

# **Gender Recognition Reform (Scotland) Bill**

**A consultation by the Scottish Government**

**December 2019**

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## MINISTERIAL FOREWORD



In a statement to the Scottish Parliament in June, I announced that the Scottish Government would consult on a draft Bill to reform the process by which trans people gain legal recognition of their lived gender through a Gender Recognition Certificate – a right they have had for 15 years.

The reforms to the Gender Recognition Act 2004 we propose were consulted on in 2017/18. We received over 15,500 responses with the majority showing support for reform.

Since that consultation, the debate on gender recognition has become polarised, both in Scotland and elsewhere. A vigorous but respectful debate is a hallmark of a mature democracy. However, what is not acceptable is some of the transphobia and misogyny we have witnessed, and abusing others in the course of any debate.

I recognise that people have concerns and I hope this consultation will alleviate those by explaining exactly what the Scottish Government is proposing. Just as important is to state what we are not proposing to introduce or to change.

History shows us that living as a different gender is not new. What is relatively new is that we recognise the rights of trans people and the discrimination they face in society. To comply with international human rights law, Scotland must have a system for obtaining legal gender recognition. Since 2004, trans people across the UK have had the right to legally change their gender through applying for a Gender Recognition Certificate. For a number of years, transgender people have been able to apply for other documentation in their acquired identity such as their passport and driving licence. Since 2010, the UK Equality Act 2010 has recognised gender reassignment as a protected characteristic.

What the Scottish Government is proposing is to amend the way in which a trans person can obtain that Certificate. The current system is viewed by many applicants or would-be applicants as demeaning, lengthy, stressful and expensive.

This proposal is in line with the approach of a number of other countries, including the Republic of Ireland, Norway, Malta, Denmark and Belgium. Where that has been done, the impact has been positive for the trans community and without a detrimental impact on others.

Many of the issues I have seen raised are not to do with the proposals in this draft Bill. Rather they are to do with the inequality that continues to impact on women and girls more generally. As a Government, we will continue to address that.

We recognise that there are men who seek to abuse women and we want women to be safe from that violence. We have taken action to change the law to protect women from such abuse. This is a global issue and not a new issue for Scotland or indeed the UK. And it is not the fault of trans people. It is the fault of the abusive men. Which is why we will continue to address violence against women and girls through our Equally Safe strategy which takes a gendered approach.

Reform of the Gender Recognition Act 2004 will not change our approach.

Nothing in what we are proposing will change the exceptions in the Equality Act 2010 which allow trans people to be excluded when this is a proportionate means of achieving a legitimate aim – for example single sex services, employment, health services. Those exceptions are very important and the Scottish Government would encourage any organisations and service providers to know their rights on this issue.

Obtaining a Gender Recognition Certificate will remain a serious and lifelong commitment. Trans people will still make a statutory declaration to this effect and people will still be subject to criminal proceedings for lying or making false applications.

What we are proposing in this draft bill, and seeking your views on, is for the Registrar General to issue the Certificate rather than the Gender Recognition Panel as per the current process, and to reduce the time where someone has to live in their acquired gender from 24 months to 6 months.

As you will see in the draft Bill we also do not propose to change public policy. I recognise that some organisations have changed policies which are not required in law. And I know that they have done so in a well-intentioned attempt to be trans inclusive. However they may have unintentionally made changes that make women feel uncomfortable and less safe. They need to take account of everyone's rights when any changes are being considered, to ensure all rights, particularly those of women and trans people, are protected. This includes the protection of women's rights and safe spaces.

We will continue to address gender inequality. We will continue to promote and protect and extend the hard won rights of women.

And I will play my part in ensuring that we hold fast to our principle of trans inclusion whilst recognising, protecting, respecting, and advancing the rights of women and girls.

Throughout the consultation time and beyond, I will continue to have an open door policy to all those who wish to discuss our proposals. I will continue to be respectful and listen to others and would urge everyone with an interest in this consultation to do the same.

A handwritten signature in black ink, appearing to read 'S Sille'.

**SHIRLEY-ANNE SOMERVILLE**  
**Cabinet Secretary for Social Security and Older People**

## **GLOSSARY**

“the GRA” is the Gender Recognition Act 2004.

“the 2010 Act” is the Equality Act 2010.

“the Bill” is the draft Gender Recognition Reform (Scotland) Bill, which is the subject of this consultation.

“the ECHR” is the European Convention on Human Rights.

“the EHRC” is the Equality and Human Rights Commission.

“a GRC” is a gender recognition certificate. A full GRC provides legal recognition of a person’s acquired gender.

“the GRP” is the Gender Recognition Panel. This is a UK Tribunal which currently deals, across the UK, with applications for legal gender recognition.

“the Principles” is a reference to the non-binding Yogyakarta Principles on sexual orientation and gender identity.

“the Registrar General” is the Registrar General for Scotland.

## CHAPTER 1: HOW TO RESPOND TO THIS CONSULTATION

### What this consultation is about

1.01. This consultation is seeking views on the draft Gender Recognition Reform (Scotland) Bill (“the Bill”), which would change for Scotland the way in which people can obtain a Gender Recognition Certificate (“GRC”).

### Why we are consulting

1.02. We are consulting following the statement by the Cabinet Secretary for Social Security and Older People to Parliament on 20 June 2019.<sup>1</sup> In this statement, the Cabinet Secretary announced that the Scottish Government would consult on a draft Bill to reform the way in which applicants from Scotland apply for a GRC. This current consultation follows the earlier consultation on the principles of reforming the Gender Recognition Act 2004 (“the GRA”).<sup>2</sup>

### Responding to this Consultation

1.03. We are inviting responses to this consultation by **17 March 2020**. No account will be taken of responses which are late and no extensions can be given to this deadline.

#### Through Citizen Space

1.04. Please respond to this consultation using the Scottish Government’s consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/family-law/gender-recognition-reform-scotland-bill>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted by **17 March 2020**. If you use the consultation hub to respond, you will receive a copy of your response via email.

#### Hard copy

1.05. If you are unable to respond using the consultation hub, please complete the Respondent Information Form and Consultation Questions and send them to:

Gender Recognition Reform  
Room GW-15  
St. Andrew’s House  
Regent Road  
Edinburgh  
EH1 3DG

<sup>1</sup> <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12196&mode=pdf>  
Columns 90 to 107.

<sup>2</sup> Information on the last consultation is at <https://consult.gov.scot/family-law/review-of-the-gender-recognition-act-2004/>

## By email

1.06. We will not accept responses submitted by email.

## No need to answer all of the questions

1.07. We welcome responses to some or all of the questions on Citizen Space or in hard copy.

## **Handling your response**

1.08. If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly. The names of organisations responding to the consultation will be published.

1.09. All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise. All respondents are also asked to remember that this is a government consultation process and no matter how strong your views we ask that you use acceptable language to express them.

1.10. To find out how we handle your personal data, please see our privacy policy: <https://www.gov.scot/privacy/>

## **Next steps in the process**

1.11. Where respondents have given permission for their response to be made public responses will be made available to the public at <http://consult.gov.scot>. Before publishing the Scottish Government will need to check that responses do not contain material which:

- Raises concerns about data protection (for example, a response which gives personal details about the person responding to the consultation or about another person);
- Raises concerns about copyright (for example, a response which encloses an academic article which is or may be subject to copyright restrictions);
- Is potentially defamatory (for example, a statement which could damage a person's or an organisation's reputation);
- Is offensive (for example, contains transphobia or misogyny, uses swear words or contains language which is derogatory about an individual or a group in society);
- Contains references to on-going court cases.



1.12. We will analyse all responses but we will not publish responses which contain material outlined above. Therefore, a response which raises concerns about data protection or raises concerns about copyright or is potentially defamatory or has offensive material or contains references to on-going court cases will not be published.

1.13. Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. An analysis report will be made available. The Scottish Government's intention is to introduce a Gender Recognition Reform (Scotland) Bill into Parliament during this current Parliamentary session (which ends in 2021).

### **Comments and complaints**

1.14. If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or:

E-mail: [family.law@gov.scot](mailto:family.law@gov.scot)

Telephone: 0131 244 4955

## CHAPTER 2: ORIGINS OF THE GENDER RECOGNITION ACT 2004

### The GRA

2.01. The GRA was introduced following two European Court of Human Rights rulings in 2002, in the cases of *Christine Goodwin v The United Kingdom*<sup>3</sup> and *I v the United Kingdom*<sup>4</sup>, that the UK had breached the Convention rights of two trans people under Article 8 (the right to respect for private life) and 12 (the right to marry and found a family).<sup>5</sup> There had also been consideration of gender recognition in a UK Interdepartmental Working Group convened in 1999.

2.02. The European Court of Human Rights cases concerned the applicants' experiences as trans people in relation to a range of issues, such as pension rights (the state pension age being different for men and women), discrimination at work and marriage. The European Court of Human Rights determined that it would not place a disproportionate burden on society to require the Government to accommodate the needs of trans people by issuing new birth certificates.

2.03. The GRA was legislation at Westminster. At the time, the Scottish Parliament approved a Sewel Motion (now known as a Legislative Consent) to allow Westminster to legislate for devolved matters.<sup>6</sup>

### The Equality Act 2010

2.04. In 2010, the UK Parliament passed the Equality Act 2010 ("the 2010 Act"). The 2010 Act is largely a reserved matter for the UK Government and therefore cannot be amended by the Scottish Parliament. The 2010 Act had two main purposes – to harmonise discrimination law, and to strengthen the law to support progress on equality.

2.05. Under the 2010 Act, it is generally unlawful to discriminate against people who have a "protected characteristic", as defined under the Act.

<sup>3</sup> The judgment in *Christine Goodwin v the United Kingdom* is at [https://hudoc.echr.coe.int/eng#{"itemid":\["001-60596"\]}](https://hudoc.echr.coe.int/eng#{)

<sup>4</sup> The judgment in *I v the United Kingdom* is at [https://hudoc.echr.coe.int/eng#{"itemid":\["001-60595"\]}](https://hudoc.echr.coe.int/eng#{)

<sup>5</sup> In earlier cases of *Rees v the United Kingdom* (9532/81) and *Cossey v the United Kingdom* (10843/84) from 1990 the European Court of Human Rights had held that there was no violation of Article 8 in relation to UK law not conferring on a trans man or woman a legal status corresponding to their post gender reassignment surgery condition.

<sup>6</sup> The Legislative Consent Motion is at <https://www.webarchive.org.uk/wayback/archive/20170701074149/http://www.gov.scot/About/Government/Sewel/SessionTwo> (number 49); the debate in the Scottish Parliament on 5 February 2004 is at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=4492&mode=pdf> and the consideration by the Justice 1 Committee is at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=2082&mode=pdf>

2.06. One of the protected characteristics in the 2010 Act is “sex”. Paragraph 54 of the Explanatory Notes to the 2010 Act says “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.”

2.07. Another of the protected characteristics is “gender reassignment”. Paragraph 41 of the Explanatory Notes to the 2010 Act<sup>7</sup> says that section 7 of the Act “defines the protected characteristic of gender reassignment for the purposes of the Act as where a person has proposed, started or completed a process to change his or her sex.”

2.08. The EHRC defines this as “when your gender identity is different from the gender assigned to you when you were born. For example:

- a person who was born female decides to spend the rest of his life as a man”

2.09. The EHRC also states that “you do not need to have undergone any specific treatment or surgery to change from your birth sex to your preferred gender. This is because changing your physiological or other gender attributes is a personal process rather than a medical one”.<sup>8</sup>

### **Other documentation**

2.10. Trans men and women who have not yet obtained a GRC may have transitioned socially, with most of their identification documents, including Government issued ones such as a passport and driving licence reflecting this. However, without a GRC the trans person will have a birth certificate and legal status which is not consistent with how they lead their lives.

### **GRA reform and the potential impact on women**

2.11. A number of the points made following the previous consultation on reforming GRA for Scotland related to the impact on women. The 2010 Act contains a number of exceptions to the general provisions which, for example, allow trans people to be excluded from single sex services when it is a proportionate means of achieving a legitimate aim. Chapter 5 of this consultation outlines these exceptions in greater detail.

<sup>7</sup> The Explanatory Notes to the 2010 Act are at <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/1/4>

<sup>8</sup> At: <https://www.equalityhumanrights.com/en/advice-and-guidance/gender-reassignment-discrimination>

## **Continued consideration of the law on gender recognition by the European Court of Human Rights**

2.12. The European Court of Human Rights has continued to consider cases relating to gender recognition. In *A.P., Garçon and Nicot v. France*<sup>9</sup> in 2017, the Court held:

- A requirement to demonstrate an irreversible change in appearance was a violation of Article 8 of the ECHR on the right to respect for private and family life. (There is no such requirement under the GRA).
- A requirement to demonstrate the existence of a gender identity disorder was not a violation of Article 8.
- A requirement to undergo a medical examination was not a violation of Article 8.

2.13. The Scottish Government's conclusions from the various relevant cases dealt with by the European Court of Human Rights are:

- Scotland must have a system for obtaining legal gender recognition, to comply with the ECHR. Any Bill to remove the current system for obtaining legal gender recognition and not replace it with a new system would be outwith the competence of the Scottish Parliament;<sup>10</sup>
- As the case-law stands at the moment, the current system in Scotland is compliant with the ECHR; and
- As the case-law stands at the moment, there is no ECHR obligation on Scotland to introduce a system for obtaining gender recognition based on an applicant's statutory declaration.

2.14. On the last point, the ECHR is a "living instrument" and interpretation of it can change over time and as ECHR member states change legislation, procedures, policies and processes. Therefore, the Scottish Government considers that it needs to keep legislation such as the GRA under review to ensure that it continues to be in line with international best practice. As indicated in the next Chapter of this consultation, the Scottish Government considers that there are policy reasons, including international developments, for changing the GRA to move towards a statutory declaration based system and away from the current system.

<sup>9</sup> The judgment in *A.P., Garçon and Nicot v. France* is at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-172913"\]}](https://hudoc.echr.coe.int/eng#{)

<sup>10</sup> This is because under section 29 of the Scotland Act 1998 a provision in an Act of the Scottish Parliament that is incompatible with rights under the European Convention on Human Rights is outwith the competence of the Scottish Parliament.

## CHAPTER 3: THE CASE FOR REFORMING THE GRA

### The current system for obtaining legal gender recognition in the UK

3.01. The GRA is UK wide legislation permitting a person aged at least 18 to make an application for a GRC. Applications are handled by the Gender Recognition Panel (“the GRP”), a UK Tribunal. Successful applicants receive either an interim GRC, which does not give legal recognition, or a full GRC which does give legal recognition. This process has been place since 2005.<sup>11</sup>

3.02. Under the GRA there are three routes or “tracks” by which a person can seek legal recognition of their acquired gender: the standard, the alternative and the overseas tracks.

3.03. The standard track is most often used by applicants.<sup>12</sup> The standard track can be used by applicants who:

- have been diagnosed with gender dysphoria (section 2(1)(a) and section 25 of the current GRA);
- have lived in their acquired gender throughout a period of two years immediately prior to their application (section 2(1)(b)); and
- intend to live in their acquired gender for the rest of their life (section 2(1)(c))

3.04. Applicants under this route must provide two medical reports to the GRP. One from a registered medical practitioner or registered psychologist who is practising in the field of gender dysphoria must include details of the diagnosis (section 3(1) and (2)). The second report must be from a registered medical practitioner and must include details of any treatment the applicant is receiving and whether they have undergone, are undergoing, or planning to undergo surgery to modify sexual characteristics (section 3(1) and (3)).

3.05. Published guidance<sup>13</sup> confirms that, along with their application, applicants must provide documentary evidence that they have lived in their acquired gender throughout the period of two years prior to their application (section 3(6)(b),(c)).

<sup>11</sup> The GRA was enacted in 2004. The substantive provisions came into force on 4 April 2005.

<sup>12</sup> Statistics are available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/808151/Main\\_Tables\\_Q4\\_2018-19.ods](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/808151/Main_Tables_Q4_2018-19.ods) (See table GRP 2).

<sup>13</sup> A summary of guidance on applying for a GRC is at <https://www.gov.uk/apply-gender-recognition-certificate> including guidance on required documents to evidence living in their acquired gender: <https://www.gov.uk/apply-gender-recognition-certificate/documents-you-must-provide>. A full guide for all users is at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/786910/t455-eng.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786910/t455-eng.pdf).

3.06. Applicants under the standard track must also make and submit a statutory declaration with their application that they meet the conditions of having lived in their acquired gender for the required two year period and intend to continue to do so until death (section 3(4)). The statutory declaration must also state whether or not the applicant is married or a civil partner (section 3(6)(a)).

3.07. An application must include any other information which the GRP may require (section 3(6)(c)).

#### The alternative track

3.08. The alternative track arrangements are set out in 3A-3F of the GRA. The alternative track can be used by applicants who:

- have been diagnosed with gender dysphoria or who have had surgery for the purpose of changing their sexual characteristics [Applicants must provide a medical report from a registered medical practitioner or registered psychologist with details of the diagnosis or surgery];
- ordinarily reside in England, Wales or Scotland;
- intend to live in their acquired gender for the remainder of their life;
- are in a marriage solemnised in Scotland or civil partnership registered in Scotland or a marriage or civil partnership made in England and Wales on or before the date of the application; and
- have lived in their acquired gender for at least 6 years before either of 10 December 2014 or 16 December 2014 (depending on which of the two jurisdictions their marriage or civil partnership was solemnised, registered or made in).

#### The overseas track

3.09. The overseas track can be used by an applicant if their acquired gender has been legally accepted in one of the approved countries or territories.<sup>14</sup> The applicant must provide evidence of this with their application (section 3(5)) and a statutory declaration as to whether or not they are married or a civil partner (section 3(6)(a)).

#### Applicants who are married or in a civil partnership

3.10. Under the GRA as enacted, people who were married or in a civil partnership had to end their marriage or civil partnership before a full GRC could be issued. At that time, the GRP would issue an interim GRC to married applicants and applicants in civil partnerships. The issue of an interim GRC is a ground for divorce under the Divorce (Scotland) Act 1976,

<sup>14</sup> There is a list at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/710998/t491-eng.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710998/t491-eng.pdf). The Gender Recognition (Approved Countries and Territories) Order 2011 SI 1630/2011 is at <http://www.legislation.gov.uk/uksi/2011/1630/contents/made>.

and of dissolution of a civil partnership. Once a marriage or civil partnership had ended the court could then issue a full GRC (section 5(1)).

3.11. These arrangements were altered when same sex marriage was introduced in Scotland, and in England and Wales, to allow for marriages constituted in either jurisdiction to continue where one or both of the parties change their gender and both wish to remain married.

3.12. The GRP are required to treat married applicants who otherwise meet the requirements for gender recognition as follows in terms of interim/full GRCs:

- where the applicant is in a marriage solemnised in Scotland (a 'protected Scottish marriage') or a marriage made under the law of England and Wales or outwith the UK (a 'protected marriage'), and their spouse has issued a statutory declaration of consent to remaining in the marriage following gender recognition, the GRP must issue the applicant with a full GRC (section 4(2) and section 4(3C)).
- where the applicant is in a protected Scottish marriage or a protected marriage but either does not wish to remain married after gender recognition, or their spouse has not issued a statutory declaration of consent to remain married following gender recognition, the GRP must issue them with an interim GRC (section 4(3) and section 4(3D)).
- If the applicant is in a marriage made under the law of Northern Ireland, they will receive an interim GRC (section 4(3) and section 4(3D)).

3.13. For applicants with an interim GRC who are in a protected Scottish marriage, they do not need to end their relationship in order to obtain a full GRC. Once an interim GRC has been issued, such an applicant can apply to the Sheriff Court for a full certificate (section 4E), but must make the application within 6 months from the date of the interim GRC's issue.

3.14. Provision is made for the GRP to issue a full GRC to an applicant whose spouse consents after an interim GRC is granted or who dies after an interim GRC is granted. Where a non-consenting spouse dies after the issue of an interim GRC, the GRP can issue a full GRC (section 4A(2) for a marriage made in England and Wales or outwith the UK and section 4C for those in a marriage solemnised in Scotland).

3.15. An applicant with an interim GRC can apply for a full GRC if their spouse or civil partner dies provided they do so within six months of the death and provided that they are not remarried or in a new civil partnership.<sup>15</sup>

<sup>15</sup> Applications under section 5(2)(b) for spouses and section 5A(2)(b) for civil partners,

3.16. The Civil Partnership (Scotland) Bill, currently before the Scottish Parliament,<sup>16</sup> will make civil partnership available to mixed sex couples. The Bill makes provision on civil partners who obtain gender recognition being able to stay in their relationship in much the same way as spouses are already able to. This reflects that, should the Bill be enacted, civil partnership – like marriage – will be open to same sex and mixed sex couples.

### Statutory declarations

3.17. A statutory declaration is a formal statement made that something is true to the best knowledge of the person making the declaration. It is an existing offence to make a false statutory declaration. The intention is that statutory declarations under the revised GRA will be formal and will have to be made in front of someone who is authorised to administer an oath.<sup>17</sup> In Scotland, a statutory declaration of this nature could be made in front of a Justice of the Peace<sup>18</sup> or a Notary Public.<sup>19</sup> It could not be made in front of a local authority councillor as they are not authorised to administer an oath.

### **What the Scottish Government is proposing to change**

3.18. The Scottish Government is proposing to amend the process by which people can obtain legal gender recognition. The Scottish Government is not changing any rights, responsibilities or protections for women or for trans people.

### **Scottish Government's rationale for proposing reform of the GRA**

#### The adverse impact of the current system

3.19. It is absolutely right that there should be a system for gender recognition, and that whatever process is in place is a solemn and serious one that requires a lifelong declaration of intent. The Scottish Government is proposing to amend the system and keep a statutory declaration. The Scottish Government is aware that the current system has an adverse impact on people applying for gender recognition, due to the requirement for a medical diagnosis and the intrusion of having their life circumstances considered by the GRP. We think that trans people should not have to go through this intrusive process in order to be legally recognised in their lived gender. Amending the process will assist in improving the lives of trans people for whom it is important to have that legal recognition, by creating an equally serious but less onerous process.

