Losing sight of women's rights (again)

Losing Sight of Women's Rights (Again): A Response to Cowan et al.

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Abstract

This article responds to Cowan et al.'s critique of our article '**Losing sight of women's rights: the unregulated introduction of gender self-identification as a case study of policy capture in Scotland**', published by *Scottish Affairs* 28(3) in August 2019. Cowan et al. make a series of strong criticisms, including of our accuracy, diligence and adherence to scholarly norms. We reject these as unreasonable. In our view, they misunderstand and misrepresent the fundamental purpose of our article, fail to engage with our core thesis of policy capture, and implausibly seek to place our view of the law beyond academic respectability. Their own strongly-asserted view of the law appears at least open to question. We argue that the problem is not with our scholarship falling below any normal acceptable standard, but rather that Cowan et al. appear to be uncomfortable with others holding and expressing any different view to theirs on this topic. They have therefore reached too quickly for assertions of incompetence or worse. We discuss the climate in which our original article was produced and in which we are now defending it. Describing our own experiences as well of those of other academics, we question how the scholarship needed to help shape policy and law in this area can take place under such conditions.

Keywords: sex; gender self-identification; policy capture; Equality Act 2010; women's rights; academic freedom

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1. Introduction

This article responds to Cowan et al.'s (2021) critique of '**Losing sight of women's rights: the unregulated introduction of gender self-identification as a case study of policy capture in Scotland**' by Dr Kath Murray and Lucy Hunter Blackburn, published by *Scottish Affairs* 28(3) in August 2019 (Murray and Hunter Blackburn, 2019). A longer version of this article, providing additional sources and comment, is available on our website.[1] Cowan et al. make a series of strong criticisms, including of our accuracy, diligence and adherence to scholarly norms. Our simplest response is to encourage readers to read our original piece for themselves. In this longer response we argue that Cowan et al.'s critique is based on a significant misreading of our text, fails to engage with our core thesis, and implausibly seeks to place our particular view of the law beyond academic respectability. We are, however, pleased that Cowan et al. set out their own interpretation of the law in this area. The position they represent has, until very recently, been asserted rather than explained, making serious scrutiny by legal specialists difficult.

We find Cowan et al.'s critique to be over-stated and intolerant of different views: arguing from our position is suggested to be evidence of at best ineptitude, and perhaps worse. In the final part of this paper we discuss the climate in which our original article was produced and in which we are now defending it. Describing our own experiences as well of those of others, we demonstrate the high stakes for researchers wishing to engage on this topic from a perspective such as ours. We question how the scholarship needed to help shape policy and law in this area can take place under such conditions.

Our original article had a third author: Lisa Mackenzie. However, for reasons discussed in part six, this could not be acknowledged at the time of publication. Lisa's authorship was acknowledged in January 2020, although at that stage it was too late to amend the Version of Record (see further, Murray et al., 2020a). In this response, we therefore cite our article as 'Murray and Hunter Blackburn'.

2. The scope of our article

Our original article examined the introduction of policies based on gender self-identification by the Scottish Prison Service (SPS) and the census authorities: its analysis centred on the policy development *process*. For reasons which will become apparent, it is worth quoting the abstract at some length:

> This paper examines how gender self identification had … become a feature of Scottish policy-making and practice, long before public consultation on GRA reform began. The analysis is structured as two case-studies that examine firstly, policy development on the census in relation to the 'sex' question, and second, Scottish Prison Service policy on transgender prisoners. The analysis shows that the unregulated roll-out of gender self-identification in Scotland has taken place with weak or non-existent scrutiny and a lack of due process, and that this relates to a process of policy capture, whereby decision-making on sex and gender identity issues has been directed towards the interests of a specific interest group, without due regard for other affected groups or the wider population.'

[1] See https://murrayblackburnmackenzie.org

(Murray and Hunter Blackburn, 2019: 262)

The main body of text is a detailed examination of primary and other sources that shed light on what decisions were made by the census authorities and the SPS, and how. We examined whether policy-makers assessed the potential impact on women, who participated in the policy process, the substantive content of those decisions, and their implications. We concluded that the available evidence showed that there had been 'a persistent failure to consider the possible wider impacts of gender self-identification, especially on women' (Murray and Hunter Blackburn, 2019: 284).

Cowan et al. therefore misrepresent our paper when they state, 'in the main, this article sought to explore the legal status of women, particularly with regard to discrimination legislation'. They fail to engage with the evidence that policy was made in such a way that the impact on other groups, particularly women, was barely considered, if at all, preferring to concentrate instead on our article's introductory discussion of the legal background. Our analysis of the census decision-making process is ignored in order to focus solely on legal and data issues. Most unexpectedly, they nowhere acknowledge or comment on our analysis of prisons policy, nor offer any comment on that, despite this accounting for just under one-third of our text. The omission is surprising given that the authors include the Justice Policy Officer for the Scottish Trans Alliance (STA), who would be well qualified to critique our analysis, since our paper documented the close involvement of the STA in the policy development process.

3. The question of the law

While Cowan et al. misrepresent our focus and coverage, the legal position is relevant to one part of our argument, namely that the policies we examined ran ahead of what the law provided for. It is not relevant to our central argument; that inadequate attention was paid to the impact of policy change on women, and that this was due to policy processes that engaged only with representatives of one set of interests. Duties and guidance for public bodies in relation to assessing policy impacts apply regardless of whether or not policies are compelled by law.[2]

Cowan et al. level a number of what are, in a scholarly context, unusually strongly worded criticisms of our position on the law. These perceived failings appear to contribute substantially to their generally negative view of our article. Therefore how far our position is, in their words, 'misleading', and how far they present an alternative which is unchallengeable, requires attention. We find Cowan et al.'s arguments here unpersuasive, at some points hard to follow, and their negative commentary excessive.

