemptions in the (reserved) Equality Act 2010 covering areas such as single sex services, occupational requirements, communal accommodation and sport. These exemptions allow trans people to be excluded when there is a good justification for doing so. In practical terms, this would be in exceptional circumstances and where an alternative course of action could not be identified. As work continues on proposals to reform the GRA, the Cabinet Secretary for Social Security and Older People will consider these issues further, including whether clarification around these exemptions is required. The Cabinet Secretary will work with the UK Government, given that the Equality Act 2010 is reserved and the UK Government is planning to reform the GRA in England and Wales.

While the area of transgender rights is an equalities issue, it impacts on many portfolios, and the Cabinet Secretary wants to ensure the Government has a joined-up approach. If Cabinet is content, the Cabinet Secretary will convene a meeting of Cabinet Secretaries and Ministers with an interest – for example education, justice and health – to discuss the issues and potential ways of dealing with them.

This would be to ensure the Scottish Government has a coherent and consistent policy approach to transgender issues; takes an inclusive approach which ensures all people are given their rights; that assessments are carried out when appropriate; and the language used is measured and tempered.