3.20. The Scottish Government does not wish trans people to go through procedures which are demeaning, intrusive, distressing and stressful. That is, quite simply, not right for our citizens.

<sup>16</sup> <https://www.parliament.scot/parliamentarybusiness/Bills/112997.aspx>

<sup>17</sup> The person making the Statutory Declaration will have to solemnly declare that the declaration is true.

<sup>18</sup> <https://www.scotcourts.gov.uk/the-courts/jp-court/signing-documents>

<sup>19</sup> As at 20 November 2019, there were 8,912 Scottish notaries.



3.21. There are further reasons for changing the GRA. One is that, as shown by the explanation earlier on this Chapter, the current legislation in this area is complex and needs to be simplified.

3.22. The need for amending the process was highlighted in responses to the consultation we carried out in 2017. The independent analysis of the responses to that consultation<sup>20</sup> found that 60% were in favour of amending the process of applying for a GRC. A summary of themes and issues raised follows.

#### General points from those who agreed with reform

3.23. The analysis shows that 60% were in favour of reform. In addition, around 1,950 respondents who agreed with reform provided additional comments about specific issues often reflecting lived experience.

3.24. The three issues most frequently cited were:

- Gender identity is a personal matter, with gender recognition sought by individuals who know their own mind and do not make such a choice without thought and commitment.
- The existing gender recognition process takes too long, is too difficult or too expensive and needs to be made easier so that it presents less of a barrier to accessing a GRC.
- The existing process is demeaning, intrusive, distressing or stressful for applicants.

3.25. Respondents sometimes related personal experiences of the difficulties they had encountered when applying for a GRC or suggested that, although they had lived in their acquired gender for many years, they had not applied for a certificate because of the costs, the intrusive nature of the process, or the difficulties in providing the evidence required.

3.26. Some respondents argued that the existing gender recognition process either contributes to ill health or leads to the stigmatising of trans people. With respect to health and well-being it was suggested that the delays and difficulties that individuals may experience in obtaining their GRA can lead to mental ill health, including both depression and suicidal feelings. Conversely, it was argued that simplification of the process may alleviate such symptoms. Similarly, while some respondents suggested that the existing process is stigmatising, discriminatory and can contribute to the harassment and abuse experienced by trans individuals, it was also argued that the reforms proposed could signal society's acceptance of trans people and thus have a very positive effect.

<sup>20</sup> The analysis of the responses to the last consultation is at <https://www.gov.scot/publications/review-gender-recognition-act-2004-analysis-responses-public-consultation-exercise-report/pages/3/>

### *Medical reports detailing a diagnosis of dysphoria*

3.27. Some respondents to the consultation specifically provided additional comment on the issue of medical requirements of the current application process. It was argued that there should be no requirement to provide medical evidence, including because this contributes to medicalisation of something that is not an illness, or may put pressure on people to undergo medical procedures that they would not otherwise want at that time. Some said that being trans is not a mental illness and should not require a psychiatric assessment or diagnosis of gender dysphoria.

3.28. Practical problems in acquiring medical evidence were described, including very long waiting times for appointments at Gender Identity Clinics and some GPs who, respondents feel, do not understand, or are not sympathetic to, the issues involved.

3.29. Some respondents suggested that the reasons why individuals do or do not want to undergo medical transition should not be relevant to the recognition of their correct gender.

### *Living in the acquired gender for two years*

3.30. Respondents to the consultation specifically provided additional comment on the issue of the current requirement to provide evidence of living in the acquired gender for two years prior to applying for a GRC. This was seen as very difficult for some or as risking trans people being exposed to prejudice or verbal or physical abuse. Reasons given included problems created when an individual's personal documents are inconsistent, or do not match the gender presented, meaning that they are forced to reveal their status when they would not otherwise choose to do so.

### *Existing use of self-declaration*

3.31. Additional commentary pointed out that self-declaration of gender is already the working practice within many organisations. Organisation respondents that provide support services for women who have been victims of rape, sexual abuse or domestic abuse noted that they operate on a self-identification basis and that this will not change, irrespective of any reform of the GRA. Another Women's Group respondent stated that they were not aware of any women's organisation within their network which required to see a birth certificate in order to access services or membership.

3.32. It was also noted that self-declaration of gender is already permitted when amending other documents such as a driving licence.

3.33. Trans men and women who have not yet obtained gender recognition may have transitioned socially with most of their identification documents, including Government issued ones, such as a passport and driving licence reflecting this, but will have an inconsistent birth certificate and legal status. As the law stands, trans people have to live in their acquired gender before applying to the GRP (unless they are applying under the overseas track).

### **Other reasons for reforming the GRA**

3.34. As well as the impact of the current system for obtaining a GRC on individuals, there are other reasons for reforming the GRA.

#### Reclassification of gender dysphoria in ICD-11

3.35. Another reason for reforming the GRA is the reclassification of “gender dysphoria”.<sup>21</sup> The World Health Organisation (WHO) publish an International Classification of Diseases (ICD). The 11<sup>th</sup> revised version of the ICD (ICD-11) published in 2018 and approved in 2019 has redefined gender identity-related health. Gender identity disorders are no longer listed in the “Mental and behavioural disorders” chapter and are now in the new “Conditions related to sexual health” chapter.

3.36. The WHO have done this to reflect evidence that trans-related and gender diverse identities are not conditions of mental ill health, and classifying them as such can cause distress. The WHO aim to ensure transgender people’s access to gender-affirming health care by continuing to include gender incongruence in the ICD.

3.37. The Scottish Government does not consider that this change by itself means that the need for a medical diagnosis when obtaining legal gender recognition has to be removed from the GRA. However, it does point to the need for the current definition of “gender dysphoria” at section 25 of the GRA<sup>22</sup> to be revised. The draft Bill at Annex C does, of course, propose a new system for obtaining legal gender recognition and repeals the definition in the current GRA of “gender dysphoria”.

#### Developments outwith Scotland since the GRA – general

3.38. A further reason for change is there have also been a number of developments outwith Scotland since the GRA was enacted such as:

- the non-binding Yogyakarta Principles (“the Principles”);
- a resolution of the Parliamentary Assembly of the Council of Europe; and
- new arrangements for obtaining gender recognition that have been adopted in other countries since 2012.

<sup>21</sup> <https://news.un.org/en/story/2019/05/1039531>

<sup>22</sup> The current definition of “gender dysphoria” in section 25 of the GRA is “the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism”: [www.legislation.gov.uk/ukpga/2004/7/section/25](http://www.legislation.gov.uk/ukpga/2004/7/section/25)

## The Yogyakarta Principles

3.39. In 2006, the Principles were agreed by a group of human rights law academics, representatives of non-governmental organisations and others. The Principles set out existing international human rights law and principles, as the authors believe they should be applied to the treatment of lesbian, gay, bisexual and transgender people.<sup>23</sup> Principle 3 indicates that countries should:

*“take all necessary ... measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex including birth certificates<sup>24</sup> ... reflect the person’s profound self-defined gender identity”* and

*“ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned”.*

## Council of Europe

3.40. In 2015, Resolution 2048 of the Parliamentary Assembly of the Council of Europe<sup>25</sup> (Resolution 2048) expressed concerns that requiring someone seeking legal recognition of their acquired gender to have been medically treated or diagnosed might be a breach of their right to respect for their private life under Article 8 of the ECHR. Resolution 2048 calls on all Member States to:

*“develop quick, transparent and accessible procedures, based on self determination, for changing the name and registered sex of transgender people on birth certificates, identity cards ... and other similar documents”.*

## Women and Equalities Select Committee of the House of Commons

3.41. In January 2016 the Westminster Women and Equalities Select Committee of the House of Commons said that the current process for obtaining legal gender recognition:

*“runs contrary to the dignity and personal autonomy of applicants”.*<sup>26</sup>

## Systems for obtaining legal gender recognition in other countries

3.42. The gender recognition processes in use in 16 other countries and territories is summarised in Annex E. There are a variety of approaches taken across Europe and across the world.

<sup>23</sup> See <http://yogyakartaprinciples.org/>. On 10 November 2017, the Yogyakarta Principles plus 10 was adopted to supplement the Yogyakarta Principles.

<sup>24</sup> In Scotland, birth certificates are not regarded as identity papers.

<sup>25</sup> At: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21736&lang=en>

<sup>26</sup> At <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2015/transgender-equality/>.

3.43. In recent years, there have been moves towards systems which are similar to the system the Scottish Government is proposing to introduce for Scotland. For example, the Republic of Ireland has a system based around statutory declarations.<sup>27</sup> The Scottish Government is not aware of problems arising in Ireland as a result of the introduction of a system for obtaining gender recognition based around statutory declarations.

### Conclusion

3.44. As outlined in this Chapter, the Scottish Government considers there are strong reasons for reforming the GRA:

- We need to move away from procedures which are seen as demeaning, intrusive, distressing and stressful.
- We need to take account of international developments.
- We need to simplify and clarify the current legislation.

<sup>27</sup> The Republic of Ireland system is described at <http://www.legislation.gov.uk/asp/2014/5/section/12/enacted>

## CHAPTER 4: THE PROPOSED NEW SYSTEM FOR OBTAINING LEGAL GENDER RECOGNITION

### Introduction

4.01. In her statement to Parliament on 20 June 2019, the Cabinet Secretary for Social Security and Older People outlined the Scottish Government's proposals for reforming the GRA.<sup>28</sup>

4.02. In summary, the Scottish Government's proposals are:

- The removal of current medical requirements when applicants are seeking legal gender recognition;
- The removal of the need to apply to the GRP. Instead, applicants would apply to the Registrar General for Scotland ("the Registrar General") who already has a number of existing functions under the GRA;<sup>29</sup>
- Applicants must either (a) have been born or adopted<sup>30</sup> in Scotland or (b) be ordinarily resident in Scotland;
- Applicants must have lived in their acquired gender for a minimum of 3 months (rather than the current 2 years) before submitting an application for gender recognition;
- After an application has been accepted by the Registrar General, the applicant would have to confirm after a reflection period of 3 months that they wish to proceed;
- Applicants would have to confirm that they intend to live permanently in their acquired gender;
- Applicants would still be required to submit statutory declarations, made in front of a notary public or a justice of the peace; and
- It will be a criminal offence to make a false statutory declaration in relation to gender recognition and to make a false application for gender recognition.

<sup>28</sup> The Cabinet Secretary's statement to Parliament is at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12196&mode=pdf> (columns 90 to 107)

<sup>29</sup> The Registrar General's existing functions under the GRA are outlined at <https://www.nrscotland.gov.uk/registration/gender-recognition>

<sup>30</sup> Or the subject of an entry in the Parental Order Register maintained by the Registrar General for Scotland. Parental orders under section 54 and 54A of the Human Fertilisation and Embryology Act 2008 follow a surrogacy arrangement, which replaced parental orders under section 30 of the Human Fertilisation and Embryology Act 1990. The Parental Order Register is currently maintained by the Registrar General under the Human Fertilisation and Embryology (Parental Orders) Regulations 2018 which replaced earlier similar regulations.

4.03. The Cabinet Secretary also announced in her Parliamentary statement that the Scottish Government:

- does not intend to allow people under 16 to apply for legal gender recognition and would seek views on reducing the age from 18 to 16;
- intends to seek views on what support is needed for children and young people who are uncertain of their gender identity;
- would prepare guidance on supporting trans pupils in schools. The aim is to set out how to protect and promote the rights of trans pupils and other pupils in schools;
- would set up a working group on sex and gender in data, including consideration of disaggregation of data by male and female;<sup>31</sup>
- would develop guidance to make sure that policy makers and service providers understand better how to ensure that the rights of women and trans people can be collectively realised; and
- does not intend at this stage to provide legal gender recognition to non-binary people and would establish a working group to consider possible changes to procedures and practice in relation to non-binary people and what we can learn from best practice internationally, in Scotland and from the rest of the UK.<sup>32</sup>

### **The draft Bill**

4.04. The draft Bill is at Annex C and detailed Explanatory Notes are at Annex D. Impact Assessments are also attached as annexes.

4.05. The draft Bill does not repeal the GRA for Scotland and replace it with a new Act. Instead, it amends the GRA to introduce the proposed new system for Scotland for obtaining legal gender recognition. The Scottish Government does not consider there is a need to repeal the GRA. What is changing is the way in which legal gender recognition is obtained: the rights and responsibilities are not changing.

<sup>31</sup> Information on this working group is at: <https://www.gov.scot/groups/sex-and-gender-in-data-working-group/>

<sup>32</sup> Further information will be made available once this group has been established in early 2020.

4.06. Key provisions of the Bill are outlined in the table below:

Section in Bill	Provision
2	An applicant must be at least 16 (see question below) and either have been born in Scotland or adopted in Scotland <sup>33</sup> or be ordinarily resident here. Section 11 gives powers to the Registrar General to make regulations on applications.
3	Once the Registrar General has considered the application, the Registrar General cannot determine it until a 3 month reflection period has passed and the applicant has confirmed in writing that they wish to proceed. (This confirmation is known in the Bill as the “notice of confirmation”).
4	The Registrar General must grant the application if it includes a statutory declaration by the applicant that the applicant is at least 16; was born or adopted in Scotland <sup>34</sup> or is ordinarily resident here; has lived in their acquired gender for at least 3 months; and intends to live in their acquired gender permanently.  Section 14 makes it a criminal offence to make a false statutory declaration in relation to gender recognition or a false application for gender recognition or a false notice of confirmation after the reflection period has expired.
5 to 7	Makes provision on statutory declarations by the applicant on whether they are married or in a civil partnership and on what type of GRC the Registrar General should issue.  Where the applicant is single, the Registrar General should issue a full GRC.  Where the applicant is married or in a civil partnership and both parties wish to stay in the relationship, the Registrar General should issue a full GRC. In other cases, the Registrar General should issue an interim GRC.
7	Also makes provision on the court issuing a full GRC where the court has granted a decree of divorce or dissolution on the grounds of the issue of an interim GRC and also makes provision on issuing a full GRC on application by a person with an interim GRC.
8	Provides recognition for GRCs issued in England and Wales or Northern Ireland and for gender recognition obtained overseas.
9	Provision on an applicant being able to review and appeal gender recognition decisions made by the Registrar General.
9	Makes provision on applications to the court to quash a GRC on the grounds that the application was fraudulent or the applicant lacked capacity.

<sup>33</sup> Or subject to a parental order in Scotland.

<sup>34</sup> Or subject to a parental order in Scotland.



10	Makes provision on correction of administrative errors in GRCs.
12	Makes provision on the Registrar General for Scotland sending a copy of a GRC issued in Scotland to other Registrar Generals in the UK, if this is necessary to update records held by other Registrar Generals.
13.	Makes provision on continuity of marriages or civil partnerships after gender recognition.

4.07. Obtaining legal gender recognition would remain a serious step. The Scottish Government considers that requiring people to live in their acquired gender for 3 months; to make statutory declarations; and to go through a period of reflection for 3 months is a balanced and proportionate way of replacing the current system with one that is more respectful of the rights of trans people. As the Cabinet Secretary said in her Parliamentary statement:

“Retaining the requirement for a statutory declaration, making it clear that a false declaration is a criminal offence and building in time for reflection will enshrine in law the seriousness of the process. No one should doubt that it is a significant undertaking, or that it will require the same level of commitment from the individual as the existing system does.”<sup>35</sup>

Question 1. Do you have any comments on the proposal that applicants must live in their acquired gender for at least 3 months before applying for a GRC?

Yes

No

If yes, please outline these comments.

<sup>35</sup> The Cabinet Secretary’s statement to Parliament is at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12196&mode=pdf> (columns 93 and 94)

Question 2. Do you have any comments on the proposal that applicants must go through a period of reflection for at least 3 months before obtaining a GRC?

Yes

No

If yes, please outline these comments.

## **Reducing the minimum age for obtaining legal gender recognition to age 16**

4.08. The current minimum age for applying for legal gender recognition is 18 (section 1 of the GRA refers).<sup>36</sup> The Scottish Government considers that this should be reduced to 16.

4.09. There are a number of existing areas in Scotland where people obtain rights at 16. At age 16 you can:

- leave home without the consent of your parent or guardian;
- get a full-time job and pay National Insurance;
- enter into a legally binding contract;
- consent to surgical, medical or dental procedures and treatments;
- marry or register a civil partnership;
- consent to lawful sexual activity;
- apply for a UK passport on your own behalf;
- vote in elections to the Scottish Parliament and Scottish local authorities;
- get a skin piercing;
- record a change of name officially.

4.10. In recent years, there have been moves to provide more rights at an earlier age (eg voting in Scottish elections is now allowed at 16 rather than 18).

<sup>36</sup> Some statistics on the years of birth of those obtaining legal gender recognition are at <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2019>  
See main tables - table GRP 4.

4.11. Reducing the minimum age for obtaining legal gender recognition to 16 would be in line with the school leaving age and with the minimum age for marrying or entering a civil partnership.

Question 3. Should the minimum age at which a person can apply for legal gender recognition be reduced from 18 to 16?

Yes

No

Don't know

If you wish, please give reasons for your view.

#### Statutory declarations and the applicant understanding what the document means

4.12. Under our proposals, a statutory declaration would be made before a notary public (many solicitors in Scotland are notaries public) or a justice of the peace.<sup>37</sup> Notaries public may charge for this service; justices of the peace currently do not.

4.13. One question which might arise is whether the person before the justice of the peace or the notary public understands what the document means. In relation to notaries public, there is guidance issued by the Law Society of Scotland on this type of issue generally.<sup>38</sup>

4.14. A justice of the peace is a member of the judiciary<sup>39</sup> and could be expected to assess capacity in the same way as they would in the courtroom. As in court, justices of the peace are always accompanied by a Legal Advisor when hearing statutory declarations.

4.15. As judicial office holders, justices of the peace receive training at the Judicial Institute for Scotland.<sup>40</sup> This training includes dealing with any vulnerable people appearing before them. Guidance is also offered in the Equal Treatment Bench Book<sup>41</sup> on dealing with persons with disabilities who

<sup>37</sup> Information on the role of justice of the peace in this type of area is at <https://www.scotcourts.gov.uk/the-courts/jp-court/signing-documents>

<sup>38</sup> At: <https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-f/division-e/guidance/guidance-re-acting-as-notary-public/>

<sup>39</sup> <http://www.scotland-judiciary.org.uk/38/0/Justices-of-the-Peace>

<sup>40</sup> <http://www.scotland-judiciary.org.uk/59/0/Judicial-Training>

<sup>41</sup> At <http://www.scotland-judiciary.org.uk/Upload/Documents/EqualTreatmentBenchBookExport171019.pdf>

appear before them. The National Curriculum for justices of the peace is also relevant.<sup>42</sup>

4.16. It will remain a criminal offence for anyone to lie or be fraudulent in order to obtain a GRC. As outlined in section 14 of the draft Bill, a person who commits any such offence is liable on summary conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (currently £10,000) (or both) and on conviction on indictment to imprisonment for a term not exceeding 2 years or an unlimited fine (or both).

### Fees

4.17. The Bill makes provision for the Registrar General to charge fees for applications.

4.18. Currently, the fee for making an application to the GRP is £140. This can be reduced if the applicant is on certain benefits or on a low income.<sup>43</sup> The level of fee charged by the GRP is, under section 7(2) of the current GRA, laid down by the UK Secretary of State<sup>44</sup> rather than by the Scottish Ministers. Section 7 of the GRA is repealed by a provision in paragraph 2 of the schedule of the draft Bill.

4.19. The Registrar General and the Scottish Ministers have not yet decided what fee, if any, should be applied to applications to the Registrar General for gender recognition. There would be a consultation on the level of any fee if the Bill should be enacted by Parliament. Any fee would be based on the usual principle of recovery of the cost of providing the service (the set-up costs, such as initial staff recruitment and changes to IT, would be met by Government and not recovered through fees). It is likely that any fee would be considerably lower than £140, as the new proposed system does not require there to be a tribunal (the current GRP is a UK Tribunal).

4.20. The Fairer Scotland Duty Assessment attached to this consultation discusses these issues.

### Conclusion

4.21. Consultees may have other comments on the draft Bill.

<sup>42</sup> <http://www.scotland-judiciary.org.uk/Upload/Documents/NationalCurriculumforJusticesofthePeace.pdf> Please see section 4.4.1 & 4.4.2.

<sup>43</sup> <https://www.gov.uk/apply-gender-recognition-certificate/how-to-apply>

<sup>44</sup> <http://www.legislation.gov.uk/ukpga/2004/7/section/7>

Question 4. Do you have any other comments on the provisions of the draft Bill?

Yes

No

If yes, please outline these comments.

## CHAPTER 5: THE IMPACT OF GENDER RECOGNITION REFORM ON WOMEN

### Introduction

5.01. The Scottish Government recognises there are concerns that have been raised about the potential impact of gender recognition reform on women. This Chapter addresses these concerns. The Scottish Government recognises the concerns must be fully considered.

5.02. The Government also recognises that issues have been raised in relation to the reform of the GRA which are not always about the process itself, but in relation to other public policy. As outlined in the statement to Parliament by the Cabinet Secretary for Social Security and Older People on 20 June 2019, the Scottish Government is developing guidance to make sure that policy makers and service providers understand better how to ensure that the rights of women and trans people can be collectively realised. The guidance will be used across the Scottish Government, will be available to all public authorities and will be publicly available.

5.03. The Scottish Government is clear that reforming the GRA does not diminish the rights of women. The Government remains committed to the protection of women as well as achieving equality and challenging discrimination.

5.04. The Scottish Government's strategy for preventing and eradicating all forms of violence against women and girls is *Equally Safe*.<sup>45</sup> This strategy is rooted in our analysis that this violent and abusive behaviour is carried out predominantly by men against women and girls precisely because they are female. This behaviour stems from systemic, deep-rooted women's inequality and includes domestic abuse, rape, sexual assault, commercial sexual exploitation (like prostitution), and so called 'honour based' violence like female genital mutilation and forced marriage.