Our article started from the position that the law makes no provision for letting self-declared gender *by itself* override sex in contexts governed by the Equality Act 2010 (hereafter EA2010), although we recognised that in certain contexts having a Gender Recognition Certificate (GRC) would entitle a person to be treated as the opposite sex to that recorded at birth. We return below to how 'sex' is problematised by Cowan et al. At this stage, the reader is invited to consider sex as a physical characteristic which is easily and accurately recorded

[2] See online version of this article for further detail (n **Error! Bookmark not defined.**).

at birth for all but a very small minority of people as male or female. That small minority is not the group for whom the policies at issue here have been specifically developed.

The alternative legal position put forward by Cowan et al. is that certain people have the right to be treated in line with self-declared gender rather than sex as recorded at birth, except in very limited circumstances. They assert that 'the inclusion of trans people *is* a legally settled matter'. Although this position is often asserted, at the time of writing our original article we could not find any *reasoned* support for it, nor do Cowan et al. cite any such texts on which we might have drawn. Their paper is able to draw on the limited treatment of the arguments in Sharpe (2020). A paper by Busby (2020) covers this ground in more detail. Although not cited by Cowan et al., Busby is thanked for commenting on their article in draft, and their paper makes several similar points, so we assume that her analysis was also influential.

The EA2010 provides general protection against discrimination, harassment or victimisation to people on the basis of nine 'protected characteristics'.[3] When they discuss the Act Cowan et al. appear to use 'trans people' to mean those who meet the tests which bring them within the scope of Section 7 of the Act, which creates the protected characteristic of gender reassignment.[4] A person has the protected characteristic of gender reassignment if they are proposing to undergo, are undergoing or have 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'. This provision is widely drawn: it need not entail any physical changes. The protection under the Act for this group applies from the moment a person first proposes to make any changes. This means, for example, that legal protection from loss of employment is available as soon as a person shares with their employer simply their intention to undergo any change.

Our interest was in policies which prioritised self-declared gender over sex, whether or not people met the criteria set out in Section 7. In the case of SPS policy, it appears likely that a person being treated in line with their self-declared gender will generally also be covered by Section 7. There is however at least one potential exception: when a person's 'social gender is unclear' on coming into custody, they 'must be asked which gender they wish to be searched by … and the rubdown search conducted accordingly' (Scottish Prison Service, 2014: 14). In the context of the census, no definitive criteria have been proposed for respondents who wish to answer the sex question based on their self-declared gender. It is a limitation of Cowan et al. that they do not recognise and reflect on the potential for a distinction between self-declaration and the scope of Section 7.

[3] These are age, disability, gender reassignment, marriage/civil partnership, pregnancy/maternity, race, religion/belief, sex and sexual orientation.

[4] Cowan et al do not define this term, which is not used in the Act, and their use of it has some potential to be confusing; specifically, their statement that the Gender Recognition Act 2004 'allowed trans people to change their sex marker on their birth certificate' fails to convey that the GRA does not permit this for all those who Cowan et al. evidently intend this term to cover, but only those who meet certain specific further legal requirements.

Sex in the Equality Act 2010

Our legal interpretation is grounded in our reading of the EA2010: we discuss the Act and its Explanatory Notes, in a section titled 'Equality Act 2010: Sex and gender reassignment'. We make this observation because at various points Cowan et al. puzzlingly appear to suggest we do not ground our position in a reading of the primary legislation.

An analysis of statute, common and case law has since been undertaken by Komorowski (2020) which considers the possible interpretations of 'sex' in the EA2010 – the definition of sex as a protected characteristic under the Act being of central relevance to our argument. Komorowski concludes that the Act should be construed as meaning either that 'sex is meant in the immutable, common law sense', that is, as a biological characteristic which is fixed for life, or that it is meant in that sense 'except for those who hold a GRC'. This conclusion is consistent with our own analysis. He rejects that having the characteristic of gender reassignment of itself alters which sex a person is under the Act. He argues: 'Section 7 does not deem them to be of the sex they identify (or propose to identify) with or as', pointing out that, if it did, then from the moment a person first proposed reassignment, before taking any action at all, they 'would immediately cease to be treated as members of their original legal sex and automatically be regarded as members of the sex of their intended identification.' He suggests this is not a plausible reading of the law. This analysis was available to Cowan et al. but disappointingly, they do not discuss it. That the EA2010 characteristic of gender reassignment does not in itself give rise to a legal right to treatment as a member of the opposite sex has also been argued more recently by Asteriti and Bull (2020) and by practising discrimination lawyers (Ludwig, 2020; Cunningham, 2020).

We referred also to a statement made by the Equality and Human Rights Commission (EHRC) in 2018 describing the interaction of the EA2010 and the Gender Recognition Act 2004. This states that obtaining a GRC changes whether a person is treated as male or female 'for the purposes of the sex discrimination provisions' in EA2010 (Equality and Human Rights Commission, 2018). Although we are not alone in treating the EHRC statement as reliable[5], Cowan et al. dismiss it, stating that it 'inaccurately represents the 2010 Act' and is 'erroneous'. If we follow them correctly, their position appears to rely conjointly on an assertion that the statement fails to take into account that 'the 2010 Act extends to direct discrimination based on perception', on the framing of certain *exclusionary* powers under the Act, and on its conflict with a particular EHRC statutory Code of Practice.