5.05. The strategies to prevent these crimes and to take effective action when they occur, wherever that may be, will continue to be rooted in our analysis that this unacceptable behaviour is carried out predominantly by men against women and girls. Reforming the GRA will not change the Scottish Government's approach in these areas.

5.06. The Cabinet Secretary said in her Parliamentary statement that concerns about the impact GRA reform would have on women were not, at their core concerns about trans women. "Rather they are about men who seek to abuse women. The fear is that some men will misuse trans equality to access women and do us harm. I understand that. I understand that predatory men will always seek to find ways to harm women. That's not a new problem in Scottish or global society – nor is it a problem created by, or the fault of, trans people."

<sup>45</sup> <https://www.gov.scot/policies/violence-against-women-and-girls/equally-safe-strategy/>.

5.07. People cannot take advantage of the GRA to hide a criminal offence. Individuals can obtain disclosure certificates for employment purposes, but previous names must be provided as part of that process. If a trans person is applying for a disclosure certificate, they can apply using their present name, and that name is all that they have to include on the application form. Separately, and in the strictest confidence, they must also provide any previous names to Disclosure Scotland. It is a criminal offence to make a false statement in relation to an application for a disclosure certificate. As stated in Chapter 4, it will remain a criminal offence for anyone to lie or be fraudulent in order to obtain a GRC.

5.08. This consultation includes a draft Equality Impact Assessment (EQIA) at Annex J. The next chapter of this consultation seeks comments on the draft Impact Assessments. When the Gender Recognition Reform (Scotland) Bill is introduced into Parliament, the Scottish Government will at the same time publish a final version of the EQIA, taking account of comments received as a result of this consultation.

## **The Equality Act 2010**

### General

5.09. As outlined in Chapter 2, the Equality Act 2010 (“the 2010 Act”) is key equality legislation. It is generally a reserved matter for the UK Government and cannot be amended by the Scottish Parliament. A key aim of the 2010 Act is to prevent discrimination against people who belong to one of the nine protected characteristics.<sup>46</sup> The nine protected characteristics include “sex” and “gender reassignment”.

5.10. For “sex” section 11 of the 2010 Act provides—

“In relation to the protected characteristic of sex—

(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman.”

5.11. In section 212(1) of the 2010 Act the definition of “woman” is “means a female of any age” and the definition of “man” is “means a male of any age”. Therefore, under the 2010 Act, the protected characteristic of sex includes a reference to a female (of any age) and a reference to a male (of any age).

<sup>46</sup> The “protected characteristics” are age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

5.12. For “gender reassignment”, section 7(1) of the 2010 Act provides that

“ 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 persons sex by changing physiological or other attributes of sex.”

5.13. As a consequence, the “gender reassignment” protected characteristic is wider than people who have obtained a full GRC: it covers people who intend to, are transitioning, or have transitioned. To have the protected characteristic a person does not need to have undergone medical or surgical treatment. The Explanatory Notes to section 7 of the 2010 Act<sup>47</sup> give as an example:

“A person who was born physically female decides to spend the rest of her life as a man. He starts and continues to live as a man. He decides not to seek medical advice as he successfully ‘passes’ as a man without the need for any medical intervention. He would have the protected characteristic of gender reassignment for the purposes of the Act.”

5.14. The 2010 Act has a number of exceptions to the general provisions on non-discrimination. Some of these exceptions are directly relevant when considering the position of women in relation to gender recognition. They are considered in more detail below. The exceptions to the 2010 Act will remain in place after the GRA has been reformed.

#### The relevant exceptions in the 2010 Act

##### *Single sex services*

5.15. The 2010 Act allows women only services and allows services to exclude trans women when it is proportionate and in pursuit of a legitimate aim. Paragraph 28 of schedule 3 the 2010 Act sets out the exception which relates to trans persons, and provides:-

(1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.

(2) The matters are—

- (a) the provision of separate services for persons of each sex;
- (b) the provision of separate services differently for persons of each sex;
- (c) the provision of a service only to persons of one sex.

<sup>47</sup> The Explanatory Notes to section 7 of the 2010 Act are at: [www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/1/4](http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/1/4)



5.16. The 2010 Act exception for single sex services will not change due to the proposals to reform the process for applying for a GRC. It will remain in place.

5.17. This provision would, for example, allow the operator of a domestic abuse refuge designed for women only to exclude a trans woman from the service if the operator judges that this is a proportionate means of achieving a legitimate aim. This is likely to involve carrying out a risk assessment.

5.18. Providers of services such as domestic abuse refuges may receive funding from the Scottish Government. As part of any application for funding, providers are asked to submit a plan on trans inclusion. Requiring an inclusion plan from funding recipients does not result in funding recipients being unable to rely on a relevant single sex exception. A recipient of the fund would be able to apply an exception which is available under the 2010 Act and could state as much in their inclusion plan.

5.19. All Scottish Government funding recipients must comply with the law, including the 2010 Act. It is for an individual organisation to make decisions as to service provision and how and when to use the exceptions within the 2010 Act.

5.20. As indicated above, the 2010 Act is generally a reserved matter for the UK Government. The UK Government's 2018 consultation on reforming the GRA in England and Wales said in paragraph 117:

“Trans people with a GRC can still be excluded from single sex services, or provided with a different service if it is proportionate to do so on the facts of the individual case. Although reliance on this exception should be rare, it is most likely to be needed in particularly difficult and understandably sensitive areas, such as the provision of women’s domestic violence refuges. Whether it is proportionate to exclude a trans person would have to be judged by the service provider on a case by case basis, considering the trans person’s needs and the impact on other service users. Refuges will continue to make sensible risk assessments of potential service users. Such assessments are required of all users, whether or not they are trans: for example the refuge might want to prevent an abusive lesbian from entering when her abused female partner is inside, or it may exclude a woman with a history of violence and instability.”<sup>48</sup>

<sup>48</sup> At:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721725/GRA-Consultation-document.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf)

## *Occupational requirements - general*

5.21. Schedule 9 of the 2010 Act<sup>49</sup> sets out exceptions in relation to work.

5.22. Paragraph 1 of schedule 9 provides a general exception to what would otherwise be by unlawful direct discrimination, including a requirement that the person not be a trans person, where there is an occupational requirement due to the nature or context of the work, and this is a proportionate means of achieving a legitimate aim.

5.23. In the Explanatory Notes for the 2010 Act an example given is that “a counsellor working with victims of rape might have to be a woman and not a transsexual person, even if she has a Gender Recognition Certificate, in order to avoid causing them further distress”.<sup>50</sup>

5.24. When appropriate, this exception could also be used in relation to health services where, for example, intimate health and personal care services are provided.

5.25. As indicated above, the 2010 Act is generally a reserved matter for the UK Government. The UK Government’s consultation on reforming the GRA in England and Wales said in paragraph 119:

“The Government’s view is that this provision would not be undermined by amendments to the legal recognition process set out in the GRA. Having a GRC will be a factor that employers consider when determining whether imposing an occupational requirement is a proportionate means of achieving a legitimate aim, but it is not the only factor.”<sup>51</sup>

5.26. The 2010 Act general occupational requirement exception will not change following GRA reform.

5.27. A further point which has been raised in this area is whether section 22 of the GRA,<sup>52</sup> on prohibition of disclosure of information, could make it harder to use the general occupational requirement exception.

5.28. Section 22(1) makes it a criminal offence for a person who has acquired “protected information” in an “official capacity” to disclose the information to any other person. “Protected information” means information which relates to a person who has made an application for a GRC and which concerns that application or, if the application is granted “otherwise concerns the person’s gender before it becomes the acquired gender”.

<sup>49</sup> <http://www.legislation.gov.uk/ukpga/2010/15/schedule/9>

<sup>50</sup> <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/16/26/1/1>

<sup>51</sup> At:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721725/GRA-Consultation-document.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf)

<sup>52</sup> <http://www.legislation.gov.uk/ukpga/2004/7/section/22>

5.29. The Scottish Government considers it wholly appropriate to safeguard trans people in this way.

5.30. There are a variety of exceptions in section 22, at subsection (4) and in an Order made by the Scottish Ministers under section 22(6).<sup>53</sup> One point which might arise when using the general occupational requirements exception is that some people in an organisation (eg people in its HR department) may know about a person's trans history but those actually taking the decisions on staff deployment (eg line managers) may not. In these circumstances, and when there is a legitimate case to use the general occupational requirements exception, the Scottish Government considers that it would be appropriate for information about a person's trans history to be shared in a strictly limited, proportionate and legitimate way.

5.31. To facilitate this, the Scottish Government will consider before any Bill to reform the GRA is introduced to Parliament if:

- Further exceptions to section 22 should be made, by way of a further Order under section 22(6).
- Scottish Government guidance on section 22 should be issued.

5.32. We will outline our approach in this area when any Bill is introduced into Parliament.

#### *Occupational requirements - religious requirements*

5.33. Paragraph 2 of schedule 9 relates to religious requirements, and covers a narrow range of employment of ministers of religion and some lay posts to promote and represent religion. If the criteria are met, it is possible to refuse to employ a trans person in these posts.

5.34. Paragraph 3 of schedule 9 relates to other requirements relating to religion or belief, where, if the criteria are met, it is possible to refuse to employ a trans person for the work.

5.35. The 2010 Act exception for occupational religious requirements will not change following GRA reform.

#### *Occupational requirements – UK armed forces*

5.36. Paragraph 4 of schedule 9 allows trans persons to be excluded from service in the UK armed forces if this is a proportionate way to ensure the combat effectiveness of the armed forces. In practice, the Scottish Government's understanding is that all branches of the UK armed forces permit trans people to serve. However, the 2010 Act exception for occupational requirements relating to the armed forces will not change following GRA reform.

<sup>53</sup> <http://www.legislation.gov.uk/ssi/2005/125/contents/made>

### *Occupational requirements - employment services*

5.37. Paragraph 5 of schedule 9 would allow a trans person to be excluded by an employment service provider, under section 55 of the 2010 Act, if one of the exceptions set out in paragraphs 1 to 4 of the schedule (discussed above) apply. This will not change following GRA reform.

### *Communal accommodation*

5.38. Schedule 23 sets out general exceptions which apply throughout the 2010 Act. Paragraph 3 relates to communal accommodation which in terms of sub-paragraph (5) is “residential accommodation which includes dormitories or other shared sleeping accommodation which for reasons of privacy should be used only by persons of the same sex”.

5.39. Paragraph 3(1) of the schedule provides that

“A person does not contravene this Act, so far as relating to sex discrimination or gender reassignment discrimination, only because of anything done in relation to—

- (a) the admission of persons to communal accommodation;
- (b) the provision of a benefit, facility or service linked to the accommodation.”

5.40. Therefore, trans persons can be excluded from communal accommodation when this is required for reasons of privacy, and this is a proportionate means of achieving a legitimate aim.

5.41. As indicated above, the 2010 Act is generally a reserved matter for the UK Government. The UK Government’s consultation on reforming the GRA in England and Wales said in paragraph 121:

“The Government’s view is that this provision would not be undermined by amendments to the legal recognition process set out in the GRA. Having a GRC will be a factor that organisations or accommodation providers will consider when offering communal accommodation, but it is not the only factor.”<sup>54</sup>

5.42. The 2010 Act exception for communal accommodation will not change following GRA reform.

<sup>54</sup> At:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721725/GRA-Consultation-document.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf)

## *Sport*

5.43. The GRA as originally enacted included provision on sport at section 19 but this was repealed for Scotland, and England and Wales and replaced by section 195 of the 2010 Act.<sup>55</sup> Section 195 contains provision allowing restrictions on trans people participating in sport to be imposed if necessary to uphold fair competition or the safety of competitors.

5.44. An example given by the Equality and Human Rights Commission (“EHRC”) in their published guidance<sup>56</sup> on where a difference in treatment of a trans person may be lawful in relation to sport is:-

“competitive sports: a sports organisation restricts participation because of gender reassignment. For example, the organisers of a women’s triathlon event decide to exclude a trans woman. They think her strength gives her an unfair advantage. However, the organisers would need to be able to show this was the only way it could make the event fair for everyone.”

5.45. The Sports Council Equality Group (SCEG) includes representation from sportscotland, Sport England, Sport Wales, Sport Northern Ireland and UK Sport. The Sports Councils collectively own the Equality Standard for Sport,<sup>57</sup> which is a framework for assisting sports organisations to widen access and reduce inequalities in sport and physical activity from under represented individuals, groups and communities. To support sports with the Equality Standard, SCEG has produced guidance on trans participation in sport at domestic and international level.

5.46. SCEG is about to launch a review of the domestic guidance. This will involve consultation with a wide group of stakeholders including both women’s rights and trans rights groups to ensure all views are considered. The review is expected to be completed by the autumn of 2020.

## *Insurance*

5.47. Paragraph 23 of schedule 3<sup>58</sup> provides that it is not a contravention of section 29 in relation to gender reassignment discrimination, to do anything in connection with insurance business in relation to an existing insurance policy.

5.48. Paragraph 20 of schedule 9<sup>59</sup> provides that it is not a contravention of Part 5 of the 2010 Act, so far as relating to gender reassignment discrimination, to do anything in relation to an annuity, life insurance policy, accident insurance policy or similar matter involving the assessment of risk if it is reasonable to do so based on reliable data.

<sup>55</sup> <http://www.legislation.gov.uk/ukpga/2010/15/section/195>

<sup>56</sup> <https://www.equalityhumanrights.com/en/advice-and-guidance/gender-reassignment-discrimination>

<sup>57</sup> <http://equalityinsport.org/equality-standard-for-sport/>

<sup>58</sup> <http://www.legislation.gov.uk/ukpga/2010/15/schedule/3>

<sup>59</sup> <http://www.legislation.gov.uk/ukpga/2010/15/schedule/9>

5.49. The 2010 Act exception for insurance will not change following GRA reform.

#### *Marriage and civil partnership*

5.50. Paragraph 25 of schedule 3<sup>60</sup> provides that an approved celebrant does not contravene section 29 of the 2010 Act, so far as relating to gender reassignment discrimination, only by refusing to solemnise the marriage, or register the civil partnership, of a person that the celebrant reasonably believes acquired their gender under the GRA.

5.51. This exception makes specific provision for Scotland, reflecting that the way in which marriages are solemnised and civil partnerships are registered is different in Scotland when compared with England and Wales.

5.52. The 2010 Act exception in relation to marriage and civil partnership will not change following GRA reform.

#### Conclusion on the exceptions in the 2010 Act

5.53. The Scottish Government considers that, as outlined above, there are a range of exceptions in the 2010 Act which can be used when appropriate to protect women, which might in some specific cases require the exclusion of trans women, if the conditions within the exception are met. These exclusions will not change following GRA reform.

5.54. The 2010 Act is largely reserved and responsibility for the legislation on the exceptions rests with the United Kingdom Government. The Women and Equalities Committee at the UK Parliament published a report on “Enforcing the Equality Act: the law and the role of Equality and Human Rights Commission” on 17 July 2019.<sup>61</sup>

5.55. Recommendation 15 by the Committee, and the UK Government response was:

“We do not believe that non-statutory guidance will be sufficient to bring the clarity needed in what is clearly a contentious area. We recommend that, in the absence of case law the EHRC develop, and the Secretary of State lay before Parliament, a dedicated Code of Practice, with case studies drawn from organisations providing services to survivors of domestic and sexual abuse. This Code must set out clearly, with worked examples and guidance, (a) how the Act allows separate services for men and women, or provision of services to only men or only women in certain circumstances, and b) how and under what circumstances it allows those providing such services to choose how and if to provide them to a person who has the protected characteristic of gender reassignment. (Paragraph 190)

<sup>60</sup> [www.legislation.gov.uk/ukpga/2010/15/schedule/3](http://www.legislation.gov.uk/ukpga/2010/15/schedule/3)

<sup>61</sup> <https://publications.parliament.uk/pa/cm201919/cmselect/cmwomeq/96/9602.htm>

As set out in response to recommendation 14, the Government is planning to develop and publish non-statutory guidance on how the Equality Act 2010's single and separate sex service exemptions apply. There are limitations to what could be achieved through statutory guidance as there is no case law in this space that moves beyond interpretation of the original legislation, so it would not be possible to set out 'rules' for the application of exemptions: statutory guidance must reflect existing law, it is not a means of establishing new law."

5.56. The Scottish Government agrees that while the 2010 Act's single and separate sex service exemptions will continue to apply after reform of the gender recognition process, non-statutory guidance by the UK Government could be helpful.

## **Conclusion**

5.57. The Scottish Government has carefully considered whether moving to a statutory declaration-based system for obtaining legal gender recognition, as outlined in the draft Bill, would impact adversely on the rights of women.

5.58. The key question in this context is very much about whether a change in the system for obtaining legal gender recognition would adversely affect women's rights. The Scottish Government has concluded that it would not.

5.59. In reaching this view, the Scottish Government has considered international experience. As outlined in Annex E, there are a variety of systems for obtaining legal gender recognition in other countries. There is no evidence from overseas which the Scottish Government is aware of which would suggest that moving to a statutory declaration-based system for obtaining legal gender recognition would impact adversely on the rights of women. Under the system which the Scottish Government is proposing for Scotland obtaining legal gender recognition will remain a serious step which could not be undertaken lightly.

## **CHAPTER 6: CONCLUSION**

### **Impact Assessments**

6.01. In line with usual practice, draft Impact Assessments have been prepared and are attached at the following Annexes:

- Annex F draft Business and Regulatory Impact Assessment (BRIA);
- Annex G: draft Child Rights and Wellbeing Impact Assessment (CRWIA);
- Annex H: draft Fairer Scotland Duty Assessment (FSDA);
- Annex I: draft Data Protection Impact Assessment (DPIA); and
- Annex J: draft Equality Impact Assessment Record (EQIA).

6.02 The Government would produce final versions of these impact assessments for the Bill once it is introduced into Parliament.

6.03 The Government does not consider that a Strategic Environmental Assessment (SEA) is required as there is no significant impact on the environment. In line with usual practice, the Scottish Government sent a pre-screening exemption from SEA to the SEA consultation authorities (the Scottish Environment Protection Agency; Scottish Natural Heritage and Historic Environment Scotland).

6.04 The Government does not consider that an Islands Impact Assessment (IIA) is required. No differential impact on the islands is envisaged.

6.05 In accordance with Parliamentary Standing Orders, the Government would prepare the following Accompanying Documents for the Bill when introduced into Parliament:

- A Policy Memorandum (this will outline the consultation and the policy underlying the Bill);
- A Financial Memorandum (this will be based on the BRIA); and
- Explanatory Notes to the Bill (a draft of these is at Annex D).

6.06 The Government would also prepare a Delegated Powers Memorandum, on powers in the Bill to make secondary legislation such as regulations.



Question 5. Do you have any comments on the draft Impact Assessments?

Yes

No

If yes, please outline these comments.

**Scottish Government**  
**December 2019**

**ANNEX A: RESPONDENT  
INFORMATION FORM**



**Scottish Government**  
Riaghaltas na h-Alba  
gov.scot

Gender Recognition Reform (Scotland) Bill

**RESPONDENT INFORMATION FORM**

**Please Note** this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:  
<https://www.gov.scot/privacy/>.

Are you responding as an individual or an organisation?

- Individual  
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

Where are you resident? (Please see one of the options below)

Scotland

Rest of the UK

Rest of the world

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
- Publish response only (without name)
- Do not publish response

**Information for organisations:**

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes
- No

## ANNEX B: CONSULTATION QUESTIONS

Question 1. Do you have any comments on the proposal that applicants must live in their acquired gender for at least 3 months before applying for a GRC?

Yes

No

If yes, please outline these comments.

Question 2. Do you have any comments on the proposal that applicants must go through a period of reflection for at least 3 months before obtaining a GRC?

Yes

No

If yes, please outline these comments.

Question 3. Should the minimum age at which a person can apply for legal gender recognition be reduced from 18 to 16?

Yes

No

Don't know

If you wish, please give reasons for your view.

Question 4. Do you have any other comments on the provisions of the draft Bill?

Yes

No

If yes, please outline these comments.

Question 5. Do you have any comments on the draft Impact Assessments?

Yes

No

If yes, please outline these comments.

**Gender Recognition Reform (Scotland) Bill**  
[CONSULTATION DRAFT]

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Schedule—Further modification of the 2004 Act and modification of other enactments

# Gender Recognition Reform (Scotland) Bill

## [CONSULTATION DRAFT]

An Act of the Scottish Parliament to reform the grounds and procedure for obtaining gender recognition; and for connected purposes

### *References to the 2004 Act*

#### **1 Meaning of “2004 Act”**

In this Act, the “2004 Act” means the Gender Recognition Act 2004.

### *Application for gender recognition certificate*

#### **2 Persons who may apply**

After section 8 of the 2004 Act insert—

### *“Applications to the Registrar General for Scotland*

#### **8A Persons who may apply to Registrar General for Scotland for gender recognition certificate**

- (1) A person of either gender may apply to the Registrar General for Scotland for a gender recognition certificate on the basis of living in the other gender if the person—
  - (a) is aged at least 16, and
  - (b) meets the condition in subsection (2).
- (2) The condition is that the person—
  - (a) is the subject of a Scottish birth register entry, or
  - (b) is not the subject of such an entry, but is ordinarily resident in Scotland.
- (3) In this Act, “Scottish birth register entry” means an entry containing a record of a person’s birth or adoption—
  - (a) in a register kept by the Registrar General for Scotland, or
  - (b) of which a certified copy is kept by the Registrar General for Scotland.
- (4) For the purposes of this Act, if a person is the subject of more than one UK birth register entry, the person is the subject of a Scottish birth register entry if the person’s most recent birth register entry is a Scottish birth register entry.”.

#### **3 Notice to be given on receipt of application**

After section 8A of the 2004 Act (inserted by section 2) insert—

**“8B Notice to be given by Registrar General for Scotland on receipt of application**

- (1) On receipt of an application under section 8A(1), the Registrar General for Scotland must notify the applicant in writing of the following matters—
  - (a) that the application has been received,
  - (b) that the reflection period has begun,
  - (c) the date on which that period ends,
  - (d) whether, if the application were granted, the Registrar General would issue a full gender recognition certificate or an interim gender recognition certificate,
  - (e) any statutory declaration or evidence which the applicant would have to give to the Registrar General under section 8D in order for the Registrar General to issue a full gender recognition certificate instead of an interim gender recognition certificate, if the application were granted,
  - (f) the effect of subsections (3) and (4).
- (2) At the same time as giving notice under subsection (1), the Registrar General must give the applicant such information as to the effect of the issue of a gender recognition certificate as the Registrar General considers appropriate.
- (3) The Registrar General must not determine the application unless, after the expiry of the reflection period, the applicant confirms by notice in writing that the applicant wishes to proceed with the application.
- (4) The application is to be treated as having been withdrawn if, at the end of the period of two years beginning with the day on which the reflection period ends, the applicant has not given the Registrar General a notice of confirmation under subsection (3) or withdrawn the application.
- (5) In this section, the “reflection period” is the period of three months beginning with the day on which the Registrar General gives notice under subsection (1).”.

**4 Grounds on which application to be granted**

After section 8B of the 2004 Act (inserted by section 3) insert—

**“8C Grounds on which application to be granted by Registrar General for Scotland**

- (1) The Registrar General for Scotland must grant an application under section 8A(1) if—
  - (a) the application includes a statutory declaration by the applicant that the applicant—
    - (i) is aged at least 16,
    - (ii) meets the condition in section 8A(2),
    - (iii) has lived in the acquired gender throughout the period of three months ending with the day on which the application is made, and
    - (iv) intends to continue to live in the acquired gender permanently, and



- (b) the application and the notice of confirmation under section 8B(3) comply with the requirements of—
  - (i) section 8D, and
  - (ii) any regulations made under section 8U(1)(d).
- (2) The Registrar General must reject an application under section 8A(1) if not required by subsection (1) to grant it.
- (3) In this Act, “the acquired gender”, in relation to a person who is applying or has applied for a gender recognition certificate under section 8A(1), means the gender in which the person is living when the application is made.”.

**5 Statutory declarations and other evidence in relation to marriage or civil partnership**

After section 8C of the 2004 Act (inserted by section 4) insert—

**“8D Statutory declarations and other evidence to be given to Registrar General for Scotland in relation to marriage or civil partnership**

- (1) An application under section 8A(1) must include a statutory declaration by the applicant as to whether or not the applicant is married or a civil partner.
- (2) Subsection (3) applies where—
  - (a) at the time the application is made, the applicant and another person (“P”) are the parties to a marriage or a civil partnership, and
  - (b) at the time the applicant gives notice of confirmation under section 8B(3), the applicant and P are still, or have since become, the parties to a marriage or civil partnership.
- (3) Either the application or the notice of confirmation must include—
  - (a) a statutory declaration by the applicant that the applicant—
    - (i) wishes the marriage or (as the case may be) civil partnership to continue after the issue of a full gender recognition certificate, or
    - (ii) does not wish the marriage or civil partnership to continue after the issue of a full gender recognition certificate, and
  - (b) either—
    - (i) a statutory declaration by P that P wishes the marriage or civil partnership to continue after the issue of a full gender recognition certificate, or
    - (ii) a statutory declaration by the applicant that no such declaration by P is included.
- (4) Where an application includes a statutory declaration under paragraph (a) or (b) of subsection (3) (the “first declaration”)—
  - (a) the notice of confirmation may include a further statutory declaration under that paragraph (the “second declaration”), and
  - (b) if there is a second declaration, the second declaration replaces the first declaration.

- (5) If an application or notice of confirmation includes a statutory declaration under subsection (3)(b)(i), the Registrar General for Scotland must give P notice that the application has been made.
- (6) Subsection (7) applies where—
  - (a) the applicant is married or a civil partner at the time the application is made, and
  - (b) before the applicant gives notice of confirmation under section 8B(3)—
    - (i) the marriage or (as the case may be) civil partnership is dissolved or annulled, or
    - (ii) the applicant’s spouse or (as the case may be) civil partner dies.
- (7) The notice of confirmation must include evidence of the dissolution or annulment or (as the case may be) death.
- (8) Subsection (7) applies whether or not the application included the statutory declarations mentioned in subsection (3).”.

## **6 Certificate to be issued**

After section 8D of the 2004 Act (inserted by section 5) insert—

### **“8E Certificate to be issued by the Registrar General for Scotland**

- (1) Where the Registrar General for Scotland grants an application under section 8A(1), the Registrar General must issue a gender recognition certificate to the applicant.
- (2) The certificate is to be a full gender recognition certificate if, at the time the application was made, the applicant was neither married nor in a civil partnership.
- (3) The certificate is to be a full gender recognition certificate if—
  - (a) at the time the application was made, the applicant was married or in a civil partnership, and
  - (b) the Registrar General is satisfied that, before the applicant gave notice of confirmation under section 8B(3)—
    - (i) the marriage or (as the case may be) civil partnership was dissolved or annulled, or
    - (ii) the applicant’s spouse or (as the case may be) civil partner died.
- (4) Subsections (5) and (6) apply where—
  - (a) at the time the application was made, the applicant was married to or in a civil partnership with another person (“P”), and
  - (b) at the time the applicant gave notice of confirmation under section 8B(3), the applicant and P were still, or had since become, the parties to a marriage or civil partnership.
- (5) The certificate is to be a full gender recognition certificate if both parties wish the marriage or (as the case may be) civil partnership to continue after the issue of a full gender recognition certificate.
- (6) Otherwise, the certificate is to be an interim gender recognition certificate.

- (7) If the Registrar General issues a full gender recognition certificate to a person under subsection (5), the Registrar General must give the person’s spouse or civil partner notice of the issue of the certificate.
- (8) The Scottish Ministers may by regulations specify the content and form of gender recognition certificates.
- (9) The Scottish Ministers must consult the Registrar General before making regulations under subsection (8).”.

**7 Issue of full gender recognition certificate to person with interim certificate**

After section 8E of the 2004 Act (inserted by section 6) insert—

*“Issue of full certificate in place of interim certificate (Scotland)*

**“8F Issue of full certificate by Registrar General for Scotland to applicant who is married or civil partner**

- (1) The Registrar General for Scotland must issue a full gender recognition certificate to a person to whom an interim gender recognition certificate has been issued if—
  - (a) the person applies to the Registrar General for a full gender recognition certificate under this subsection within the period of six months beginning with the day on which the interim gender recognition certificate is issued, and
  - (b) the Registrar General is satisfied that the condition in subsection (2) is met.
- (2) The condition is—
  - (a) when the interim gender recognition certificate was issued, the applicant and another person (“P”) were the parties to a marriage or civil partnership,
  - (b) the applicant and P are still, or have since become, the parties to a marriage or civil partnership, and
  - (c) the application under subsection (1)(a) includes a statutory declaration by P that P wishes the marriage or (as the case may be) civil partnership to continue after the issue of a full gender recognition certificate.
- (3) The Registrar General must reject an application under subsection (1) if not required by that subsection to grant it.
- (4) Where an application is made under subsection (1), the Registrar General must give P—
  - (a) notice of the application, and
  - (b) if the application is granted, notice of the issue of the full gender recognition certificate.

**8G Application under section 8F: death of spouse or civil partner**

- (1) Where an application is made under section 8F(1) and the applicant’s spouse or (as the case may be) civil partner dies before the application is determined—

- (a) the application is to be treated as an application made under section 8K(1), and
  - (b) that application is to be treated as having been made at the time when the application under section 8F(1) was made.
- (2) The Registrar General for Scotland must specify the period within which the applicant is to produce the required evidence in support of the new application.
- (3) In this section—
- “new application” means the application under section 8K(1) which the person is, by virtue of subsection (1), treated as having made,
  - “required evidence” means the evidence required by section 8K(4)(b).

**8H Issue of full certificate by sheriff to applicant who is married or civil partner**

- (1) A sheriff must issue a full gender recognition certificate to a person to whom an interim gender recognition certificate has been issued if—
- (a) the person applies to the sheriff for a full gender recognition certificate within the period of six months beginning with the day on which the interim gender recognition certificate is issued, and
  - (b) the sheriff is satisfied that the condition in subsection (2) is met.
- (2) The condition is—
- (a) when the interim gender recognition certificate was issued, the applicant and another person (“P”) were the parties to a marriage or a civil partnership,
  - (b) the applicant and P are still, or have since become, the parties to a marriage or civil partnership, and
  - (c) the applicant is not in possession of a statutory declaration by P that P wishes the marriage or (as the case may be) civil partnership to continue after the issue of a full gender recognition certificate.
- (3) The sheriff must reject an application under subsection (1) if not required by that subsection to grant it.
- (4) Where an application is made under subsection (1), the sheriff must—
- (a) give P notice of the application, and
  - (b) if the application is granted—
    - (i) give P notice of the issue of the full gender recognition certificate, and
    - (ii) give a copy of the certificate to the Registrar General for Scotland.
- (5) Proceedings under this section are to be heard in private if the applicant so requests.

**8I Issue of full certificate by court on divorce or dissolution of civil partnership (Scotland)**

- (1) Subsection (2) applies where—

- (a) a court grants—
    - (i) a decree of divorce on the ground that an interim gender recognition certificate has been issued to a party to the marriage, or
    - (ii) a decree of dissolution on the ground that an interim gender recognition certificate has been issued to a party to a civil partnership, and
  - (b) a full gender recognition certificate has not already been issued to that party under section 8H.
- (2) The court must—
- (a) issue a full gender recognition certificate to the party to whom the interim gender recognition certificate was issued, and
  - (b) give a copy of the full gender recognition certificate to the Registrar General for Scotland.
- (3) In this section, a reference to an interim gender recognition certificate includes a reference to an interim gender recognition certificate issued under this Act as it applies in England and Wales or Northern Ireland.

**8J Issue of full certificate by Registrar General for Scotland following divorce or dissolution of civil partnership**

- (1) The Registrar General for Scotland must issue a full gender recognition certificate to a person to whom an interim gender recognition certificate has been issued if—
- (a) the person applies to the Registrar General for a full gender recognition certificate under this subsection, and
  - (b) the Registrar General is satisfied that the condition in subsection (2) is met.
- (2) The condition is that, in proceedings instituted during the period of six months beginning with the day on which the interim gender recognition certificate was issued—
- (a) the person’s marriage was dissolved or annulled, otherwise than on the ground that the interim gender recognition certificate was issued, or
  - (b) the person’s civil partnership was dissolved or annulled, otherwise than on that ground.
- (3) The Registrar General must reject an application under subsection (1) if not required by that subsection to grant it.
- (4) An application under subsection (1) must—
- (a) be made within the period of six months beginning with the day on which the marriage or (as the case may be) civil partnership is dissolved or annulled,
  - (b) include evidence of—
    - (i) the dissolution or annulment, and

- (ii) the date on which the proceedings for the dissolution or annulment were instituted.

**8K Issue of full gender recognition certificate by Registrar General for Scotland following death of spouse or civil partner**

- (1) The Registrar General for Scotland must issue a full gender recognition certificate to a person to whom an interim gender recognition certificate has been issued if—
  - (a) the person applies to the Registrar General for a full gender recognition certificate under this subsection, and
  - (b) the Registrar General is satisfied that the condition in subsection (2) is met.
- (2) The condition is that the applicant’s spouse or civil partner died within the period of six months beginning with the day on which the interim gender recognition certificate was issued.
- (3) The Registrar General must reject an application under subsection (1) if not required by that subsection to grant it.
- (4) An application under subsection (1) must—
  - (a) be made within the period of six months beginning with the day on which the death occurs,
  - (b) include evidence of the death and the date on which it occurred.

**8L Application to Registrar General for Scotland or sheriff: calculation of periods of time**

- (1) Subsection (2) applies for the purpose of calculating the end of a period of months under sections 8B to 8K.
- (2) Where the period would end on the 29th, 30th or 31st day of a month but for the fact that the month does not include such a day, the period ends on the last day of the month.”.

*Gender recognition outwith Scotland*

**8 Gender recognition obtained outwith Scotland**

After section 8L of the 2004 Act (inserted by section 7) insert—

**“8M Gender recognition obtained elsewhere in the United Kingdom**

- (1) Where a person has been issued with a full gender recognition certificate under this Act as it applies in England and Wales or Northern Ireland—
  - (a) the person is to be treated for all purposes as if the person had, when that certificate was issued, been issued with a full gender recognition certificate by the Registrar General for Scotland, and
  - (b) accordingly, the person’s gender is the acquired gender.
- (2) In this Act, “the acquired gender”, in relation to a person mentioned in subsection (1), means the person’s gender under the law of England and Wales or Northern Ireland following the issue of the certificate.

**8N Gender recognition obtained outwith the United Kingdom**

- (1) Where a person has obtained overseas gender recognition—
  - (a) the person is to be treated for all purposes as if the person had, when that recognition was obtained, been issued with a full gender recognition certificate by the Registrar General for Scotland, and
  - (b) accordingly, the person’s gender is the acquired gender.
- (2) But subsection (1) does not apply if it would be manifestly contrary to public policy to treat the person as mentioned in subsection (1)(a).
- (3) In this Act—
  - (a) “overseas gender recognition” means gender recognition obtained in a country or territory outwith the United Kingdom which resulted in a person’s gender under the law of that country or territory becoming male instead of female, or female instead of male,
  - (b) “the acquired gender”, in relation to a person mentioned in subsection (1) (where that subsection applies), means the person’s gender under the law of the country or territory in which the person obtained gender recognition, following the recognition being obtained.
- (4) This section—
  - (a) applies whether or not the person has been issued with a confirmatory gender recognition certificate under section 8O,
  - (b) does not apply to a person who has been issued with a full gender recognition certificate under this Act (including as it applies in England and Wales or Northern Ireland).

**8O Issue of confirmatory gender recognition certificate by Registrar General for Scotland**

- (1) A person who has obtained overseas gender recognition may apply to the Registrar General for Scotland for a confirmatory gender recognition certificate.
- (2) A confirmatory gender recognition certificate is a certificate confirming that a person has obtained overseas gender recognition.
- (3) An application under subsection (1) must include—
  - (a) evidence of the overseas gender recognition obtained by the applicant, or
  - (b) if the applicant is unable to provide such evidence, a statutory declaration by the applicant as to the matters set out in subsection (4).
- (4) Those matters are—
  - (a) that the applicant has obtained overseas gender recognition,
  - (b) the reason that the applicant is unable to provide evidence of that recognition,
  - (c) the gender acquired by the applicant as a result of that recognition,
  - (d) the country or territory in which the recognition was obtained,

- (e) the date on which the recognition was obtained,
- (f) the place or register where details of the recognition—
  - (i) are available, or
  - (ii) if they are not available, would have been available and the reason why they are not available.
- (5) An application under subsection (1) must also set out the applicant’s reasons for making the application.
- (6) The Registrar General—
  - (a) may reject an application under subsection (1) if—
    - (i) the application includes a statutory declaration under subsection (3)(b), and
    - (ii) the Registrar General is not satisfied that evidence of the overseas gender recognition was unavailable,
  - (b) otherwise, must grant an application under subsection (1) if satisfied that the applicant has obtained overseas gender recognition.
- (7) Where the Registrar General grants an application under subsection (1), the Registrar General must issue a confirmatory gender recognition certificate to the applicant.
- (8) The Scottish Ministers may by regulations specify the content and form of confirmatory gender recognition certificates.
- (9) The Scottish Ministers must consult the Registrar General before making regulations under subsection (8).

**8P Determination by court of question as to overseas gender recognition**

- (1) This section applies where a question arises as to whether—
  - (a) a person has obtained overseas gender recognition, or
  - (b) it would be manifestly contrary to public policy to treat a person who has obtained overseas gender recognition as if the person had been issued with a full gender recognition certificate by the Registrar General for Scotland, in accordance with section 8N(1).
- (2) A court may make an order determining the question mentioned in subsection (1)—
  - (a) where the question arises in the course of civil proceedings before the court, or
  - (b) on an application being made to the court by a person who has an interest in the question.
- (3) An order under subsection (2) may determine the question—
  - (a) for all purposes, or
  - (b) for such purposes as are specified in the order.
- (4) Proceedings under this section are to be heard in private if the person to whom the question relates so requests.



- (5) Where a court makes an order under subsection (2), the court may make such other order as it considers appropriate in consequence of, or otherwise in connection with, the order under subsection (2).
- (6) In this section, “a court” means the Court of Session or a sheriff.
- (7) This section does not apply in relation to a person to whom a full gender recognition certificate has been issued under this Act (including as it applies in England and Wales or Northern Ireland).”.

*Further provision about applications and certificates*

**9 Review and appeal of decisions**

After section 8P of the 2004 Act (inserted by section 8) insert—

*“Review and appeal of decisions by Registrar General for Scotland*

**8Q Review of Registrar General for Scotland’s decision on application for certificate**

- (1) Subsection (2) applies where the Registrar General for Scotland has determined an application under—
  - (a) section 8A(1) for a gender recognition certificate,
  - (b) section 8F(1), 8J(1) or 8K(1) for a full gender recognition certificate, or
  - (c) section 8O(1) for a confirmatory gender recognition certificate.
- (2) The person who made the application (the “applicant”) may request that the Registrar General reviews the determination on the ground that—
  - (a) the application was incorrectly rejected, or
  - (b) in the case of an application under section 8A(1), the wrong type of gender recognition certificate was issued.
- (3) A request under subsection (2) is to be made in writing.
- (4) The Registrar General—
  - (a) must comply with the request if it is made within the period of 40 working days beginning with the day on which the application is determined,
  - (b) may (but need not) comply with the request if it is made after the end of that period.
- (5) Following a review under this section, the Registrar General must—
  - (a) if satisfied that—
    - (i) the application was incorrectly rejected, grant the application and issue a certificate to the applicant,
    - (ii) the wrong type of gender recognition certificate was issued, revoke the certificate that was issued and issue a new certificate to the applicant,
  - (b) otherwise, confirm the original determination.

- (6) For the purposes of subsection (4)(a), a working day is any day other than a Saturday, a Sunday or a day which, under the Banking and Financial Dealings Act 1971, is a bank holiday in Scotland.

**8R Appeal to sheriff against Registrar General for Scotland's decision following review**

- (1) Where the Registrar General for Scotland determines a review under section 8Q, the person who requested the review may appeal to the sheriff against the determination.
- (2) An appeal under subsection (1)—
  - (a) must be made within the period of 28 days beginning with the day on which the determination is made,
  - (b) may be made on a point of law only,
  - (c) is to be heard in private if the appellant so requests.
- (3) On an appeal under subsection (1) the sheriff may—
  - (a) allow the appeal and—
    - (i) where the application was incorrectly rejected, issue the certificate applied for,
    - (ii) where the wrong type of certificate was issued, revoke the certificate that was issued and issue a new certificate,
  - (b) allow the appeal and refer the matter to the Registrar General for redetermination, or
  - (c) dismiss the appeal.
- (4) Subsection (5) applies where—
  - (a) the sheriff issues a full gender recognition certificate under subsection (3)(a),
  - (b) the appellant and another person (“P”) were the parties to a marriage or civil partnership when the application to which the appeal relates was made, and
  - (c) when the appeal is determined, the appellant and P are still, or have since become, the parties to a marriage or civil partnership.
- (5) The sheriff must give P notice of the issue of the certificate.
- (6) The sheriff must give a copy of a certificate issued under subsection (3)(a) to the Registrar General.

**8S Revocation of certificate on application to the sheriff**

- (1) A person who has an interest in a gender recognition certificate may apply to the sheriff for the revocation of the certificate on the ground that—
  - (a) the Registrar General for Scotland issued the wrong type of gender recognition certificate under section 8E,
  - (b) the application for the certificate was fraudulent, or
  - (c) the person to whom the certificate was issued was incapable of—

- (i) understanding the effect of obtaining the certificate, or
  - (ii) validly making the application for the certificate.
- (2) A person who has an interest in a confirmatory gender recognition certificate may apply to the sheriff for the revocation of the certificate on the ground that the application for the certificate was fraudulent.
- (3) Where the sheriff grants an application under subsection (1) or (2), the sheriff—
  - (a) must revoke the certificate,
  - (b) if the application was made under subsection (1)(a), must—
    - (i) issue a new certificate to the person to whom the revoked certificate was issued, or
    - (ii) refer the matter back to the Registrar General for redetermination, and
  - (c) may make such other order as the sheriff considers appropriate in consequence of, or otherwise in connection with, the revocation of the certificate.
- (4) Subsection (5) applies where—
  - (a) the sheriff issues a full gender recognition certificate under subsection (3)(b)(i),
  - (b) the person to whom the certificate is issued (“A”) and another person (“P”) were the parties to a marriage or civil partnership when the application under section 8A(1) to which the certificate relates was made, and
  - (c) when the application under subsection (1) is determined, A and P are still, or have since become, the parties to a marriage or civil partnership.
- (5) The sheriff must give P notice of the issue of the certificate.
- (6) The sheriff must give a copy of a certificate issued under subsection (3)(b)(i) to the Registrar General.
- (7) Proceedings under this section are to be heard in private if the person to whom the certificate was issued so requests.”.

**10 Correction of error in certificate**

After section 8S of the 2004 Act (inserted by section 9) insert—

*“Correction of errors (Scotland)*

**8T Correction of error in certificate by Registrar General for Scotland**

- (1) Subsection (2) applies where the Registrar General for Scotland becomes aware that a gender recognition certificate or confirmatory gender recognition certificate issued by the Registrar General contains an error.
- (2) The Registrar General may issue a corrected certificate to the person to whom the certificate relates.
- (3) Nothing in this section enables the Registrar General to issue—

- (a) a full gender recognition certificate in place of an interim gender recognition certificate,
- (b) an interim gender recognition certificate in place of a full gender recognition certificate.”.