It is not clear why discrimination by perception is regarded as relevant to a criticism of the EHRC statement in this context unless, counter-intuitively, Cowan et al. regard the protection against discrimination based on perception provided by the EA2010 as granting a person the misperceived characteristic in law. That would however appear to involve a significant misreading of the law. As the Explanatory Notes to the Act state: ' If an employer rejects a job application form from a white man who he wrongly thinks is black, because the applicant has an African-sounding name, this would constitute direct race discrimination based on the employer's mistaken perception'.[6] The focus of the law here is therefore on the motive of the discriminator, not the status of the victim. An alternative 'status-granting' effect from the

[5] See online version (n 13)

[6] See: Equality Act Explanatory Notes, Commentary on Sections, Part 2, Chapter 2, Section 13 (paragraph 63). Available at: https://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/2/1

provision would thus be an implausible reading. It would for example imply that because a person was vulnerable to discrimination on the basis of anti-Catholicism (under the protected characteristic of 'religion or belief') because they had an Irish surname, they were therefore entitled to be treated as Roman Catholic in applying for a role which the law allows to be restricted to people of that faith. In the context of sex discrimination, it appears clear to us that the Act's encompassing of misperception means simply that anyone male, *whether or not covered by Section 7,* may draw on the Act if they are 'wrongly' (in Cowan et al.'s words) perceived to be a woman for any reason and discriminated against on that basis. This provision therefore appears irrelevant to any discussion of the interpretation of 'sex', or indeed any of the protected characteristics, under the EA2010.

In their disagreement with us, and the EHRC statement, Cowan et al. place particular weight on how Schedule 3, Paragraph 28 of EA2010 is drafted. This allows the powers available under the Act to provide separate- and single-sex services to be used without contravening the prohibition on discrimination on the basis of gender reassignment. Cowan et al. argue 'the Equality Act says nothing about GRCs in its exceptions … in other words, the law does not distinguish here between those who have GRCs and those who do not. Trans people can access services available to the gender in which they present, regardless of whether they have a GRC'. The inference of *inclusion* from the drafting of an *exclusion* does not appear to us a straightforward reading of the statute, the Explanatory Notes provide reason to question it,[7] and no case law is quoted based on this reading, which also contradicts Komorowski's conclusion about the plausible definitions of sex in the Act. We think this argument ought to be examined further by lawyers.

Cowan et al.'s position on the EHRC statement also contradicts their acknowledgment elsewhere in the paper that a GRC changes a person's sex 'for the purposes of the law'. Having rejected the EHRC's analysis of the relationship between the two Acts, we think it would have been helpful for Cowan et al. to set out in more detail their alternative understanding of this relationship.

EHRC Code of Practice

Cowan et al. are very critical of our perceived failure to refer to the EHRC *Statutory Code of Practice: Services, Public Functions, and Associations* (Equality and Human Rights Commission, 2011). Taking a contrary position to the one we hold and the conclusion reached by Komorowski, the Code asserts that people with the characteristic of gender reassignment should generally be treated in line with their self-declared gender, irrespective of whether they hold a GRC. It does not explain this position by reference to the wording of the statute. The contents of the Code appear central to Cowan et al.'s interpretation of the law and to their objection to us presenting a different view. They describe it three times as 'authoritative' (a term used also by Busby). Although conceding that it is 'not legally binding', they omit to quote the section that states: 'The Code does not impose legal obligations. Nor is it an authoritative statement of the law: only the courts and tribunals can provide such authority' (Equality and Human Rights Commission, 2011; 18). We feel this is a significant omission. While the EA2006 provides that any statutory codes made by the EHRC are admissible in court proceedings and shall be taken into account, it subjects them to a test of relevance to the circumstances. We have been advised that this has the effect of making the

[7] At one point the Explanatory Notes refer explicitly to the potential to exclude a GRC holder from a particular single sex setting (see online version n 26).

content of these documents a factor courts should take into account, but not determinative. Cowan et al present the Code's place in legal proceedings in rather stronger terms.[8]

Nor are we alone in disregarding the Code in a general discussion of the legal context. We note that it is not mentioned as a relevant source in Komorowski's (2020) analysis. Sharpe refers approvingly to the content of the Code, but with the caveat that it is 'not an authoritative statement' (2020: 550). Others identify problems with its content. While Busby relies on the Code in a similar way to Cowan et al., she finds it imperfect: it is 'unclear on some pertinent issues related to gender reassignment', and for some of its advice 'the margin for confusion and misapplication is wide', so that '[r]eview and revision of the guidance would … enhance legal certainty' (2020: 2, 14, 26). Consistent with our policy capture thesis, practising solicitor Rebecca Bull states that in her view 'the Code does not adequately reflect the EA 2010 and it seems that it has been deliberately edited in order to take into account the views of only one stakeholder group (gender reassignment) over those of women' (2020: 6.19). Other questions have arisen recently about the EHRC's legal rigour in developing its detailed advice to service providers in this area. It has recently withdrawn from its website some of its administrative advice relating to the provision of services to people with the characteristic of gender reassignment and amended others, after being challenged to explain how that content was justified from the legislation. The EHRC is also currently facing a judicial review on the grounds that some of its guidance in this area is not fully compliant with the law.

Despite questions over the reliability and status of its legal content, it could still be asked whether the Code *in practice* influenced the policy processes we studied: we found no evidence of that. As it is directed at those providing services and public functions to individuals, the Code appears most relevant to prison policy. The legal annex to SPS's relevant policy makes no reference to the Code, nor is it referred to elsewhere in the policy. We note also that Morton's (2018) account of the STA's engagement with public service providers, including the SPS, is silent on the Code. Cowan et al. do not explain why the Code would be a relevant advisory document at all in the context of planning for the census. In sum, our decision not to rely upon reference to the Code was not a failure of scholarship, but an accurate reflection of what our primary sources revealed and of the Code's relevance to our discussion and its general standing.

Gender Representation on Public Boards (Scotland) Act 2018

It is relevant here also that the Gender Representation on Public Boards (Scotland) Act 2018 (hereafter GRPBA) includes a provision expressly bringing a person with the characteristic of gender reassignment and 'living as a woman' within scope of the definition of 'woman' for the purpose of that Act. This expanded definition was added after representations to the relevant parliamentary committee by the STA (Equalities and Human Rights Committee, 2017: para's. 48-51). The reasoning appears to have been that the established definition of 'woman' under the EA2010 was not broad enough to include this wider group. Again, the implications of this for their argument are not considered by Cowan et al.

[8] For further discussion see online version (n 21 & n 22).

The advocacy of self-declaration

Comments by STA Manager James Morton, quoted in our article, also suggest that advocates of self-declaration did not regard such policies as being simply mandated by law, but at minimum involved a degree of organisational choice.

> We strategized that by working intensively with the Scottish Prison Service to support them to include trans women as women on a self-declaration basis within very challenging circumstances, we would be able to ensure that all other public services should be able to do likewise.
>
> (Morton, 2018: 233).

We would have liked Cowan et al. to have considered why such 'strategizing' was regarded as necessary, if introducing policies based on gender self-declaration meant that organisations were - in their words - 'simply applying the law'.

Assessing the legal position

We are satisfied that we hold a reasonable interpretation of the legal position, grounded in a fair reading of the law, not unique to us; that this was presented with sufficient background for an introductory discussion; and that it justifies our argument that policy change ran ahead of legal change. Neither our view nor its presentation merit the exceptional degree of criticism levelled at it by Cowan et al., whose view of the law as being 'settled', apparently to a point leaving no room for legitimate disagreement, itself relies on sources and arguments that we would submit are open to question.

Although Cowan et al. accuse us of neglecting 'the gradual shift in law and policy across the UK over at least the last two decades', they do not clearly demonstrate that the legal requirements on organisations changed in that period in the way they assert. Indeed, when Cowan et al. observe 'It is *possible* that courts *in future may* interpret [the detailed definition of 'gender reassignment'] to mean that sex, for the purposes of the 2010 Act, is not a purely physiological concept' (Ibid. 4, emphasis added) they appear to concede at least that at present sex for the purposes of the EA2010 is not a matter of self-declared gender. Importantly, they overlook that it is exactly this gradual shift in policy which interests us and forms the substance of our analysis.

Cowan et al. consider at some length the law relating to the provision of single sex services and spaces, and the provision in EA2010 which makes it lawful to discriminate against those covered by Section 7 in allowing access to those, a power which they argue is 'narrow'. In this response, we concentrate on their objection to our view that self-declaration (or, if preferred, falling within Section 7) does not of itself confer a legal right to treatment as the opposite sex. Our view here is that how widely the exclusion powers can be used is a secondary issue, compared to whether self-declaration is sufficient to be included to start with. From our perspective, the scope of the exclusion is only relevant to the treatment of GRC holders. On Cowan et al.'s alternative reading of the law, how readily the exclusion power can be used is somewhat more relevant here, as on their understanding it determines how much discretion organisations have over the admission of all people covered by Section 7 to single-sex provision (this of course still implies that discretion is being exercised). For reasons of space, our response to their material on this point is provided in a note in the

longer online version of this article,[9] but we hope that it may receive a more extended legal treatment by others.

We should record that in discussing the law relating to single sex provision Cowan et al. mis-quote the primary legislation at one point, to substantial effect. They incorrectly state that 'all' of the conditions listed in the relevant part of the statute must be met before a single sex service may be provided, where the wording is 'any'.[10] The Explanatory Notes illustrate clearly that the individual conditions are intended to cover various discrete settings, so that meeting all of them would be near-impossible. This mis-reading contributes to Cowan et al.'s view that the EA2010 sets 'stringent criteria' which must be met if separate provision for women and men is to be lawful in any context. This is a point we would be interested to see discussed further, in view of how relatively common such provision is.

Where we do agree with Cowan et al. is in the desirability of achieving 'a much-needed clearer understanding of law and policy on sex and gender in Scotland, particularly as it relates to the application of the 2010 Act' and their:

> … call for researchers and others – in Scotland and elsewhere – to take care, particularly in interpreting and applying the law, especially as it applies to marginalised minority populations, so that we do not further obfuscate or mislead on important legal and social issues.

We would add women as a group about whom we should care equally here: women's history, and much of the continuing treatment of women and girls around the world, shows that it is simplistic to assume that only those groups which are in a minority can be vulnerable or risk having their needs marginalised, whether in law or more generally.

4. Why sex matters

Cowan et al. state that:

> It is not obvious why the fact that these legal protections are available to trans women, whereby trans women can bring discrimination claims for the protected characteristic of sex, 'renders sex irrelevant as a protected characteristic' ... Perhaps their intended meaning is that the Act, in allowing trans women to access sex discrimination protections, precludes non-trans women from accessing the same protections. But this is plainly not so. Allowing a trans woman to claim sex discrimination does not hinder the operation of the sex-based protections for anyone else.
>
> It is possible that Murray et al are arguing that a trans woman should not be treated as a woman … if her presence poses some sort of risk or threat to other women, for example in a sex segregated space, such as a women's shelter. Again, even if that were true, it is not clear how this argument 'renders sex irrelevant as a protected characteristic' under the Act.

[9] See n 26 in online version. We only note here surprise that Cowan et al. feel that we 'risk misleading readers unfamiliar with the law' when we refer to a particular assertion of the legal position as an 'understanding'. We think it would be misleading to imply the legal position on the application of the exclusion powers is settled.

[10] Schedule 3, paragraph 27(1)(a).

This deserves a substantial response. In our article we stated that 'the physical and social consequences of being born and living with a female body are so significant that women need specific protections in law and policy.' (Murray and Hunter Blackburn, 2019: 265). These protections include the right in certain circumstances to single-sex services and spaces, and single sex activities. We argued that recognition of this need underpinned the Sex Discrimination Act 1975 (later incorporated into the EA2010). The EA2010 states that single sex provision is allowed in a variety of situations, including where a person of one sex 'might reasonably object' to the presence of 'a person of the opposite sex', or to physical contact with someone of the opposite sex, where that is likely to be part of the service. In single sex sports, the exclusion of people covered by gender reassignment is specifically permitted under the Act where it can be justified on the grounds of safety and fairness, in a clear recognition of sex as a physical state.