**11 Further provision about applications**

After section 8T of the 2004 Act (inserted by section 10) insert—

*“Further provision about applications to Registrar General for Scotland*

**8U Further provision about applications to Registrar General for Scotland**

- (1) The Registrar General for Scotland may by regulations make provision for or about—
  - (a) the form and manner in which an application is to be made,
  - (b) fees payable in connection with an application,
  - (c) the form and manner in which a notice under section 8B(3) is to be given,
  - (d) information or evidence to be included in an application or a notice under section 8B(3) (in addition to the information and evidence required by this Act),
  - (e) such other matters in connection with the making of an application as the Registrar General considers appropriate.
- (2) In subsection (1), “application” means an application made to the Registrar General for Scotland under—
  - (a) section 8A(1) for a gender recognition certificate,
  - (b) section 8F(1), 8J(1) or 8K(1) for a full gender recognition certificate,
  - (c) section 8O(1) for a confirmatory gender recognition certificate.
- (3) Regulations under subsection (1)(d) may require information or evidence to be included by way of statutory declaration.
- (4) Regulations under subsection (1)—
  - (a) may be made only with the consent of the Scottish Ministers,
  - (b) may make—
    - (i) incidental, supplementary, consequential, transitional, transitory or saving provision,
    - (ii) different provision for different purposes,
  - (c) may modify any enactment (including this Act).”.

**12 Copies of certificates to be given to other Registrars General**

After section 10 of the 2004 Act insert—

**“10A Copies of certificates to be given by Registrar General for Scotland to other Registrars General**

- (1) This section applies in relation to a full gender recognition certificate—

- (a) issued by the Registrar General for Scotland, or
  - (b) a copy of which is given to the Registrar General for Scotland under section 8H(4)(b)(ii), 8I(2)(b), 8R(6) or 8S(6).
- (2) The Registrar General for Scotland must send a copy of the certificate to the Registrar General for England and Wales if the person to whom it was issued—
- (a) is the subject of a UK birth register entry and the Registrar General for England and Wales keeps a certified copy of, or a register containing, that entry, or
  - (b) is a party to a marriage or a civil partnership under the law of England and Wales.
- (3) The Registrar General for Scotland must send a copy of the certificate to the Registrar General for Northern Ireland if the person to whom it was issued—
- (a) is the subject of a UK birth register entry and the Registrar General for Northern Ireland keeps a certified copy of, or a register containing, that entry, or
  - (b) is a party to a marriage or a civil partnership under the law of Northern Ireland.”.

### **13 Continuity of marriage or civil partnership**

After section 11D of the 2004 Act insert—

#### **“11E Continuity in Scotland of marriage or civil partnership**

- (1) The continuity of a marriage or civil partnership is not affected by the issuing of a full gender recognition certificate to either or both of the parties to the marriage or (as the case may be) civil partnership.
- (2) Subsection (3) applies in relation to a marriage or civil partnership under the law of England and Wales, Northern Ireland or a country or territory outwith the United Kingdom.
- (3) Subsection (1)—
  - (a) has effect notwithstanding anything in that law which affects the continuation of a marriage or civil partnership merely by virtue of the change or changes of gender occurring by virtue of the issue of the full gender recognition certificate or certificates,
  - (b) does not affect that law.”.

### **14 Offences**

After section 22 of the 2004 Act insert—

#### **“22A Offence of making false declaration or application (Scotland)**

- (1) A person commits an offence if the person knowingly makes a statutory declaration in accordance with this Act or regulations made under it which is false in a material particular.
- (2) A person commits an offence if the person knowingly includes any other information which is false in a material particular in—

- (a) an application under—
    - (i) section 8A(1) for a gender recognition certificate,
    - (ii) section 8F(1), 8J(1) or 8K(1) for a full gender recognition certificate, or
    - (iii) section 8O(1) for a confirmatory gender recognition certificate, or
  - (b) a notice of confirmation under section 8B(3).
- (3) A person who commits an offence under subsection (1) or (2) is liable—
- (a) on summary conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),
  - (b) on conviction on indictment to imprisonment for a term not exceeding two years or a fine (or both).”.

*Further modification of enactments*

**15 Further modification of enactments**

The schedule further modifies the 2004 Act and modifies other enactments.

*Final provisions*

**16 Ancillary provision**

- (1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act.
- (2) Regulations under this section may—
  - (a) make different provision for different purposes,
  - (b) modify any enactment.
- (3) Regulations under this section—
  - (a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act,
  - (b) otherwise, are subject to the negative procedure.

**17 Commencement**

- (1) This section and sections 16 and 18 come into force on the day after Royal Assent.
- (2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.
- (3) Regulations under this section may—
  - (a) include transitional, transitory or saving provision,
  - (b) make different provision for different purposes.

**18 Short title**

The short title of this Act is the Gender Recognition Reform (Scotland) Act 2021.

SCHEDULE  
*(introduced by section 15)*

FURTHER MODIFICATION OF THE 2004 ACT AND MODIFICATION OF OTHER ENACTMENTS

**PART 1**

GENDER RECOGNITION ACT 2004

- 1 The 2004 Act is amended in accordance with this Part.
- 2 The following provisions are repealed—
  - (a) section 1 and schedule 1,
  - (b) sections 2 to 8, apart from section 4(4),
  - (c) sections 11A to 11D,
  - (d) section 21.
- 3 In section 10—
  - (a) in subsection (1), after “issued” insert “under this Act as it applies in England and Wales and Northern Ireland”,
  - (b) subsection (1A) is repealed,
  - (c) in subsection (1B)—
    - (i) after “Gender Recognition Panel” insert “under this Act as it applies in England and Wales or Northern Ireland”,
    - (ii) the words “or the sheriff” are repealed,
    - (iii) for “protected Scottish marriage or a protected Scottish civil partnership” substitute “marriage solemnised in Scotland or civil partnership registered in Scotland”.
- 4 In section 17—
  - (a) in subsection (1), for “a full gender recognition certificate has been issued to any person or revoked” substitute “a person’s gender has become, or ceased to be, the acquired gender”,
  - (b) in subsection (2), for “a full gender recognition certificate has been issued to any person or revoked” substitute “a person’s gender has become, or ceased to be, the acquired gender”.
- 5 In section 18, in subsection (2), for “Court of Session” substitute “sheriff”.
- 6 In section 20, in subsection (1), for “to whom a full gender recognition certificate has been issued were not” substitute “had not become”.
- 7 In section 22, for subsection (2) substitute—
  - “(2) “Protected information” means information which relates to a person—
    - (a) who has made an application for a gender recognition certificate or a confirmatory gender recognition certificate under this Act, and which concerns that application or any other application by the person under this Act, or
    - (b) whose gender has become the acquired gender, and which concerns the person’s gender before it became the acquired gender.

(2A) In this section, a reference to an application under this Act includes a reference to an application under this Act as it applies in England and Wales or Northern Ireland.”.

8 In section 24—

(a) after subsection (5) insert—

“(5ZA) Regulations made by the Scottish Ministers under section 8E(8) or 8O(8)—

- (a) may make incidental, supplementary, consequential, transitional, transitory or saving provision,
- (b) may make different provision for different purposes,
- (c) are subject to the negative procedure.”,

(b) in subsection (5A), after “under” insert “—

(a) section 8U(1) are subject to—

- (i) the affirmative procedure if they add to, omit or replace any part of the text of an Act,
- (ii) otherwise, the negative procedure,

(b)”.

9 (1) Section 25 is amended as follows.

(2) In subsection (1)—

(a) in the definition of “the acquired gender”, for “section 1(2)” substitute “sections 8C(3), 8M(2) and 8N(3)(b),”,

(b) after the definition of “the appointed day” insert—

““confirmatory gender recognition certificate” means a certificate issued as such under section 8O(6)(b), 8Q(5)(a) or 8R(3)(a),”,

(c) for the definition of “full gender recognition certificate” substitute—

““full gender recognition certificate” means a certificate issued as such under section 8E(2), (3) or (5), 8F(1), 8H(1), 8I(2)(a), 8J(1), 8K(1), 8Q(5)(a), 8R(3)(a) or 8S(3)(b),

“gender recognition certificate” means a full gender recognition certificate or an interim gender recognition certificate,

“interim gender recognition certificate” means a certificate issued as such under section 8E(6), 8Q(5)(a), 8R(3)(a) or 8S(3)(b),”,

(d) after the definition of “interim gender recognition certificate” (inserted by paragraph (c)) insert—

““overseas gender recognition” has the meaning given by section 8N(3)(a),

“Scottish birth register entry” has the meaning given by section 8A(3),”,

(e) the definitions of the following terms are repealed—

- (i) approved country or territory,
- (ii) gender dysphoria,
- (iii) Gender Recognition Panel,



- (iv) protected civil partnership,
  - (v) protected marriage,
  - (vi) protected Scottish civil partnership,
  - (vii) protected Scottish marriage,
  - (viii) registered psychologist,
  - (ix) statutory declaration of consent.
- (3) After subsection (1) insert—
- “(1A) A reference in any enactment to the fact that a person’s gender has become the acquired gender under this Act includes a reference to the fact that a person’s gender is the acquired gender by virtue of section 8M or 8N.”.
- 10 (1) Part 2 of schedule 3 is amended as follows.
- (2) In paragraph 14—
- (a) before sub-paragraph (1) insert—
    - “(A1) Sub-paragraph (1) applies where the Registrar General for Scotland—
      - (a) issues a full gender recognition certificate or a confirmatory gender recognition certificate to a person who is the subject of a Scottish birth register entry,
      - (b) receives a copy of a full gender recognition certificate issued to such a person by a court under section 8H, 8I, 8R or 8S, or
      - (c) receives under section 10(1) a copy of a full gender recognition certificate issued to a person under this Act as it applies in England and Wales or Northern Ireland.”,
    - (b) in sub-paragraph (1), the words from “If” to “person” are repealed,
    - (c) in sub-paragraph (2), for “6(1)” substitute “8T(1)”.
- (3) In paragraph 19—
- (a) for sub-paragraph (1) substitute—
    - “(1) Sub-paragraphs (2) and (3) apply if, after an entry has been made in the Gender Recognition Register in relation to a person—
      - (a) the Court of Session or a sheriff revokes the certificate to which the entry relates, or
      - (b) the High Court of Justice makes an order quashing the decision to grant the person’s application for a gender recognition certificate under this Act as it applies in England and Wales or Northern Ireland.”,
    - (b) in sub-paragraph (2), for “or the Court of Session” substitute “, Court of Session or sheriff”,
    - (c) after sub-paragraph (3) insert—
      - “(4) The Registrar General must cancel an entry in the Gender Recognition Register if the Registrar General revokes the certificate to which the entry relates.”.
- (4) In paragraph 20A—
- (a) in sub-paragraph (4)—

- (i) in the definition of “qualifying Scottish civil partnership”, after “certificate” insert “or a confirmatory gender recognition certificate”,
  - (ii) in the definition of “qualifying Scottish marriage”, after “certificate” insert “or a confirmatory gender recognition certificate”,
- (b) after that sub-paragraph insert—
- “(5) In sub-paragraph (4), a reference to a full gender recognition certificate includes a reference to a full gender recognition certificate issued under this Act as it applies in England and Wales or Northern Ireland.”.

## PART 2

### OTHER ENACTMENTS

#### *Divorce (Scotland) Act 1976*

- 11 In section 1 of the Divorce (Scotland) Act 1976 (grounds of divorce)—
- (a) in subsection (1)(b), after “2004” insert “(as it applies in Scotland, England and Wales or Northern Ireland)”,
  - (b) in subsection (3B)—
    - (i) in paragraph (a), for “under the Gender Recognition Act 2004, the Gender Recognition Panel issue a full gender recognition certificate” substitute “a full gender recognition certificate under the Gender Recognition Act 2004 (as it applies in Scotland, England and Wales or Northern Ireland) is issued”,
    - (ii) in paragraph (b), for “4E” substitute “8H”.

#### *Criminal Law (Consolidation) (Scotland) Act 1995*

- 12 In section 44 of the Criminal Law (Consolidation) (Scotland) Act 1995 (false statements and declarations), after subsection (2) insert—
- “(2A) Subsection (2)(a) does not apply to a statutory declaration made in accordance with the Gender Recognition Act 2004 or regulations made under section 8U(1)(d) of that Act.”.

#### *Civil Partnership Act 2004*

- 13 In section 117 of the Civil Partnership Act 2004 (dissolution)—
- (a) in subsection (2)(b), after “(c. 7)” insert “(as it applies in Scotland, England and Wales or Northern Ireland)”,
  - (b) in subsection (3A)—
    - (i) in paragraph (a), for “under the Gender Recognition Act 2004, the Gender Recognition Panel issue a full gender recognition certificate” substitute “a full gender recognition certificate under the Gender Recognition Act 2004 (as it applies in Scotland, England and Wales or Northern Ireland) is issued”,
    - (ii) in paragraph (b), for “4E” substitute “8H”.

*Marriage and Civil Partnership (Scotland) Act 2014*

- 14 In section 30 of the Marriage and Civil Partnership (Scotland) Act 2014 (renewed marriage or civil partnership following issue of full gender recognition certificate)—
- (a) in subsection (1)(a)—
    - (i) for “protected Scottish marriage” substitute “marriage solemnised in Scotland”,
    - (ii) after “certificate” insert “or a confirmatory gender recognition certificate”,
  - (b) in subsection (1)(b)—
    - (i) for “protected Scottish civil partnership” substitute “civil partnership registered in Scotland”,
    - (ii) after “certificates” insert “or a confirmatory gender recognition certificate”,
  - (c) in subsection (2)—
    - (i) in paragraph (a), the words “protected Scottish” are repealed,
    - (ii) in paragraph (b), the words “protected Scottish” are repealed,
  - (d) for subsection (7) substitute—
    - “(7) In this section—
      - (a) “full gender recognition certificate” has the meaning given by section 25(1) of the Gender Recognition Act 2004 and includes a full gender recognition certificate issued under that Act as it applies in England and Wales or Northern Ireland,
      - (b) “confirmatory gender recognition certificate” has the meaning given by section 25(1) of the Gender Recognition Act 2004.”.

*Courts Reform (Scotland) Act 2014*

- 15 In schedule 1 of the Courts Reform (Scotland) Act 2014 (civil jurisdiction of summary sheriff), after paragraph 5 insert—
- “Proceedings in relation to overseas gender recognition*
- 5A Proceedings for or in relation to an order under section 8P of the Gender Recognition Act 2004.”.

*The Gender Recognition (Approved Countries and Territories) Order 2011*

- 16 The Gender Recognition (Approved Countries and Territories) Order 2011 (S.I. 2011/1630) is revoked.

## **ANNEX D: DRAFT EXPLANATORY NOTES TO THE GENDER RECOGNITION REFORM (SCOTLAND) BILL**

### **Introduction**

1. The Gender Recognition Reform (Scotland) Bill (“the Bill”) amends the Gender Recognition Act 2004 (“the GRA”), to reform the grounds and procedure for obtaining gender recognition.

2. These draft Explanatory Notes outline the effect of the provisions of the Bill. When the Bill is introduced into the Scottish Parliament, the Scottish Government will also, in line with the Parliament’s Standing Orders, prepare:

- Explanatory Notes (based on this draft).
- A Policy Memorandum.
- A Financial Memorandum.
- A Delegated Powers Memorandum (on powers to make regulations and orders).
- A statement of legislative competence.

3. The Scottish Government will also publish Impact Assessments. Drafts of these Impact Assessments are attached to the consultation, for comment.

4. These draft Explanatory Notes are provided to help consultees understand the proposals contained in the draft Bill attached to the consultation. These Notes are not meant to be an authoritative interpretation of the law: that can only be provided by the courts.

### **Background**

5. The origins of the GRA; the way in which the current system for obtaining legal gender recognition works; and the Scottish Government’s proposed changes to the system are outlined in the consultation. Key aspects of the proposals for obtaining legal gender recognition in the future are:

- The removal of current medical requirements;
- The removal of the need to apply to the Gender Recognition Panel (“the GRP”);
- The gender recognition process should apply to those aged at least 16, thereby reducing the minimum age from 18;<sup>62</sup>
- Applications should be made to the Registrar General for Scotland (“the Registrar General”);

<sup>62</sup> The consultation seeks views on whether the minimum age for applying for gender recognition should be reduced from 18 to 16.

- Applicants must either (a) be the subject of an entry in a birth or adoption record kept by the Registrar General<sup>63</sup> or (b) be ordinarily resident in Scotland;
- Applicants must declare that they have lived in their acquired gender throughout the period of 3 months occurring immediately before submitting an application for gender recognition (the current requirement is 2 years),<sup>64</sup> and that they intend to continue to live in their acquired gender permanently;
- The Registrar General may not determine an application until after the expiry of a 3 month reflection period, and may only determine the application if the applicant thereafter confirms (within 2 years) that they wish to proceed with it;
- The Registrar General should, where required, grant a full Gender Recognition Certificate (“GRC”) to a single applicant. A full GRC provides legal gender recognition;
- The Registrar General should grant a full GRC to a married applicant or applicant in a civil partnership if both parties wish the marriage or civil partnership to continue after the issue of the full GRC, and this is evidenced by statutory declarations from both. If either party does not wish the marriage or civil partnership to continue, the Registrar General would instead grant an interim GRC.

## **Provisions in the Bill**

### Section 1: Meaning of “2004 Act”

6. Section 1 provides that, in the Bill, the “2004 Act” means the Gender Recognition Act 2004. (In these Explanatory Notes, the 2004 Act is referred to as the “GRA”).

### Section 2: persons who may apply

7. Section 2 inserts new section 8A into the GRA.

8. The new section enables a person to apply to the Registrar General for a GRC if the person is aged at least 16 and is either (a) the subject of an entry in a birth or adoption record kept by the Registrar General or (b) ordinarily resident in Scotland.

### Section 3: notice to be given on receipt of application

9. Section 3 inserts new section 8B into the GRA.

<sup>63</sup> Or the subject of an entry in the Parental Order Register maintained by the Registrar General for Scotland. Parental orders under section 54 and 54A of the Human Fertilisation and Embryology Act 2008 follow a surrogacy arrangement, which replaced parental orders under section 30 of the Human Fertilisation and Embryology Act 1990. The Parental Order Register is currently maintained by the Registrar General under the Human Fertilisation and Embryology (Parental Orders) Regulations 2018 which replaced earlier similar regulations.

<sup>64</sup> Except for applications under the overseas track (when a person has obtained legal gender recognition overseas) when no minimum period is laid down.

10. The new section makes provision about notifications which the Registrar General must provide to the applicant.

11. It sets out the information which the Registrar General must provide to the applicant in relation to the handling of the application, and requires the Registrar General to provide certain information as to the effect of the issue of a GRC (subsections (1) and (2)).

12. It also provides that the Registrar General must not determine the application unless, after the end of a 3 month reflection period, the applicant confirms that they wish to proceed with it (subsection (3)). This confirmation is referred to in the Bill as the “notice of confirmation”.

13. Under new section 8U(1)(c) of the GRA (inserted by section 11 of the Bill), the Registrar General, with the consent of the Scottish Ministers, may make regulations about the form and manner in which a notice of confirmation is given. By virtue of an amendment to the GRA (by paragraph 8(b) of the schedule of the Bill), any such regulations are subject to the affirmative procedure if they add to, omit or replace any part of the text of an Act. Otherwise, they are subject to the negative procedure.

14. If the applicant has not, within 2 years of the reflection period ending, given the Registrar General written notice of their intention to proceed (or has otherwise withdrawn the application), the application is treated as having been withdrawn (subsection (4)). This provides administrative certainty in a case where the applicant fails to confirm they wish to proceed, as it gives an end date for applications.

#### Section 4: grounds on which application to be granted

15. Section 4 inserts new section 8C into the GRA.

16. The new section requires the Registrar General to grant an application for a GRC if the applicant has provided a statutory declaration that the applicant:

- Is aged at least 16;
- Has a record of their birth or adoption in a register (or a certified copy is) kept by the Registrar General, or is otherwise ordinarily resident in Scotland;
- Has lived in their acquired gender for at least the previous 3 months;
- Intends to live permanently in their acquired gender;
- The application and the notice of confirmation comply with new section 8D of the GRA (added by section 5 of the Bill) which concerns evidence to be given in relation to marriage or civil partnership, and with any regulations made under new section 8U(1)(d) (added to the GRA by section 11 of the Bill).

17. A “statutory declaration” is an existing feature of the process for obtaining legal gender recognition: the relevant legislation on statutory declarations is the Statutory Declarations Act 1835.<sup>65</sup> A statutory declaration is similar to an affidavit and is a formal statement that something is true to the best of the knowledge of the person making the declaration. The statutory declaration will be made in the presence of a notary public (most solicitors in Scotland are notaries public) or a justice of the peace.

18. It is an existing offence (by virtue of section 44(2)(a) of the Criminal Law (Consolidation) (Scotland) Act 1995) to knowingly and wilfully make a false statutory declaration. The Bill creates a new specific offence in respect of false statutory declarations relating to gender recognition. This is provided for by section 14, which inserts new section 22A into the GRA. In consequence of this new specific offence, the existing general offence in section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 is amended (by paragraph 12 of the schedule of the Bill) so that it no longer applies in relation to a statutory declaration made in accordance with the GRA or regulations made under new section 8U(1)(d) of the GRA.

#### Section 5: statutory declarations and other evidence in relation to marriage or civil partnership

19. Section 5 inserts new section 8D into the GRA.

20. The new section provides that an application for a GRC under new section 8A(1) of the GRA must include a statutory declaration by the applicant as to whether the applicant is married or in a civil partnership.

21. Where the applicant is married or in a civil partnership, the applicant must, (under subsection (3)), include in the application or notice of confirmation:

- A statutory declaration by the applicant that the applicant either wishes or does not wish the marriage or the civil partnership to continue after the issue of a full GRC; and
- Either, a statutory declaration by the applicant’s spouse or civil partner that they wish the marriage or civil partnership to continue after the issue of a full GRC or a statutory declaration by the applicant that no such declaration by the spouse or civil partner is included.

22. By virtue of subsection (4), a statutory declaration included in a subsequent notice of confirmation replaces any corresponding declaration previously provided with the original application.