Cowan et al.'s difficulty with our argument appears to start from a strong belief that there are no obvious consequences for women if the law treats a subset of the population born male as if they had been born female. We demur. Bull (2020) counters this argument with the specific example of the potential impact on comparators for equal pay claims, showing how legal sex changes have the potential to extinguish such claims. More generally, the protections relevant here often operate collectively: the nature of a shared space (for example, for changing, washing, sleeping or living) depends on all the people present in it, there are a finite number of places on woman-only short-lists, leadership programmes or sports teams, sports people compete against one another, a person providing intimate personal care or medical examinations provides this to another person, and so on. Cowan et al.'s statement that '[a]llowing a trans woman to claim sex discrimination does not hinder the operation of the sex-based protections for anyone else' fails to grasp this point. It is a mistakenly individualistic conception of how these protections function.

We would argue that the burden of proof of there being no negative impact on women from the admission to such settings of a sub-set of people born male, based on self-declared gender, rests with those who advocate it, and remains to be made. The most substantial attempt of which we are aware to argue for an absence of potential harm (Sharpe, 2020) has had a robust response from Asteriti and Bull (2020), who object among other things to the narrow definition of harm employed. We find Asteriti and Bull's to be the more cogent and complete analysis of the two; we would encourage interested readers to consider both.

Cowan et al. draw a distinction not made in the EA2010 (or by us) between sex- and gender-based discrimination, using the former for what they term 'biologically-based' discrimination and the latter apparently conceptualised as covering everything else, and theoretically detached from sex. They then impose this split on our use of 'sex discrimination', leading them to accuse us of a conceptual narrowness which they themselves have introduced. They similarly argue that it is 'reductive' to see pay penalties experienced by women as based on a variety of sex-based effects. We in turn find their attempts to 'de-sex' labour market (and other) effects by reframing the impact of sex-based stereotypes and prejudices as disembodied 'gender'-based discrimination unpersuasive. They also misunderstand the specific meaning of the term 'gender pay gap'.[11]

[11] See online version (n32-33 & n 34).

Sex gives rise to a variety of effects over the life course, some directly related to biology, some due to how adequately account is taken of needs unique to female biology, some due to how well absolute or average differences in female and male biology are recognised (as analysed recently, for example, by Criado Perez, 2019) and some arising solely from assumptions made about, and expectations placed on women *based on their sex* from birth onwards. We therefore agree with Cowan et al. that biological and social effects are 'so interrelated … that often *both* are in play'. We disagree however that sex can ever be treated as irrelevant to women's specific experience of discrimination, and suggest that the attempted abstraction of any pure 'gender' effect that operates in isolation from sex is an unhelpful distraction from engaging properly with how all these effects interact for women in practice, often in complicated ways.

Cowan et al. also question what 'significant implications for the legal understanding of sex' or 'women's interests' we believe there could be if the question on 'sex' in the next census was based on self-declared gender rather than sex. We consider that once sex is conflated with self-declared gender identity in a single category, it becomes impossible to collect data which allows the impact of policies on people who are born female and who live with various consequences associated with that to be accurately described and assessed. Cowan et al. appear to see the 'reality of …everyday lives' resting solely in current identity, and to assume no important persistent effects from earlier experiences shaped by sex, or the continuing materiality of sex. We do not think researchers are in a position to make that assumption and some research actively contradicts it.[12] Public bodies also have duties to monitor the effect of their actions on those with protected characteristics, including sex, under the EA2010, which they cannot fulfil unless data on sex is collected in line with how that characteristic is defined in that Act. Readers interested in further treatment of this point will find it in Sullivan (2020a: 524), who argues:

> Without accurate data on sex, we lose the ability to understand differences and to design evidence-based policies tackling problems facing girls and boys, women and men. We also lose the ability to gain an accurate understanding of issues facing, trans people of both sexes.

Further, if sex were to cease to be collected in the census, it would set a powerful precedent: many organisations would be likely to believe that if sex is too sensitive even for the census to solicit, they could not ask for it either, in almost any other context, including ones where asking such a question is used to determine access to single sex provision of any sort. This is the larger risk we see posed to sex as a functional category for any purpose, including the operation of the EA2010. We hope an example helps to make the point.

A hostel believes it is only entitled to ask for information on the sex of users as a matter of self-declaration. This means it officially does not know, and believes it must not presume to know from any other indications, which of its clients are female and which male, as an issue of material fact. It is therefore now unable to guarantee female-only shared rooms, despite it being lawful under the EA2010 to provide single-sex sleeping arrangements, and even if women clients make it clear they want them. It is a necessary condition for the use of the

[12] See online version (n 31).

powers available under Schedule 3, paragraph 28 EA2010, which Cowan et al. highlight, that organisations feel able to solicit information about sex as a material fact.

As a general observation, much of Cowan et al.'s argument relies on sex being a problematic concept, with multiple meanings, within and outside the law, with some particularly surprising statements included in places. For example, they state:

> … what Murray et al would seem to prefer the census to do is ask respondents to state the sex that was recorded on their birth certificate. This means we are asking people to record the sex that the doctor or nurse deemed them to be, having inspected their external genitals post-partum, usually in the first few days after birth. This is the definition of sex that the authors themselves use in the article (p264). But this is *genital* sex, which clearly *can* be changed.

This confuses *how* sex is worked out accurately and non-invasively for almost all human beings according to appearance at birth with *what* sex is. This is not a confusion we share.

We suggest that an unhelpful amount of confusion has been sewn round the concept of sex for policy and law makers in recent years, as discussed by Sullivan (2020a). We recommend Marinov (2020) for a longer discussion of this. Sex in numerous species, including *homo sapiens*, means the state of being male or female for reproductive purposes (Richie, 2019; Dahlen, 2020). For almost everyone, whether they are female or male is observed accurately at birth from outward appearance.[13] A small number of people are diagnosed with differences in sex development (DSD) conditions each year, however the specialist charity *dsdfamilies* (2018) estimates that in the UK, sex will be unclear in only about seven or eight of these cases.

Of critical relevance here, policies based on self-declared gender identity are intended almost entirely for people for whom there was no ambiguity or error of observation at birth regarding their reproductive category, but who at some later point have made any of a range of possible changes: declaratory, social, legal and/or physical.[14] They have not however moved from one reproductive category to the other, because human beings cannot do that. The question for policy and law makers is not what sex a person has but what, if any, *relevance* that should continue to have in particular contexts, once a person makes any of these changes, whether different degrees of change, and different reasons, merit different responses, and whether the word 'sex' may in some legal contexts be taken to have a definition other than its ordinary meaning. We think much of the discussion here would be clearer if the issue were laid out to policy- and law-makers in those terms. The discussion would also be clearer if the considerable variety in the group of people who are of policy and legal interest here were acknowledged. This means the diversity in the age at which people make any changes, the different changes a person may make at different times, how recently they made changes and how they describe and conceptualise themselves. A person may change how they wish to be described either sometimes or always, asking people to use pronouns other than the ones normally associated with their sex, with no other changes, through a change of name, changes to document markers, making reversible cosmetic

[13] For a very small further number, sex can be reliably established with further tests at that point.

[14] We are unaware of any group which advocates for such policies seeking to have them confined to people with diagnoses of differences in sex development (DSD) conditions.

changes and changes to mode of dress, to taking substantial largely irreversible steps (such as any of hormones, facial feminisation surgery, mastectomies or breast augmentation, genital surgery) intended to make a person as visibly indistinguishable as possible from a member of the opposite sex. Not all people who make any of these changes will explain it to themselves or others in the same way: they may or may not describe themselves as having a particular self-declared gender, having a gender identity or being transgender or transsexual, or having changed sex. Not all will have a diagnosis of gender dysphoria or believe that that is a relevant concept.[15]

We understand Cowan et al.'s position to be that sex should have little or no relevance in policy or law (or social relations) once a male person has ceased to self-describe as a man all (or possibly only some) of the time[16] and, further, if they state that they identify as a woman, then that person should be treated always or almost always as if they had been born female. The self-declaration argument further implies that it should be irrelevant whether a person has undertaken any changes, physical or otherwise, beyond making a declaration of identity. That is a point people are free to argue. We are among those who believe that others should be free to challenge it, given its implications for women especially, without meeting charges of bad faith, prejudice or incompetence.

5. The perils of pedantry

Referencing errors

Cowan et al. worry a great deal about perceived errors in our referencing. They are especially critical of a reference citing the organisation Engender, where they accuse us of omitting relevant information, due to 'either misrepresentation, or poor academic research'.[17] Here, however, they are simply creating a non-existent fault out of their own misreading.[18] They are also concerned that in the same reference we refer to a paragraph 2.4 which is not there. In this case, a stray decimal point was inserted into a '24' and overlooked in proof-reading (happily, the correct numbering was used for a further reference to the same paragraph later in the text). They note that a reference to a work by Stock has a different date in the text (2018) to the bibliography (2019). We are happy to clarify that 2019 is the correct one. In our experience errors such as this are usually picked up at the publisher proofing stage, and one or two are not uncommon in our experience of reading academic texts. We would prefer they were not there, but doubt they will have interfered with readers' understanding of the text. Those errors that are correctly identified do not merit criticism on the scale levelled at us, and we suggest are no more significant than the various oversights in their own text.[19]

[15] For further discussion see online version (n **Error! Bookmark not defined.**2-47).

[16] We use a male person as the relevant case, given the subject matter of our article, but the same of course would apply for a female person, mutatis mutandis.

[17] Following publication of our article, one of the authors also highlighted this reference on social media, stating that 'the function of [our] miscitation is to tendentiously sew doubt' (Giles, 2019: 5).

[18] For a full explanation see online version (n 50).

[19] Examples are provided in the online version, to demonstrate the risks of subjecting other people's work to an unforgiving level of attention (n 52).

Literature review, citations and peer reviewed sources

Cowan et al. draw substantial negative conclusions about our competence from what they assert are shortcomings of academic practice. They state for example that our article 'lacks the kind of thoroughgoing review of literature … that academic rigour demands'. Noting that Cowan et al. also prefer a format without a literature review, we are curious what relevant literature they have in mind here. They do not say. We note that Cowan et al. cite (but do not review) only one formal article on the UK legal position. This is Sharpe's (2020) piece, published almost a year after ours.

We find similar difficulty with the criticism that our supposed 'failure to cite applicable legislation and guidance, and/or research/authorities in support of their [legal] position, suggests of a lack of rigour in their scholarship and, regrettably, results in an argument wanting in accuracy and balance'. This accusation appears to rest, as already discussed, on their failure to notice our references to the statute, an unconvincingly-argued rejection of the analysis set out in a recent EHRC statement, and a questionable level of attachment on their part to an EHRC Code of Practice. Their own analysis omits reference to at least one text unavailable to us but which we think they should have considered (Komorowski, 2020) and what appears at first sight to be a piece of primary legislation (the GRPBA 2018) relevant to anyone holding their position. Both they and Busby (2020: 2) refer specifically to 'the dearth of case law in this area': they do not explain how case law supports their view, but do make speculative claims about how the law might be interpreted in future.