<sup>65</sup> The 1835 Act is at [www.legislation.gov.uk/ukpga/Will4/5-6/62/contents](http://www.legislation.gov.uk/ukpga/Will4/5-6/62/contents)

23. Under subsection (5), if the application includes a statutory declaration by the applicant's spouse or civil partner that they wish the marriage or civil partnership to continue, the Registrar General must notify the spouse or civil partner that an application for a GRC has been made.

24. Subsections (6), (7) and (8) make provision for cases where the applicant's marriage or civil partnership is ended by dissolution, annulment or the other party's death in the period between the application being made and the applicant providing the "notice of confirmation" (within a period of two years after the reflection period).

#### Section 6: certificate to be issued

25. Section 6 inserts new section 8E into the GRA.

26. The new section sets out circumstances in which the Registrar General must issue either a full GRC or an interim GRC to an applicant, in a case where the Registrar General grants an application made under new section 8A(1) of the GRA.

27. Where the applicant was single at the time the application was made or becomes single before the applicant gives the notice of confirmation (due to dissolution, annulment or the other party's death), the Registrar General will issue a full GRC (subsections (2) and (3)).

28. Where the applicant is married or in a civil partnership with another person (and at the time of giving notice of confirmation, both are still or have become the parties to a marriage or civil partnership), and both parties wish the marriage or civil partnership to continue after the issue of a full GRC, the Registrar General will issue a full GRC and give notice of this to the applicant's spouse or civil partner (subsections (5) and (7)). In other cases, the Registrar General will issue an interim GRC (subsection (6)). These provisions apply regardless of whether the marriage or civil partnership took place in Scotland or elsewhere.

29. Subsection (4)(b) refers to persons who were still, or had become, the parties to a marriage or civil partnership. This takes account of the fact that the relationship between the parties at the point when the applicant gives notice of confirmation may not be the same as when the applicant first applied for a GRC. For example, the couple may have changed their relationship from a civil partnership to a marriage. (Similar references in new sections 8D(2)(b), 8F(2)(b), 8H(2)(b) and 8R(4)(c) of the GRA, as inserted by sections 5 to 7 and 9 of the Bill, address the same point.)

30. The new section does not require the Registrar General to notify the applicant's spouse or civil partner when an interim GRC is issued. This takes account of the fact that, in circumstances where the spouse or civil partner does not wish the relationship to continue after the issue of a full GRC, the Registrar General may not have contact details for the spouse or civil partner.



31. The Scottish Ministers may, after consulting the Registrar General, make regulations specifying the content and form of full and interim GRCs (subsections (8) and (9)). By virtue of the amendments made by paragraph 8(a) of the schedule of the Bill, any such regulations will be subject to the negative procedure.

Section 7: issue of full gender recognition certificate to person with interim certificate

32. Section 7 inserts new sections 8F, 8G, 8H, 8I, 8J, 8K and 8L into the GRA.

33. These new sections relate to when a full GRC may be issued in place of an interim GRC. Broadly similar existing provision in the GRA will, in consequence, be repealed by paragraph 2 of the schedule of the Bill.

*New section 8F*

34. This new section requires the Registrar General, upon application by a person within 6 months of being issued an interim GRC, to issue a full GRC to the person if certain conditions are met including that the application contains a statutory declaration by the applicant's spouse or civil partner that they wish the marriage or civil partnership to continue after the issue of a full GRC. This caters for cases where the spouse or civil partner changes their mind and decides to stay in the relationship.

*New section 8G*

35. Where an application is made under section 8F of the GRA and the applicant's spouse or civil partner dies before the application is determined, this new section provides that the application is to be treated instead as an application having been made under new section 8K(1) of the GRA. It also requires the Registrar General to specify the period within which the applicant must produce the required evidence to support the application under section 8K(1).

*New section 8H*

36. Under the existing provisions of the GRA, the GRP may grant and issue a full GRC to a married applicant, but only if the application includes a statutory declaration by the applicant's spouse consenting to the marriage continuing after the issue of a full GRC. If the applicant's spouse has not made any such a statutory declaration, the GRP must issue an interim GRC instead.

37. However, under existing section 4E of the GRA,<sup>66</sup> a person issued with an interim GRC in these circumstances (who is in a marriage solemnised in Scotland) may apply to the sheriff for a full GRC. On civil partnerships, the Civil Partnership (Scotland) Bill currently before the Parliament<sup>67</sup> includes provision to amend section 4E so that an equivalent application may be made by a civil partner.

38. Under the new general recognition system being established by the Bill, the Registrar General will be able to grant and issue a full GRC to a married person or a person in a civil partnership, but again only if the person has a statutory declaration from their spouse or civil partner that they wish the relationship to continue.

39. New section 8H provides that, where any such person is issued with an interim GRC, the person may (within 6 months) apply to the sheriff for a full GRC. The sheriff must issue a full GRC if satisfied that the condition in subsection (2) is met, including that the applicant is not in possession of a statutory declaration by the spouse or civil partner that they wish the marriage or civil partnership to continue. This new section ensures that any such applicant may still obtain a full GRC from the sheriff without the consent of the applicant's spouse or civil partner. But the sheriff must notify the spouse or civil partner of the application and, if granted, notify the spouse or civil partner of the issue of the full GRC. In consequence of the new section (making provision which is broadly equivalent to section 4E of the GRA), paragraph 2 of the schedule of the Bill repeals section 4E.

#### *New section 8I*

40. Under this new section, a court granting a divorce or dissolution on the ground of an interim GRC issued to a party in a marriage or civil partnership (including an interim GRC issued elsewhere in the United Kingdom under the GRA) must issue a full GRC and give a copy to the Registrar General, unless a full GRC has already been issued under new section 8H.

#### *New section 8J*

41. This new section requires the Registrar General to, on application, issue a full GRC to a person who already has an interim GRC if, in proceedings instituted within 6 months of the issue of the interim GRC (subsection (2)), the person's marriage or civil partnership is dissolved or annulled.

<sup>66</sup> <http://www.legislation.gov.uk/ukpga/2004/7/section/4E>

<sup>67</sup> <https://www.parliament.scot/parliamentarybusiness/Bills/112997.aspx>. Paragraph 5(7) of schedule 2 refers.

42. This does not extend to cases where the ground of divorce or dissolution is that the interim GRC was issued. This is because where the court grants a decree or dissolution on this ground, the court must separately issue a full GRC by virtue of section 8I (provided one has not already been issued to the party under section 8H).

43. Under subsection (4), the application to the Registrar General must be made within 6 months of the marriage or civil partnership being dissolved or annulled.

#### *New section 8K*

44. This new section requires the Registrar General to, on application, issue a full GRC to a person who already has an interim GRC if the person's spouse or civil partner dies within 6 months of the issue of an interim GRC (subsection (2)). The application must be made within 6 months of the death (subsection (4)).

#### *New section 8L*

45. This new section provides that where a period of months referred to in sections 8B to 8K would end on the 29th, 30th or 31st day but the month does not include such a day, the period ends on the last day of the month.

#### Section 8: gender recognition obtained outwith Scotland

46. Section 8 inserts new sections 8M, 8N, 8O and 8P into the GRA.

#### *New section 8M*

47. This new section provides that, where a person has obtained a full GRC under the GRA in another part of the United Kingdom, the person is to be treated as if the person had been issued with a full GRC by the Registrar General for Scotland.

#### *New section 8N*

48. This new section provides that, where a person has obtained 'overseas gender recognition' (as defined), the person is to be treated as if the person had been issued with a full GRC by the Registrar General for Scotland. But this rule doesn't apply if it would be manifestly contrary to public policy (for example, in a case where gender recognition was obtained overseas at a very young age). Whether or not a public policy exception applies will depend on the facts and circumstances, and may be determined by the courts under new section 8P.

49. In broad terms, this approach is similar to the current approach taken in Scotland to validity of marriages entered into outwith Scotland<sup>68</sup> and recognition of divorce obtained overseas.<sup>69</sup>

50. At the moment, overseas gender recognition is not recognised automatically in the UK (including Scotland). Persons who have obtained gender recognition overseas who wish to be recognised in the UK have to apply for a GRC issued by the GRP under its overseas track.<sup>70</sup>

51. The overseas track operated by the GRP can be used when a person has obtained gender recognition in an “approved country or territory” listed in a statutory instrument made by the Secretary of State after consulting with the Scottish Ministers and the Department of Finance and Personnel in Northern Ireland. Paragraph 16 of the schedule to the Bill revokes for Scotland the current statutory instrument on approved countries and territories as it is no longer needed once gender recognition obtained overseas is automatically recognised in Scotland.

#### *New section 80*

52. This new section enables a person who has obtained ‘overseas gender recognition’ to apply to the Register General for a confirmatory GRC. It sets out what the application must contain, and how the Registrar General will deal with it. There is no obligation on any person to apply for a confirmatory GRC but it may be helpful to put the matter beyond doubt. In addition, a person may wish to apply for a confirmatory GRC if they wish an amendment to be made to a register entry (for birth, marriage or civil partnership) held by the Registrar General.

53. Subsections (8) and (9) empower the Scottish Ministers, after consulting the Registrar General, to make regulations on the form and content of a confirmatory GRC. These regulations would be subject to the negative procedure, by virtue of the provision made at paragraph 8(a) of the schedule.

<sup>68</sup> Section 38 of the Family Law (Scotland) Act 2006 refers:

<http://www.legislation.gov.uk/asp/2006/2/section/38>

<sup>69</sup> Part II of the Family Law Act 1986 refers <http://www.legislation.gov.uk/ukpga/1986/55/part/II>  
Part II of the 1986 Act implements the Hague Convention on the Recognition of Divorces and Legal Separations: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=80>

<sup>70</sup> There is a limited exception. Section 21(6) of the GRA currently provides some acknowledgement of the need to recognise gender recognition obtained elsewhere in the European Union. Paragraph 1(2)(d) of the schedule to the Bill repeals section 21 for Scotland as it is no longer required given the Bill provides automatic recognition of gender recognition obtained overseas.

*New section 8P*

54. This new section applies where a question arises as to whether a person has obtained overseas gender recognition or, if so, whether it would be manifestly contrary to public policy to treat the person as if the person had been issued with a full GRC by the Registrar General. It provides that a court may make an order determining the question, if the question arises in the course of civil proceedings before the court or on an application to the court by a person having an interest in it.

Section 9: Review and appeal of decisions

55. Section 9 inserts new sections 8Q, 8R and 8S into the GRA.

*New section 8Q*

56. This new section provides that, where the Registrar General has determined an application for a GRC or a confirmatory GRC, the applicant may request a review of the decision on the ground that the application was incorrectly rejected or that the wrong type of GRC was issued.

57. In line with usual practice for internal reviews of decisions of this nature, the Registrar General would be expected to make arrangements to ensure that staff carrying out the review had not been involved in taking the original decision.

58. The Registrar General must carry out a review if the request is made within working 40 days of the original decision and may do so if it is made after 40 days (subsection (4)). Subsection (5) sets out the steps the Registrar General must take following the review.

*New section 8R*

59. This new section ensures that, if the applicant remains dissatisfied after the review carried out by the Registrar General, the applicant can appeal to the sheriff.

*New section 8S*

60. This new section enables a person who has a genuine interest (such as the Registrar General) in a GRC to apply to a sheriff to revoke the GRC on various grounds (subsection (1)). The grounds are that the wrong type of GRC was issued, the application for it was fraudulent, the applicant was incapable of understanding the effect of it, or the applicant was incapable of validly making the application.

61. This new section also enables a person who has an interest in a confirmatory GRC to apply to a sheriff for the revocation of the certificate on the ground that the application for it was fraudulent (subsection 2).

62. Where the sheriff grants any such application, subsection (3) specifies the further steps that the sheriff must take and the sheriff's supplementary powers. Subsections (4) to (6) also require the sheriff to notify, in certain circumstances, the applicant's spouse or civil partner of the issue of a full GRC to the applicant, and to send a copy of the GRC to the Registrar General.

63. Subsection (7) provides that proceedings under new section 8S are to be held in private if the person to whom the GRC was issued so requests.

64. It is possible that provisions in the Bill may give rise to a need for rules of court. If required, the Scottish Government would, in line with usual practice, prepare a policy paper on proposed court rules for the Family Law Committee of the Scottish Civil Justice Council.<sup>71</sup>

#### Section 10: Correction of error in certificate

65. Section 10 inserts new section 8T into the GRA.

66. The new section empowers the Registrar General to correct a GRC (including a confirmatory one) if the Registrar General becomes aware that it contains an error (such as where a name on the GRC has been spelt incorrectly). This power does not extend to cases where the wrong type of GRC was issued, as that is for the review and appeal process outlined at new sections 8Q and 8R.

#### Section 11: further provision about applications

67. Section 11 inserts new section 8U into the GRA.

68. The new section empowers the Registrar General, with the consent of the Scottish Ministers, to make Regulations about:

- The form and manner in which an application for a GRC is to be made;
- Fees payable in connection with an application for a GRC;
- The form and manner in which a notice of confirmation is to be given;
- Information or evidence to be included in an application for a GRC or a notice of confirmation;
- Other matters in connection with the making of an application for a GRC.

69. By virtue of paragraph 8(b) of the schedule of the Bill, any such regulations are subject to the affirmative procedure if they add to, omit or replace any part of the text of an Act. Otherwise, they are subject to the negative procedure.

<sup>71</sup> Information on the Family Law Committee of the Scottish Civil Justice Council is at <https://www.scottishciviljusticecouncil.gov.uk/committees/family-law-committee>

## Section 12: copies of certificates to be given to other Registrars General

70. Section 12 inserts new section 10A into the GRA.

71. The new section provides that, where a full GRC is issued by the Registrar General or a copy of one is given to the Registrar General by a sheriff or court under new section 8H(4)(b)(ii), 8I(2)(b), 8R(6) or 8S(6) of the GRA, the Registrar General must, in the circumstances specified, send a copy of it to the Registrars General for England and Wales or Northern Ireland. This enables register entries held in England and Wales or Northern Ireland to be updated after the applicant obtains gender recognition in Scotland.

## Section 13: continuity of marriage or civil partnership

72. Section 13 inserts new section 11E into the GRA.

73. The new section provides that under Scots law the continuity of a marriage or civil partnership is not affected by the issuing of a full GRC.

## Section 14: Offences

74. Section 14 inserts new section 22A into the GRA.

75. The new section provides that it is an offence for a person to knowingly:

- make a statutory declaration in accordance with the GRA, or regulations made under it, which is false in a material particular, or
- include any other information which is false in a material particular in: an application for a GRC under new sections 8A(1), 8F(1), 8J(1) or 8K(1), an application for a confirmatory GRC under new section 8O(1), or a notice of confirmation under new section 8B(3) of the GRA.

76. A person who commits any such offence is liable on summary conviction<sup>72</sup> to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (currently £10,000) (or both), and on conviction on indictment to imprisonment for a term not exceeding 2 years or an unlimited fine (or both).

## Section 15: further modification of enactments

77. Section 15 introduces the schedule (the content of which is explained below).

<sup>72</sup> The Scottish Sentencing Council's Jargon Buster has information on what "summary" and "indictment" mean: <https://www.scottishsentencingcouncil.org.uk/about-sentencing/jargon-buster/>

### Section 16: ancillary provision

78. Section 16 empowers the Scottish Ministers to, by regulations, make ancillary provision for the purposes of, or in connection with or for giving full effect to the Bill.

79. Regulations made under this section are subject to the negative procedure, unless they add to, replace or omit any part of the text of an Act in which case they are subject to the affirmative procedure.

### Section 17: commencement

80. Section 17 provides that the final provisions in sections 16, 17 and 18 of the Bill come into force on the day after Royal Assent, and that other provisions of the Bill come into force such as the Scottish Ministers may by regulations appoint.

81. There are a number of tasks which the Scottish Ministers and the Registrar General would need to undertake before the new system of gender recognition could start. These tasks include:

- Recruiting staff to handle the applications sent to the Registrar General;
- Setting up systems (including IT systems) to handle the applications;
- Preparing guidance for applicants;
- Making regulations on matters such as the form and content of applications;
- Working with the UK Government on an Order under section 104 of the Scotland Act 1998 to make consequential changes to UK legislation;
- Considering what transitional arrangements would be required (e.g. in relation to any applications from Scotland being dealt with by the GRP at the time the changes in Scotland on how gender recognition is obtained take place).

### Section 18: short title

82. Section 18 specifies the short title of the Act for the Bill.

### Schedule: Further modification of the 2004 Act and modification of other enactments

#### *Part 1*

83. Part 1 of this schedule amends the GRA as follows.



84. Paragraph 2 repeals, for Scotland, section 1 (applications) and schedule 1 (GRPs) of the GRA. It also repeals for Scotland the following sections of the GRA:

- Section 2 (determination of applications),
- Section 3 (evidence),
- Sections 3A, 3B, 3C, 3D, 3E and 3F (relating to alternative grounds),
- Section 4 (successful applications), other than section 4(4) which relates to annulment or dissolution of marriage after issue of an interim GRC,
- Sections 4A, 4B, 4C, 4D, 4E and 4F (relating to applications for full GRCs by married persons),
- Section 5 (issue of full certificates where applicant has been married),
- Sections 5A, 5B, 5C and 5D (relating to applications by civil partners),
- Section 6 (errors),
- Section 7 (applications: supplementary),
- Section 8 (appeals etc.),
- Sections 11A to 11D (on the continuity of marriage and civil partnership), and
- Section 21 (foreign gender change and marriage).

85. Despite these repeals, some provisions of the GRA will remain unchanged. For example, section 9(1) of the GRA will continue to provide that, where a full GRC is issued to a person, the person's gender becomes for all purposes the acquired gender. This reflects the fact that, although the Bill changes the way in which gender recognition can be obtained, it does not change rights and responsibilities after gender recognition has been obtained.

86. Paragraph 3 makes changes to section 10 (registration). It amends section 10(1) and 10(1B), and repeals section 10(1A).

87. Paragraph 4 amends section 17 (trustees and personal representatives) to cover gender recognition generally.

88. Paragraph 5 amends section 18 (orders where expectations defeated) so cases in Scotland can be heard by the Sheriff Court.

89. Paragraph 6 amends section 20(1) (gender-specific offences).

90. Paragraph 7 amends section 22 (prohibition of disclosure of information) to cover applications for a GRC generally.

91. Paragraph 8 amends section 24 (orders and regulations) to make provision about the Parliamentary procedures which apply to regulations made under powers conferred by virtue of the Bill.

92. Paragraph 9 amends section 25 (interpretation) to add definitions to the GRA to reflect the proposed new process and removes for Scotland definitions which are no longer needed.

93. Paragraph 10 amends paragraphs 14 and 19 of schedule 3 (registration) to reflect the new role given to the Registrar General in relation to issuing GRCs and confirmatory GRCs, and that applications to revoke GRCs and confirmatory GRCs may be made to the sheriff. It also adjusts paragraph 20A of schedule 3 of the GRA as regards the registration of Scottish marriages and civil partnerships following gender recognition. (Paragraph 20A defines a qualifying Scottish marriage or civil partnership to include one where a confirmatory GRC is issued or the Gender Recognition Panel has, in relation to any other part of the UK, issued a GRC.)

## *Part 2*

94. Part 2 of the schedule amends other enactments as follows.

95. Paragraph 11 amends section 1 of the Divorce (Scotland) Act 1976. This amendment ensures that when the GRP (for England and Wales and Northern Ireland) or the Registrar General (for Scotland) issue a full GRC after issuing an interim GRC, the issue of an interim GRC is not a ground of divorce. This reflects that the GRP and the Registrar General will only do this when both parties wish the marriage to continue thereafter.

96. Obtaining gender recognition overseas will not be a ground of divorce, or dissolution of a civil partnership, under the Bill. This reflects the fact that most countries have different systems when gender recognition is obtained. For example, the birth entry register is often amended directly with no interim GRC, whereas the interim GRC would be the relevant ground for divorce in Scotland.

97. Paragraph 12 amends section 44 (false statements and declarations) of the Criminal Law (Consolidation) (Scotland) Act 1995. This amendment is made in consequence of new section 22A of the GRA (inserted by section 12 of the Bill). It ensures that section 44(2) does not apply to a statutory declaration made in accordance with the GRA or regulations made under new section 8U(1)(d) of it.

98. Paragraph 13 amends section 117 (dissolution) of the Civil Partnership Act 2004. This amendment makes provision on the dissolution of civil partnership similar to the amendment made by paragraph 11 of the schedule in relation to divorce. The Civil Partnership (Scotland) Bill currently before Parliament provides that the issue of an interim GRC will not be a ground of dissolution once a full GRC is issued.<sup>73</sup>

<sup>73</sup> Please see paragraph 6 of schedule 2 to the Civil Partnership (Scotland) Bill: <https://www.parliament.scot/parliamentarybusiness/Bills/112997.aspx>

99. Paragraph 14 of the schedule amends section 30 (renewed marriage or civil partnership following issue of full gender recognition certificate) of the Marriage and Civil Partnership (Scotland) Act 2014. Section 30 of the 2014 Act gives powers to the Scottish Ministers to make regulations on renewed marriage and civil partnership ceremonies following gender recognition. Paragraph 14 amends section 30 so that it also applies to confirmatory GRCs and full GRCs issued by the Gender Recognition Panel (which will continue to operate elsewhere in the UK), as it applies to full GRCs issued by the Registrar General. It also adjusts the references to protected Scottish marriages and civil partnerships in consequence of the changes made to the definitions in section 25(1) of the GRA by paragraph 9 of the schedule of the Bill.

100. Paragraph 15 amends schedule 1 (civil jurisdiction of summary sheriff) of the Courts Reform (Scotland) Act 2014.<sup>74</sup>

101. Paragraph 16 revokes, for Scotland, the Gender Recognition (Approved Countries and Territories) Order 2011<sup>75</sup> as this will no longer be needed once gender recognition obtained overseas is recognised in Scotland.