Their concluding comments are particularly critical of our failure to include peer reviewed sources, noting 'references are made only to news articles, personal blogs and institutional reports'. In questioning our reliance on non-academic sources, Cowan et al. once again reveal their failure to read the article as a piece of primary research, based on the scrutiny of official documents and other relevant sources, which constitute the majority of our references. Our purpose was to expand and diversify the available findings, not to reflect on an existing literature. We note moreover that around half their own references appear to fall into the category of 'news articles, personal blogs and institutional reports'. We do not however, share their enthusiasm for treating this as grounds for disputing diligence or competence. Further, where they express concern that we cite a non-peer-reviewed source for our explanation of 'gender identity' and suggest five alternative peer-reviewed sources, they do not explain how citing these, or providing a lengthier treatment of the concept, would have affected our argument.

In their complaints about format and sources, we also find a surprising unfamiliarity with *Scottish Affairs* itself, a long-established and well-known journal which takes 'a position between informed journalism and academic analysis, and provides a forum for dialogue between the two' (Edinburgh University Press, 2020). In its general approach, our article is squarely within the tradition of papers published in this journal.

6. Climate on sex and self-declared gender

Last, we want readers to understand the climate in which our original article was produced and in which we are defending it. Describing our own experiences, as well as those of other academics, we illustrate below the unusually high stakes for researchers wishing to engage on this topic from a perspective such as ours.

Publication of 'Losing sight of women's rights'

After acceptance by *Scottish Affairs*, for a short period of time publication of our article was uncertain. A member of Edinburgh University Press (EUP) staff wrote an internal memo, arguing the article should not be published, describing it as transphobic, and comparable with anti-Semitic, homophobic, Islamophobic and sexist opinion. The only example provided to support this argument was that we used the word 'women' to refer to people who share the characteristic of being born female. A senior member of EUP staff then contacted the editor of *Scottish Affairs* to draw this to his attention (and also involved the University of Edinburgh legal team). The journal rejected the analysis in the EUP internal memo. Despite this, the subsequent two months until publication were difficult, as we continued to fear further interventions. The publication of our article rested on the willingness of the journal to stand fast against the claims made about us from within the EUP.[20]

At the start of this response, we noted the omission of Lisa Mackenzie from the authors named at the time of original publication. As explained in a statement published in January 2020 this was due to a perceived conflict of interest on the part of her employer at the time of publication. We now feel able to explain this in more detail. Having voluntarily shared the draft text with her then employers after the comments from within the EUP were shared with us, Lisa was placed under immediate investigation at work for her co-authorship of this piece. At that late stage she decided to remove her name, in the expectation that this would reduce any risk to her employment. Her employers were never able to identify to her any specific part of the text which was inappropriate or problematic from their perspective and the investigation was eventually concluded without proceeding to any disciplinary action.

We have presented the findings from our paper only once, at a multi-speaker University of Edinburgh event organised to discuss women's sex-based rights in June 2019. The event itself was characterised as transphobic and hateful on social media in posts shared by university members, including two of the co-authors.[21] The longer online version of this article discusses the difficult circumstances surrounding this event in more detail: these include a speaker being subject to an assault in which harm was only prevented by the intervention of security staff, an occurrence later disputed on social media, including by one of the co-authors. Despite an unusually large readership we have been less inclined than we might otherwise have been to seek further opportunities to present our paper, largely because we anticipate that considerable time might need to be set aside to deal with any adverse reaction, either in advance or afterwards. Happily, the article itself continues to attract a substantial readership, with 8,726 downloads of the published article from the EUP site to the end of October 2020 and 1,528 downloads of the 'open access' version from the University of Edinburgh's *Research Explorer* portal.[22]

On publication of our article, our attention was drawn to comments by one of the co-authors on social media, who called it a 'poorly-sourced conspiracy theory masquerading as an academic case study' (Giles, 2019: 9). This comment formed part of a series of strong criticisms directed at the journal, published on Twitter, which also suggested that we were

[20] A more detailed account is available at MurrayBlackburnMackenzie (2020: Annex 3).

[21] As collated here: https://mbmpolicy.files.wordpress.com/2020/10/3.-scottish-affairs-twitter.-uoe-event.pdf

[22] See https://www.research.ed.ac.uk/portal/en/publications/losing-sight-of-womens-rights(2016d817-a978-4f1a-8982-3459b9c05fed).html

responsible for 'deliberate' omissions (Giles, 2019: 1). Two of the authors have publicly questioned whether *Scottish Affairs* subjected our article to a proper peer review process (it did). [23] Later in 2019, without naming us, an Equality Network policy officer referred to policy capture as 'anti-trans rhetoric' and suggested the thesis had been 'disproved' (Crowther, 2020). We note that given the space of a full academic article, Cowan et al. do not engage in any substantial way with our policy capture thesis nor the evidence we present about the detailed operation of the policy process. Far less do they 'disprove' that policy capture is a relevant concept here. Neither has anyone else, to our knowledge. The Cowan et al. response is the only detailed critical feedback to have been provided directly to us since publication in summer 2019, and the only published academic piece we are aware of so far responding to our article. Indeed, it is the only critical feedback we have received directly (apart from a personal threat that was reported to the police and a handful of comments on social media). All other comments directed to us and to the journal from academic readers and others since publication have been positive. We do however of course stand ready to address any criticism of our central thesis if any such is forthcoming.

A balanced debate? Sex and self-declared gender in academia

Our own experiences are by no means unique amongst those engaging with the debate on sex and self-declared gender from a similar perspective to our own. Difficulties encountered include calls to be removed from teaching, security required for ordinary lecturing duties, disinvitations, cancelled events, attempts to have editorships removed, and lost opportunities to publish.[24]

A recent article defending the collection of reliable data on sex in the census by Professor Alice Sullivan (2020a) was published on the unusual condition that two invited critical response pieces would be published in the same edition (Hines, 2020a and Fugard, 2020). Responding to these, Sullivan notes that Hines fundamentally misrepresents her arguments, and adds:

> Having entirely swerved the substance of the paper, Hines resorts to a series of ad hominems. She accuses me of paranoia and bad faith, and of being 'trans exclusionary', and dismisses me as representing a 'vocal minority'. No evidence is provided for any of these assertions. (2020a: 540).