**The Scottish Government  
December 2019**

<sup>74</sup> Information on the role of summary sheriffs is at <http://www.scotland-judiciary.org.uk/39/0/Summary-Sheriffs>

<sup>75</sup> <http://www.legislation.gov.uk/uksi/2011/1630/contents/made>

## ANNEX E - SCOTTISH GOVERNMENT'S UNDERSTANDING OF GENDER RECOGNITION IN OTHER JURISDICTIONS

1. The table below summarises the key features of the legal gender recognition arrangements in other countries and territories.<sup>76</sup> Further details are provided in Parts 2-4 of this Annex.

Country	Self-determination model	Assessment model- administrative system-	Assessment model- Court-based process	Treatment model- treatment or surgery required
Argentina	Yes			
Australian Capital Territory		Yes		
Austria				Yes
Belgium	Yes			
Canada- British Columbia		Yes		
Chile <sup>77</sup>	Yes			
Colombia	Yes			
Czech Republic				Yes
Denmark	Yes			
Finland				Yes
France			Yes	
Iceland	Yes			
Ireland	Yes			

<sup>76</sup> By “self-determination model”, the table refers to systems of gender recognition which are based on an applicant’s own declaration as to their lived gender. By “assessment model”, this table refers to systems whereby an applicant’s evidence must be supported by third party evidence from a doctor or psychologist and is considered by either a court or an administrative body. We have categorised as a “treatment model” a gender recognition system which requires an applicant to have had hormone treatment, or to have been sterilised or had reassignment surgery.

<sup>77</sup> For those aged 18 or above and a court based process for those aged 14 to 18.

Malta	Yes			
New Zealand			Yes	
Norway	Yes			
Portugal	Yes			

## 2. Countries with systems based on an applicant's self-determination

### Argentina

2.1. The law in Argentina was adopted in 2012 and provides<sup>78</sup> that a person aged 18 or over must make a request to the National Register of Persons stating that they are covered by this law and seeking an amended birth certificate and a new identity card.

2.2. Where the person is under 18, the request is made by their legal representatives and with their agreement, taking into account the person's evolving capacities and best interests. If the person's legal representatives do not wish to make the application or it is otherwise impossible to obtain approval, a court process can be used.

### Belgium

2.3 Belgium adopted a new law in May 2017 which removed the requirement to undergo sterilisation. Applicants aged 18 and over must make a declaration stating that they are convinced that the sex shown in their act of birth does not correspond with their gender identity.<sup>79</sup> Applicants aged 16 and 17 must be supported by their parent or legal representative and have consulted a psychiatrist.

2.4 The applicant then receives an information pack and the King's Prosecutor is advised of the application and has a period of three months during which they may refuse the application in exceptional cases. At the end of this three month period and before six months have passed in total, the applicant must reconfirm their application before the process is completed.

<sup>78</sup> Ley 26.743 Establécese el derecho a la identidad de género de las personas was adopted in 2012. A translation in English is at <http://tgeu.org/argentina-gender-identity-law/>

<sup>79</sup>See ILGA Europe Media release at <https://www.ilga-europe.org/resources/news/latest-news/new-legal-gender-recognition-belgium>

## Chile

2.5. In November 2018, Chile adopted a new law pertaining to the right to respect for an individual's gender identity<sup>80</sup>. People aged 18 or above can make an application to the Civil Registry. They must be:

- of age
- able to verify their identity;
- unmarried<sup>81</sup>; and
- make a declaration along with two witnesses, under promise or oath, that they know all the legal effects involved in the rectification of their sex as disclosed on their birth certificate.

2.6. The Civil Registry can reject an application only in limited circumstances and can declare the application inadmissible only if the individual has not reached the age of majority or the person is married.

2.7. An individual can use the process on up to two occasions.

2.8. For individuals between 14 and 17, the request must be made to the family court. The court requires to consider evidence, including psychological or psychosocial reports.

## Colombia

2.9. The law in Colombia was adopted in 2015 and provides that a person is permitted to correct the Civil Registry of Birth by filing a petition with a notary public.

2.10. The petition must be accompanied by a sworn declaration indicating their willingness for the Civil Registry of Birth to be corrected and information about their understanding of their sexual identity.

2.11. The notary is required to issue a public deed correcting the entry within 5 business days of receipt of petition and necessary documents.

2.12. Correction of the Civil Registry of Birth may consist of either male to female or female to male.

2.13. The sex shown for a person in the Civil Registry of Birth may be corrected up to twice and requests must be 10 years apart.

<sup>80</sup> It appears that the changes will come into effect once certain secondary regulations have also been issued, including by the Ministry of Justice and Human Rights to regulate the procedure.

<sup>81</sup> The parties to the marriage can divorce as part of the procedure of applying for rectification of the applicant's birth certificate.

## Denmark

2.14. From 1 September 2014, Danish residents aged 18 or over may apply to change their personal number in the Central Persons Register by application to the Minister of the Interior and Social Security and then completing a six month reflection period. If a false statement is made this is punishable under the Danish penal code.

## Iceland

2.15. The Icelandic Parliament approved a new law in June 2019 giving individuals the right to change their official gender registration, according to their gender identity. Children under 18 need the approval of their parents.

## Republic of Ireland

2.16. Under the Irish legislation, which came into force in 2015,<sup>82</sup> a person who was born, or is ordinarily resident in the Republic of Ireland, and is aged 18 or over, may apply to the Department of Social Protection to change their legal sex from male to female or vice versa by submitting an application form incorporating a statutory declaration.

2.17. It is an offence for a person knowingly or recklessly to provide false or misleading information in a material respect in an application. There is also an offence under the Irish Statutory Declarations Act 1938 if an individual makes a statutory declaration which to their knowledge is false or misleading in any material respect. They are liable on conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or both.

2.18. Applications by 16 and 17 year olds must be accompanied by a court order permitting their application to proceed. The court order is granted if there is parental consent and medical evidence about the young person's capacity and transition to their acquired gender.

2.19. A person who has obtained recognition of their acquired gender in another jurisdiction can apply for recognition in the Republic of Ireland. Between September 2015 and the end of August 2019, 517 applicants have been issued with gender recognition certificates,<sup>83</sup> an average of 129 applications per year.

2.20. If an applicant later changes their mind, they must request revocation of the GRC. The Minister for Social Protection decides whether to grant this request. Up to the end of August 2019, there have been three such requests, all of which have been granted.<sup>84</sup>

<sup>82</sup> At <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html>. The Irish application form, including the statutory declaration, can be found at <http://www.welfare.ie/en/pdf/GRC1.pdf>

<sup>83</sup> Source is the Government of Ireland, Department of Employment Affairs and Social Protection, Client Identity Services.

<sup>84</sup> Source is the Government of Ireland, Department of Employment Affairs and Social Protection, Client Identity Services.

## Malta

2.21. The law in Malta<sup>85</sup> was adopted in 2015. It provides that all Maltese citizens may request the Director for Public Registry to change their “recorded gender and first name” by way of a declaratory public deed drawn up by a notary public. This deed must contain “a clear, unequivocal and informed declaration by the applicant that one’s gender identity does not correspond to the assigned sex” and a specification of the gender particulars.

2.22. Where a person is under 16, persons exercising parental authority may file an application in court, with the court required to ensure the best interests of the child are taken into account and to give due weight to the views of the child, having regard to the child’s age and maturity.

2.23. Amendments made to an adult applicant’s Act of Birth as a result of legal recognition can only be modified again by a court order.

## Norway

2.24. The law in Norway provides that a Norwegian resident aged 16 and over may apply for a change in the gender in which they are registered in the National Register to the Tax Office. If they are aged between 6 and 16 they must apply along with the person or persons who have parental responsibility for them.

2.25. If in respect of a child between 6 and 16 only one parent consents, the application must be made then to the County Governor of Oslo and Akershus and will be granted if this is best for the child.

## Portugal

2.26. A new law was adopted in Portugal on 31 July 2018, which permits an individual who is a Portuguese national aged 18 and over to have the sex in which they are recorded changed based on their gender identity not corresponding with the sex in which they were recorded at birth.

2.27. Those aged 16 and 17 can apply through their legal representatives, there must be medical evidence as to their legal capacity, but not of a medical diagnosis.

<sup>85</sup> At <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>



### **3. Countries using an administrative assessment model- third party evidence of gender identity is required**

#### Australian Capital Territory

3.1. A person seeking to change their sex on a birth certificate issued in the Australian Capital Territory can apply to Access Canberra enclosing an application form and a statement by a doctor.<sup>86</sup>

3.2. The statement from the doctor or psychologist requires to confirm either that that applicant has had 'appropriate clinical treatment' for the alteration of their sex or that the applicant is an intersex person.

#### Canadian province of British Columbia

3.3. A person seeking to change their sex on a birth certificate issued in British Columbia may apply to change this from female to male or vice versa by applying to the British Columbia Vital Statistics Agency.<sup>87</sup> The application form states that they "have assumed, identify with and intend to maintain the gender identity that corresponds with the requested change". In addition, they must provide a statement in the prescribed form from a physician or psychologist confirming that the applicant's gender identity does not align with the "Sex" designation on the identification issued to the applicant by the provincial government.

3.4. A person under 18 may also apply provided they have the consent of all their parents or legal guardians, and are able to provide a required statement from a physician or psychologist.

3.5. A similar arrangement is also used in the Canadian province of Manitoba.<sup>88</sup>

### **4. Countries using a court-based assessment model**

#### France

4.1. The law in France was altered with effect from 1 January 2017. Any adult or emancipated minor can apply to the court to have their gender corrected in the civil registry, declaring their free and informed consent to the change of documents with supporting evidence. They require to demonstrate sufficient facts in support of this such as: that they appear publicly to belong to the affirmed sex; that they are known in that sex to their family, friends and

<sup>86</sup> Further information including the forms to be used can be found here- [https://www.accesscanberra.act.gov.au/app/answers/detail/a\\_id/1691](https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/1691)

<sup>87</sup> Information on the process is at <https://www2.gov.bc.ca/gov/content/life-events/birth-adoption/births/birth-certificates/change-of-gender-designation-on-birth-certificates?keyword=birth&keyword=certificate>.

<sup>88</sup> See [http://vitalstats.gov.mb.ca/change\\_of\\_sex\\_designation.html](http://vitalstats.gov.mb.ca/change_of_sex_designation.html).

colleagues; or that they have changed their forename to one of the affirmed sex.

### New Zealand

4.2. An adult aged 18 and over whose birth was registered in New Zealand may apply to the Family Court for a declaration that the birth certificate issued to them should contain their nominated sex and not the sex recorded in the birth register.<sup>89</sup> Typically, there must be expert medical evidence that the applicant:

- has assumed or has always had the gender identity of a person of the nominated sex;
- has undergone medical treatment usually regarded by medical experts as desirable; and
- will as a result maintain a gender identity of a person of the nominated sex.

4.3. Each case is assessed taking into account the medical evidence and what is medically recommended for that person.

## **5. Countries using a treatment model where medical treatment or surgery is required<sup>90</sup>**

### Czech Republic

5.1. The law in the Czech Republic permits a person to change their legally recognised gender including a change in their personal identification number, provided they have had genital surgery and been sterilised.

### Finland

5.2. A Finnish national, or person resident in Finland must:<sup>91</sup>

- submit a medical statement confirming that they have been sterilised or are otherwise infertile and that they feel they belong permanently to the opposite gender; and
- evidence of the consent of their spouse or partner where they are married or in a recognised partnership.

## **The Scottish Government December 2019**

<sup>89</sup> Births, Deaths, and Marriages and Relationships Act 1995, section 28 and guidance at [https://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Services-Births-Deaths-and-Marriages-Information-for-Transgender-Applicants?OpenDocument](https://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Births-Deaths-and-Marriages-Information-for-Transgender-Applicants?OpenDocument)

<sup>90</sup> . Paragraph 2.12 of Chapter 2 this consultation notes the impact of the case of *A.P., Garçon and Nicot v. France* in 2017, in the European Court of Human Rights.

<sup>91</sup> At <http://www.finlex.fi/fi/laki/kaannokset/2002/en20020563.pdf>

## ANNEX F: DRAFT BUSINESS AND REGULATORY IMPACT ASSESSMENT (BRIA)

### Title of Proposal

Draft Gender Recognition Reform (Scotland) Bill (“the draft Bill”)

### 1. Purpose and intended effect

- **Background**

1.1. The provisions of the Gender Recognition Act 2004 (“the GRA”) provide for trans men and women to apply for legal gender recognition on the basis of their “living in the other gender” or “having changed their gender under the law of a country or territory outside the United Kingdom”. The GRA describes the gender of a person who is living in the other gender or has changed their gender under the law outside of the UK, as their “acquired gender”.

1.2. The draft Bill, if implemented, would introduce a reformed process in Scotland by which a trans man or woman aged 16 and over who was born or adopted in Scotland<sup>92</sup> or was ordinarily resident here, could seek legal recognition of their acquired gender (“Scottish applications”). To achieve this, the draft Bill repeals and replaces certain provisions of the GRA for Scotland and makes connected consequential changes to other provisions of the GRA. This consultation includes both a draft Bill and draft Explanatory Notes for the Bill.

- **Objective**

1.3. The Scottish Government considers that the existing arrangements under the 2004 Act are too intrusive and onerous for applicants. The objective of the provisions of the draft Bill for Scottish applications is to remove the existing requirements under the 2004 Act for applicants under the standard and alternative track to provide medical evidence; provide documentary evidence of their having lived in their acquired gender for a minimum period of 2 years; and to have to submit their applications to the Gender Recognition Panel, a tribunal. The draft Bill replaces this with a scheme based on the use of statutory declarations, and also makes provisions for the recognition in Scotland of individuals who obtained gender recognition in another country or territory.

- **Rationale for Government intervention**

1.4 Adopting a new system for legal gender recognition in Scotland would require an Act of the Scottish Parliament.

<sup>92</sup> Or the subject of a parental order in Scotland.

## **2. Consultation**

- **Within Government**

2.1. The Scottish Government's Family Law team have worked with:

- the Equality Unit;
- Communities Analytical services;
- National Records of Scotland;
- The Scottish Public Pensions Agency (regarding any impacts in relation to public service pensions);
- The Scottish Courts and Tribunals Service; and
- The Scottish Legal Aid Board

- **Public Consultation**

2.2. This draft BRIA forms part of a public consultation on the draft Bill. The Scottish Government carried out a consultation from 9 November 2017 to 1 March 2018 ("the 2018 consultation") on proposals for reforming the GRA.<sup>93</sup> Chapter 7 of the independent analysis of responses<sup>94</sup> recorded comments made by consultees on the draft Impact Assessments included with this previous consultation. The Scottish Government has taken account of relevant comments when preparing this draft BRIA.

2.3. There are a number of policy changes since the 2018 consultation. In particular:

- The Scottish Government has decided not to extend legal gender recognition to those under 16. The Scottish Government does consider that those uncertain of their gender identity should be supported. The consultation also seeks views on whether the minimum age for applying for legal gender recognition should be reduced from 18 to 16.
- The Scottish Government has decided not to extend legal gender recognition at this stage to non-binary people. The Scottish Government considers that legal recognition of non-binary people would raise a number of issues in relation to areas such as registration, data, rights and responsibilities, changes to legislation, service delivery and costs. The Scottish Government is setting up a working group on non-binary people.

- **Business**

2.4 For the purposes of an earlier draft BRIA conducted in relation to the 2018 consultation,<sup>95</sup> we conducted interviews with representatives from a variety of organisations. More detail is in the 2018 draft BRIA.

<sup>93</sup> The previous consultation and related documents are at <https://consult.gov.scot/family-law/review-of-the-gender-recognition-act-2004/>

<sup>94</sup> The analysis of responses is at <https://www.gov.scot/publications/review-gender-recognition-act-2004-analysis-responses-public-consultation-exercise-report/pages/8/>

<sup>95</sup> The draft BRIA published with the 2018 consultation is at: <https://www.gov.scot/publications/review-gender-recognition-act-2004/pages/23/>.

2.5. While policy changes have occurred since the 2018 consultation, further interviews with business have not been required: the draft Bill continues to be based on the earlier proposal to adopt a statutory declaration-based system. In addition, what is changing is the way in which legal gender recognition is obtained: the rights and responsibilities are not changing.

### **3. Options**

3.1 Option 1: no change

3.2 Option 2: take forward the draft Bill

#### **3.3 Sectors and groups affected**

3.4 We consider that the following groups or sectors are affected:

- Trans people who want to be legally recognised in the gender with which they identify and in which they live;
- Their spouses or civil partners;
- The Registrar General for Scotland (“RGS”) and National Records of Scotland (“NRS”) - who currently deal with updating the Gender Recognition Register and issue updated birth certificates to successful applicants for legal gender recognition under the GRA who were born or adopted in Scotland. Under the draft Bill NRS would receive, consider and process Scottish applications for gender recognition;
- Employers and business - who may engage with a transgender employee or customer, who is seeking to transition to an acquired gender or is living in their acquired gender and who may obtain legal gender recognition; and
- Pension providers (including businesses with their own employee pension schemes), and which schemes may have members who have changed their legal gender.

#### **Benefits and costs**

##### Option 1: no change

#### 3.5 Option 1- Benefits

Legal gender recognition would still be available using the existing GRA process. This may have the benefit of stability and there would be no need for further legislation.

#### 3.6 Option 1- Costs

3.6.1 No set up costs or running costs would be incurred. Applicants would still (in the majority of cases) have to provide medical evidence and evidence of their having lived in their acquired gender for a defined period ending with the date of their application. People aged 16 and 17 could not apply for legal gender recognition.

## Option 2: adopt a gender recognition scheme as per the draft Bill

### 3.7 Option 2- Benefits

3.7.1 This would meet the objective of removing intrusive requirements and streamlining the existing process. It would also allow people aged 16 and over to apply.

### 3.8. Option 2- Costs

#### *General*

3.8.1. Option 2 would not lead to significant costs. The possibility of legal gender recognition is already provided in the GRA. The majority of associated costs have been incurred with the introduction of the GRA. The Bill is not proposing changes to the rights and responsibilities arising as a result of gender recognition.

#### *Business*

3.8.2. In practice, businesses and the third sector must already recognise and respect transgender people who are living in, transitioning to live in, or intending to transition to live in, accordance with their gender identity whether or not they then obtain legal recognition under the GRA. This is because under the Equality Act 2010 it is unlawful, subject to limited exceptions, to discriminate against a person who has the protected characteristic of gender reassignment. Section 7(1) of the 2010 Act provides that “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.”<sup>96</sup>

3.8.3. Overall, the organisations interviewed in preparation for the draft BRIA carried out for the 2018 consultation (for which see Part 4 of that draft BRIA)<sup>97</sup> took the view that there would be minimal costs for them, if Scotland adopted a system of legal gender recognition based on an applicant's statutory declaration. Two of those interviewed felt that smaller organisations might not have formulated a policy in relation to gender diverse employees and service users and that an increase in the numbers of people obtaining legal gender recognition might increase the likelihood that a business would encounter a transitioned or transitioning employee or customer. This may require such organisations to incur costs in formulating policies. However, these costs would not be the direct result of the adoption of Option 2.

#### *Costs for the Registrar General for Scotland (RGS)*

3.8.4 There would be costs relating to the need for the RGS to receive, consider and process Scottish applications if the draft Bill were enacted, replacing the Gender Recognition Panel in Scotland. (When the GRA came into effect, the UK

<sup>96</sup> Equality Act 2010, section 7: [www.legislation.gov.uk/ukpga/2010/15/section/7](http://www.legislation.gov.uk/ukpga/2010/15/section/7)

<sup>97</sup> The draft BRIA published with the 2018 consultation is at: <https://www.gov.scot/publications/review-gender-recognition-act-2004/pages/23/>.

Government indicated that the cost of establishing the Gender Recognition Panel would be £0.7 million<sup>98</sup>. No contribution has been sought from Scotland towards the running of the Gender Recognition Panel.)

3.8.5. There would be no capital costs in this area.

3.8.6. We estimate that there would be one-off set up costs associated with IT systems, application forms and for training and familiarisation events for staff dealing with applications. These costs are in the range of £300,000 to £350,000.

3.8.7. Running costs will primarily depend on the numbers of applicants. Only a small number of respondents commented specifically on the contents of the BRIA published as part of the 2018 consultation. Some respondents expressed concerns about the Scottish Government's estimate of costs. The predominant view was that the potential number of applicants had been under estimated. However, others considered the estimates appropriate.

3.8.8 Based on international evidence (outlined in more detail below), the Scottish Government considers that the draft Bill, if enacted, is likely to lead to an overall increase in the number of successful applications.

3.8.9. The Republic of Ireland has a slightly smaller population than Scotland.<sup>99</sup> Between September 2015 (when their new arrangements started) and August 2019, a total of 517 people had obtained recognition under Ireland's Gender Recognition Act 2015.<sup>100</sup> This is an average of 129 applicants for each year of operation.

3.8.10. Denmark has a similar size population to Scotland.<sup>101</sup> Denmark received an average of 279 applications per year in the first two years of operation of a reformed process for gender recognition based on an applicant's declaration.

3.8.11. Norway, which has a population of 5.23 million has experienced a higher initial uptake than Denmark or the Republic of Ireland. In the first eight months of operation<sup>102</sup> there, 706 applications were received.

3.8.12. In the light of this information, we consider it reasonable to estimate that the numbers of Scottish applications would be around 250 applications per year. Currently, around 30 people per year who were born or adopted in Scotland obtain legal recognition of their acquired gender under the GRA. There are no statistics available for applicants resident in Scotland who apply under the current arrangements.

<sup>98</sup> As set out in the Legislative Consent motion for the Gender Recognition Bill 2004 at <http://www.gov.scot/About/Government/Sewel/SessionTwo/GenderRecognition>.

<sup>99</sup> About half a million fewer than Scotland- see <http://countrymeters.info/en/Ireland/>

<sup>100</sup> Source is the Department of Employment Affairs and Social Protection Client Identity Service

<sup>101</sup> Denmark's population in 2016 was estimated to be 5,748,769 per <https://countryeconomy.com/demography/population/denmark>. . Scotland's population in 2015 was estimated to be 5,373,000 per <https://www.nrscotland.gov.uk/news/2016/scotlands-population-at-its-highest-ever>.