Another researcher has recently shared with us a reviewer's comments on a draft article in their specialist area which repeatedly described the text as 'transphobic', and included assertions such as 'using the term opposite biological sex is not only sexist, homophobic and transphobic, it is biologically incorrect',' 'male bodied people is incorrect and transphobic' and 'The Authors should remember that not just gender, but sex too, is a social construction'.[25] The article is without a publisher at the time of writing. Writing as a biologist in defence of the position that sex is a two-category, immutable state for human beings, Marinov feels moved to include this statement: 'A disclaimer: I am not a tenured faculty member and have no job security; I am well aware that my career prospects could be

[23] See https://mbmpolicy.files.wordpress.com/2020/10/2.-scottish-affairs-twitter.-peer-review.pdf.

[24] See online version for references to specific examples for each of these.

[25] Reviews and correspondence with the journal about the reviews shared with us in full by the author. We have shown the editor of *Scottish Affairs* the correspondence shared with us, as a verification for readers.

jeopardized by this essay' (2020: 279). Against this background, it is one of Cowan et al.'s more frustrating complaints that our article suffers from a 'lack of academic rigour' due to a lack of peer-reviewed references to support our own position. Readers will not be surprised to learn that our access to relevant formal academic literature from any perspective other than that taken by Cowan et al. was severely limited, although that position is starting slowly to improve. Academic activity in line with the position advocated by Cowan et al. meanwhile enjoys considerable institutional support and funding, as evidenced in multiple university-based events, large research grants, and dedicated journals and special editions. [26]

7. Conclusion: Academic intolerance

Cowan et al. conclude that 'There are many reasons to be concerned about Murray et al's article', following this statement with a series of assertions about scholarly shortcomings. It appears to us however that the problem here is not with our scholarship falling below any normal acceptable standard, but rather that Cowan et al. are uncomfortable with others holding and expressing any different view to theirs on this topic. They have therefore reached too quickly for assertions of incompetence or worse. They misunderstand and misrepresent the fundamental purpose of our article, fail to engage with our core thesis of policy capture, and ignore one of our two substantive case studies in its entirety. Asserting that our 'legal arguments are reliant upon misinterpretations and selective quotations from statute and case law' they do an injustice to how we present our position on the law and ignore available arguments in its favour. Their own legal view, which is presented as the only one acceptable to put forward, relies substantially on a text that describes itself as 'not authoritative' and whose content is open to challenge. They rely, too, on readings of the statute which also appear to us at least open to question, and in the case of 'misperception' either irrelevant or wrong. At points they misread our content and blame us for the results. They over-react to small faults and seek to police our adherence to particular scholarly practices in a way we find superficial and oddly rigid. All this leads to a serious claim of 'glaring inaccuracies and discrepancies within the article' which we submit is not remotely proven (it is offered with no notes or cross-references). We reject this as unreasonable criticism. We have to leave readers to judge how far Cowan et al. themselves may be vulnerable to any of the criticisms they level at us.

Addressing the specific question of whether policy capture occurred, they argue only that our thesis 'ignores the gradual shifts in law and policy across the UK over at least the last two decades, and, particularly with respect to the GRA and the 2010 Act, the processes of scrutiny and consultation that accompanied them'. As we argue above, we do not think the case is persuasively made that the law changed in favour of self-declared gender over the period they mention, while the shift in policy is of course our core concern. Cowan et al. provide no account of the nature of the scrutiny and consultation which accompanied the EA 2010, and how that would support their position, nor of the processes round the GRA 2004, which anyway is not relevant to those who fall outside its scope.

We would suggest that, if anything, the evidence that policy capture is a relevant concept to apply here has strengthened since we undertook our original research. Jones and Mackenzie's (2020) more extensive consideration of primary sources on the development of plans for the census in different parts of the UK has found even stronger evidence of how

[26] See online version (n66-68).

public authorities prioritised representations from advocacy groups including the STA, Gendered Intelligence and Stonewall, over other possible interests. Similarly, Biggs (2020) has found the same lack of interest in impacts on women, and prioritisation of arguments put forward in favour of prioritising self-declared gender identity, in the development of prisons policy for England and Wales. Meanwhile, in a recent paper produced with SPS support as part of a project intended to 'influenc[e] the future direction of its transgender prison policy' (Maycock, 2020: 37), the very limited acknowledgement of possible negative impacts on women prisoners is again apparent. Our particular focus was on institutional behaviours and decision making in response to advocacy, rather than on the advocates themselves, a point which does not emerge clearly from a reading of Cowan et al. However, a report produced by the law firm Dentons for an international group of organisations which support self-declaration has since set out how it has been a deliberate advocacy strategy in multiple jurisdictions to seek legal changes in this area by pursuing these (in its own words) 'under the radar': we have discussed elsewhere how far the processes by which laws enabling self-declaration were achieved in other jurisdictions appear to reflect that approach (Murray et al. 2020b).

For some time the academic climate has been such that claims about the primacy of self-declared gender over sex, with substantial implications for law and policy, have been placed beyond discussion. A contrast might be drawn with religion, where it is generally accepted that people may legitimately hold conflicting beliefs of great importance to their sense of self, literally in good faith. People's motives, integrity and competence have been persistently regarded as fair game, in our case by a group whose lead author is in a far more senior role than any of us.[27] We question how the scholarship desirable to support legal and policy change can take place properly in such an environment and wonder whether this is a direction those with a senior role in shaping academic discussion really wish to go.

Given the nature of the claims made about our work, we feel entitled and compelled to defend ourselves robustly here. We are however aware that this could itself provoke further reaction, on social media or elsewhere. We would encourage people engaging with the authors of either article to preserve at least the tone we have tried to strike here.

[27] One of us is an early career researcher, one is completing a PhD and the third is a freelance researcher.

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