<sup>102</sup> From 1 July 2016 to 20 March 2017.

3.8.13. Based on this estimate of application numbers, we anticipate that the running costs would be up to £150,000 per year. These costings assume that applications would be handled by a team of 3 staff with support from other existing RGS staff. (In Ireland, applications are handled by 4 staff in the Client Identity Service which is part of the Department of Employment Affairs and Social Protection. These staff do not work solely on gender recognition applications.)

3.8.14. Running costs could potentially be offset if a fee were charged for making an application for legal gender recognition. The draft Bill makes provision for the RGS, with the consent of the Scottish Ministers, to provide for application fees but no decision has been taken on the future use of such a power. Any proposal to do so would be subject to a full and careful separate consultation including about the level of any such fees.

#### *Costs to the Scottish Courts and Tribunals Service*

3.8.15. We consider that any costs for the Scottish Courts and Tribunals Service, would be minimal. There may be more people making statutory declarations for the purposes of gender recognition before a Justice of the Peace if the scheme envisaged by the draft Bill should be implemented.

3.8.16. In addition, under the draft Bill:

- a person who divorces, or whose civil partnership is dissolved, on the basis of the issue of an interim GRC can be granted a full GRC by the court [this reflects the current arrangements]
- a person who has an interim GRC can in certain circumstances apply to the sheriff for a full GRC [this reflects the current arrangements]
- an applicant who has been refused a full GRC by the RGS could, after the application has been reviewed, appeal to the sheriff court. [Based on current experience, the expected number of appeals is very low. There has been one appeal heard in the Court of Session.]
- if there is evidence a GRC has been obtained by fraud, an application could be made to the sheriff court or the Court of Session for the GRC to be quashed. Such applications are expected to be very rare.

3.8.17. In such cases, court fees can be charged although in some cases, fee exemptions may be applied.

#### *Costs to the Scottish Legal Aid Board*

3.8.18. The impacts for the Scottish Legal Aid Board are considered at section 6.

#### *Costs in relation to pensions*

3.8.19. Pension policy is a reserved matter to the UK Government, although there are some executive devolved powers in relation to pension policy for certain public



service schemes in Scotland.<sup>103</sup> A change of legal gender has the potential to affect pension rights. However, we consider that the impacts of the adoption of Option 2 from the perspective of a successful applicant's pension rights or of their survivor's pension rights are now minimal.

3.8.20. The state pension age has now equalised for men and women. Consequently, gender recognition no longer has the potential to affect whether a person who is legally recognised in their acquired gender becomes entitled to the state pension at an earlier stage or later stage.

3.8.21. However, a change of legal gender can affect rights to occupational pensions. Historically, men and women have been treated differently for pension purposes, as have widowers, surviving civil partners and same-sex spouses in respect of survivor rights in pensions.

3.8.22. In some cases, where a member changes their legal gender from male to female, there are protections for their surviving female spouse to ensure that they do not lose entitlement as a result of their spouse's decision to change their legal gender.<sup>104</sup>

3.8.23. As stated above, historically survivors in same sex marriages and civil partnership have been treated differently for pension purposes and currently, because mixed sex civil partnerships cannot be registered in Scotland, a civil partner who wishes to obtain gender recognition may need to agree with their civil partner to convert their civil partnership to a marriage or dissolve the civil partnership. This will change if the Civil Partnership (Scotland) Bill currently being considered by the Scottish Parliament is enacted. That Bill will allow for the registration of mixed sex civil partnerships in Scotland.

3.8.24. In the Supreme Court decision in *Walker v Innospec Limited* [2017] UKSC 47<sup>105</sup> the court dis-applied an exception in the Equality Act 2010 which allowed defined-benefit occupational pension schemes to restrict access to survivors' benefits, for survivors of a civil partnership or same-sex marriage, to benefits based on accruals from December 2005 onwards. As a consequence, changes are now being introduced to public service pension schemes. These changes align pensions paid for survivors of same sex marriages and civil partnerships with those paid to widows (i.e. female survivors of mixed sex marriages): in these cases, the member's full service is used to determine entitlement. The existing restriction of only using service from 1988 onwards for widowers (i.e. male survivors of mixed sex marriages) continues to apply. The UK Government has announced that it intends to align

<sup>103</sup> Information on these public sector schemes is available at the Scottish Public Pension Agency's website: <http://www.sppa.gov.uk/>.

<sup>104</sup> There is further information on this in guidance to applicants for gender recognition on the impact of legal recognition for pensions and benefits the Department for Work and Pensions at: <https://www.gov.uk/government/publications/gender-recognition-how-pensions-and-benefits-may-be-affected>.

<sup>105</sup> The judgement and a summary can be accessed at <https://www.supremecourt.uk/cases/uksc-2016-0090.html>

survivor benefits for mixed sex civil partners with those that are available for survivors of mixed sex marriages.<sup>106</sup>

3.8.25. Private sector schemes are responsible for ensuring that they are compliant with the Walker judgment. Based on evidence from the interviews we undertook for the draft BRIA in relation to the 2018 consultation, it seems many schemes already either make no difference in their terms or nonetheless decided to treat civil partners and spouses (whether they are in same sex or mixed sex marriages), in the same way. This is confirmed by information available from the UK Government.<sup>107</sup>

3.8.26. The draft Bill if enacted would allow an applicant in any marriage or civil partnership to remain in that marriage or civil partnership in certain circumstances. What is changing is the way in which legal gender recognition is obtained: the rights and responsibilities are not changing.

### **Competition Assessment**

4.1. The proposals will not limit, either directly or indirectly, the number or range of suppliers.

4.2. The proposals will not limit the ability of suppliers to compete nor will they reduce supplier's incentives to compete vigorously.

### **Test run of business forms**

4.3. There are no new forms for business proposed. If the draft Bill is subsequently enacted, there would be new application forms and template statutory declarations to be completed, but these will not impact on business.

### **5. Digital Impact Test**

5.1. The draft Bill makes provision for the RGS to determine, by way of regulations and with the consent of Scottish Ministers, the form and manner in which an application is to be made. There are no current proposals for the draft Bill that elements of the new process would be done by means of electronic communication. However, the policy is to enable the electronic submission of applications, should this be desirable in future. Sections 8, 9 and 15 of the Electronic Communications Act 2000 already enable, in relation to devolved matters, the Scottish Ministers to make an order to modify the provisions of any enactment or subordinate legislation. The

<sup>106</sup> At

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/815741/Civil\\_Partnerships\\_-\\_Next\\_Steps\\_and\\_Consultation\\_on\\_Conversion.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815741/Civil_Partnerships_-_Next_Steps_and_Consultation_on_Conversion.pdf)

Paragraphs 73 and 78

<sup>107</sup> Paragraph 10 of the Executive Summary in the UK Government "Review of Survivor Benefits in Occupational Pension Schemes at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/323874/survivor-benefits-in-occupational-pension-schemes.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/323874/survivor-benefits-in-occupational-pension-schemes.pdf) indicated that 27% of private pension schemes had a difference in the way survivor benefits between mixed sex spouses and civil partners were calculated.

arrangements in the draft Bill do not prevent the use of online digital methods of communication.

## **6. Legal Aid Impact Test**

6.1. There could potentially be costs for the Scottish Legal Aid Board if the draft Bill were implemented, but any cost implications would be minimal.

6.2. For example, the removal of any requirements for medical evidence or documentary evidence of the applicant having lived in their acquired gender throughout a defined period prior to the application date would reduce any potential requirement for an applicant to consult a solicitor, as part of the process of preparing their application. This should minimise the number of applicants who seek legal advice and use legal aid advice and assistance.

6.3. The draft Bill also provides that an applicant who disputes a decision of the RGS, for example, to refuse an application on the basis it does not comply with the statutory requirements, must firstly ask the RGS to review that decision. After review, they could raise an appeal in the sheriff court in certain circumstances. Currently, an appeal against a decision of the Gender Recognition Panel requires to be raised in the Court of Session in Scotland.

6.4. Removing the necessity for medical evidence or documentary evidence demonstrating that an applicant has lived in their acquired gender for the required period should also reduce the possibilities for an application to be refused, and thereby reduce the likelihood of appeals. The number of appeals under the 2004 Act is very low in any event. There have been two appeals against Gender Recognition Panel decisions, one of which was to the Court of Session in Scotland (the other was in England).

## **7. Enforcement, sanctions and monitoring**

### **Enforcement and sanctions**

7.1. The draft Bill provides for a new offence of making a false statutory declaration in association with an application for recognition and a new offence of making a false application. The penalties on conviction for either offence are the same as for the current offence of making a false statutory declaration more generally.<sup>108</sup> On conviction on indictment a person would be liable to imprisonment for a term not exceeding two years or a fine, or both. On summary conviction, the penalty is a maximum prison term of 12 months, or a fine up to the statutory maximum (£10,000) or both.

<sup>108</sup> Section 44(2) of the Criminal Law (Consolidation)(Scotland) Act 1995 at <https://www.legislation.gov.uk/ukpga/1995/39/section/44>.

7.2. The draft Bill will allow a sheriff to revoke a GRC where the application was fraudulent or on the grounds of an applicant's incapacity, where for example they were not capable of understanding the effect of obtaining the certificate.

### **Monitoring**

7.3. The draft Bill makes no provision on the publication of statistics about applications under the GRA. Such statistics are currently published quarterly.<sup>109</sup> We do not propose that this should change.

## **8. Implementation and delivery plan**

8.1. The consultation on the draft Bill will influence decisions about next steps and the content of legislation that the Scottish Government introduces in the Scottish Parliament.

8.2. If a Bill should be introduced, this BRIA would be finalised, taking account of points made by consultees. The final version of the BRIA would be published.

### **Post-implementation review**

8.3. If a Bill is enacted, such legislation would be reviewed within 10 years.

## **9. Summary and recommendation**

### Summary of costs of implementing the draft Bill

9.1. Estimated costs have been based on around 250 applications per year being received.

<b>Cost</b>	<b>Estimate</b>
Start-up costs (including IT systems, application forms, staff training, and preparation of guidance for applicants)	£300,000 to £350,000
Administration costs	Up to £150,000 per annum

<sup>109</sup> These can be found at <https://www.gov.uk/government/collections/tribunals-statistics>.

**Declaration and publication**

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

**Signed:****Date:****Scottish Government Contact point:**

THIS WILL BE COMPLETED AFTER THIS CONSULTATION AND VIEWS HAVE BEEN OBTAINED FROM CONSULTEES

**The Scottish Government  
December 2019**

## ANNEX G: DRAFT CHILD RIGHTS AND WELLBEING IMPACT ASSESSMENT

CRWIA front sheet	
<p><b>Policy/measure</b></p> <p><b>A general description of the policy/measure</b></p>	<p>The draft Gender Recognition Reform (Scotland) Bill, would, if enacted, introduce reformed arrangements for trans people aged 16 and over who were born or adopted in Scotland or who are ordinarily resident here to apply for legal gender recognition. The reformed arrangements would replace some of the current arrangements under the Gender Recognition Act 2004 (“the GRA”) for Scotland.</p> <p>“Gender recognition law” is the area of the law which allows a person to be legally recognised in a sex which is different to the one in which they were recorded at birth.</p>
<p><b>Initiating department</b></p> <p><b>The responsible team or division. If this is a cross-cutting policy, name the team that has overall responsibility</b></p>	<p>Family Law team, Civil Law and Legal System Division, Justice Directorate</p>
<p><b>Policy aims</b></p> <p><b>What the policy or measure is trying to achieve; what are the expected outcomes</b></p>	<p>The objective of the draft Bill is to remove the need for applicants to provide medical evidence or evidence that they are living in the acquired gender, and the need to apply to a tribunal, the Gender Recognition Panel. The draft Bill provides that the minimum age of applicants would be 16. This is in line with the age at which children and young people acquire a number of rights.</p> <p>The Scottish Government carried out a consultation from 9 November 2017 to 1 March 2018<sup>110</sup> on proposals for reforming the GRA (“the 2018 consultation”).</p> <p>Chapter 7 of the independent analysis of 2018 consultation responses recorded comments made by</p>

<sup>110</sup> The 2018 consultation is available at: <https://www.gov.scot/publications/review-gender-recognition-act-2004/>.

	<p>respondents on the draft Impact Assessments included with the 2018 consultation.<sup>111</sup></p> <p>The Scottish Government has taken account of these comments of respondents, and those raised by stakeholders and correspondences after the 2018 consultation, when reaching its decision not to extend legal gender recognition to those under 16 in the draft Bill and in the light of the mixed evidence highlighted in the draft Child Rights and Wellbeing Impact Assessment published as part of the 2018 consultation.<sup>112</sup></p>
<p><b>Timetable</b></p> <p><b>What is the time frame for a policy announcement/consultation/implementation?</b></p>	<p>Subject to the current consultation, the Scottish Government has committed to bringing forward legislation to reform the GRA in this Parliamentary Session.</p>
<p><b>Date</b></p>	<p>THIS WILL BE COMPLETED AFTER THIS CONSULTATION AND VIEWS HAVE BEEN OBTAINED FROM CONSULTEES</p>

<sup>111</sup> The analysis of responses is at <https://www.gov.scot/publications/review-gender-recognition-act-2004-analysis-responses-public-consultation-exercise-report/pages/8/>.

<sup>112</sup> At: <https://www.gov.scot/publications/review-gender-recognition-act-2004/pages/25/>.

**CRWIA Stage 1  
Screening – key questions**

**1. What aspects of the policy/measure will affect children and young people up to the age of 18?**

The Articles of the UNCRC and the wellbeing indicators under the Children and Young People (Scotland) 2014 apply to all children and young people up to the age of 18, including non-citizen and undocumented children and young people.

- If the draft Bill is enacted and reduces the age at which a person can apply for gender recognition in Scotland to 16, this will affect people aged between 16 and 18. The draft Bill does not make provision for those younger than 16.

**2. What likely impact – direct or indirect – will the policy/measure have on children and young people?**

‘Direct’ impact refers to policies/measures where children and young people are directly affected by the proposed changes e.g. in early years, education, child protection or looked after children (children in care). ‘Indirect’ impact refers to policies/measures that are not directly aimed at children but will have an impact on them. Examples include: welfare reforms, parental leave, housing supply or local transport schemes.

- The provisions of the draft Bill would have a direct impact on people aged 16 and 17.

**3. Are there particular groups of children and young people who are more likely to be affected than others?**

Under the UNCRC ‘children’ can refer to: individual children, groups of children, or children in general. Some groups of children will relate to the groups with protected characteristics under the Equality Act 2010: disability, race, religion or belief, sex, sexual orientation. It may be possible to align the CRWIA with the Equality Impact Assessment in these cases. ‘Groups’ can also refer to children by age band or setting, or those who are eligible for special protection or assistance e.g. pre-school children, children in hospital, children in rural areas, looked after children, young people who offend, victims of abuse or exploitation, child asylum-seekers, or children living in poverty.

- The children primarily affected by the provisions of the draft Bill are those aged 16 and 17 who experience issues around their gender identity.
- “Gender reassignment” is a protected characteristic under the



Equality Act 2010. 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. The definition includes a person of any age.

**4. Who else have you involved in your deliberations?**

Have you included all policy leads who may have an interest in these developments?

- In respect of the 2018 consultation draft Equality Impact Assessment (“EQIA”) and the draft EQIA at Annex J we have held two framing exercises involving colleagues from across government, including Equality Unit, Communities Analytical Services, Education Directorate, and a member of the LGBT staff network. Those attending identified consequences for people under 18.
- We have considered the results of the independent analysis of the 2018 consultation responses and the evidence and views set out.

**5. Will this require a CRWIA?**

- Yes.

**CRWIA Declaration**

Tick relevant section, and complete the form.

CRWIA required	CRWIA not required
✓	

**Authorisation**

[ ] Deputy Director, Civil Law and Legal System

**Date**  
THIS WILL BE COMPLETED AFTER THIS CONSULTATION AND VIEWS HAVE BEEN OBTAINED FROM CONSULTEES

## CRWIA Stage 2 Scoping - key questions

### 1. What children's rights are likely to be affected by the policy/measure?

List all relevant Articles of the UNCRC and Optional Protocols. All UNCRC rights are underpinned by the four general principles: non-discrimination; the best interests of the child; the right to life; survival and development; and the right to have children's views given due weight.

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#### Article 2

Being transgender may be an "other status". This article may also be relevant for a child who has a transgender parent or parents.

#### Article 3

Article 3(1) is relevant to the provision of the draft Bill permitting those aged 16 and 17 to change their legal sex.

#### Article 5

This article of the Convention is relevant in relation to the draft Bill provision to extend gender recognition arrangements to those aged 16 and over. It is about balancing the responsibilities and rights of parents against the right of the child to make decisions.

#### Article 6

Extending gender recognition to those aged 16 and 17 could affect their development as it may permit them to be legally recognised in the identity in they are living in.

#### Article 7

Article 7(1) may be relevant. It provides that "the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents." The legal sex of a person who has obtained gender recognition is recorded in the gender recognition register (and will be disclosed on a new birth certificate issued to a successful applicant). This article also links to article 8.

The implementation handbook for the Convention,<sup>113</sup> published by UNICEF, says:

<sup>113</sup> At [https://www.unicef.org/publications/index\\_43110.html](https://www.unicef.org/publications/index_43110.html)

“Although the Convention does not specify what must be registered, other rights (to name and nationality, to know parentage, family and identity) imply that registration ought, as a minimum, to include:

the child’s name at birth,  
the child’s sex,  
the child’s date of birth,  
where the child was born,  
the parents’ names and addresses,  
the parents’ nationality status.”

### **Article 8**

This article concerns a child’s right to an identity. The implementation handbook for the Convention says that gender identity is an aspect of identity.

### **Article 12**

Article 12 of the Convention concerns a child’s right for their views to be listened to and taken seriously. This is key in relation to the draft Bill provision permitting a person aged 16 and over to apply for gender recognition.

### **Article 13**

This article may be relevant in relation to transgender children. For example, the right could relate to receiving information about gender identity and the provisions of the law.

### **Article 14**

Article 14 may be relevant in relation to our proposals. The article is about the right to freedom of thought, conscience and religion. There may be cases where a parent or guardian’s beliefs conflict with the beliefs of a person aged 16 and 17.

### **Article 16**

Article 16 may be relevant. For example, transgender children should be entitled to receive confidential advice. Records or correspondence about a person’s transgender status or gender history should similarly be confidential and should be processed accordingly. The draft Bill does not contain provisions changing the existing arrangements to protect the privacy of applicants for gender recognition or the gender history of those applicants who are granted legal recognition.

### **Article 17**

Article 17 may be relevant. There may be separate actions the Scottish Government could take in relation to the supply of information to meet the needs of individual transgender children and young people.

There is also a wider point about educational material being available which recognises and educates children and young people about diversity.

### **Article 18**

Article 18(2) concerns assistance to parents and legal guardians in the performance of their child-rearing responsibilities. It may be relevant in relation to advice and support provided to parents.

### **Article 23**

This article, which relates to children with disabilities, may be relevant. We refer to evidence about transgender children and young people in paragraphs 4.1. to 4.5. below.

### **Article 24**

Article 24(1) provides for the right of the child to “the enjoyment of the highest attainable standard of health”. The rights relate to both physical and mental health. (Neither the GRA nor the draft Bill make provision relating to the arrangements in NHS Scotland for treatment and support.)

## **2. How will the policy/measure affect children’s wellbeing as defined by the wellbeing indicators?**

List all wellbeing indicators relevant to the policy/measure. The indicators are: Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible and Included.

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All of the wellbeing indicators are relevant to our proposals.

## **3. How many children and young people are likely to be affected by the policy or measure?**

List potential sources of official and other data, or note the need to locate this information. Are there different levels of impact for different groups of children?

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3.1. A 2014 research paper sets out the finding of a range of studies estimating the numbers of children and adults who might be trans or experience gender dysphoria.<sup>114</sup> For example, it notes that in one study from the Netherlands, parents reported 1.4% of boys and 2% of girls want to be the opposite sex and that in another, for people aged 15 to 70 years old, 0.6% of men and 0.2% of women reported an ambivalent or incongruent gender identity.

3.2 If we assume that an average of the figures in paragraph 3.1 for boys and girls and men and women aged 15-70 , i.e. that 1.05% might be trans, is representative in Scotland, then extending gender recognition to those aged 16 and 17 could affect around 1,100 people aged 16 and 17 in Scotland.<sup>115</sup> The UK Government's LGBT Survey was open to respondents aged 16 and over. Of the 6,910 respondents who identified as trans men and women, 15.5% were aged 16 and 17.<sup>116</sup> (However, compared to general UK population, young people were over-represented in this survey.)

3.3 A number of countries permit those younger than 18 to obtain legal gender recognition. The table in Appendix A contains information about other countries and territories which have processes for people aged under 18. There is also some data available about the numbers of under 18 year olds doing so. Numbers are generally low as a percentage of those otherwise obtaining recognition. The Republic of Ireland and Norway have similar populations to Scotland though they have differing recognition systems. Between September 2015 and August 2019, 13 young people aged 16 and 17 have obtained legal recognition in the Republic of Ireland.<sup>117</sup> This is 2.5% of the total number of people who had changed their legal gender there (517) by the end of August 2019. In Norway, which does not have a court process for children between 6 and 16, between 1 July 2016 and September 2016, nine children changed their legal gender. This is 3.6% of the total applicants in the same period (250).

#### **4. What research evidence is available?**

Preliminary identification of the research base for this policy/measure.

4.1. The Scottish Government has decided not to seek to extend gender recognition to those younger than 16. The draft CRWIA published with the 2018 consultation set out research evidence the Scottish Government had

<sup>114</sup> Kuyper, L & Wijzen, C (2014) Gender Identities and Gender Dysphoria in the Netherlands, *Archives of Sexual Behaviour* (Volume 43 Issue 2)

<sup>115</sup> As at mid 2018 there was an estimated population of 109,296 16 & 17 year olds (55,721 males and 53,575 females). Source: National Records of Scotland, 2019. Mid-2018 population estimates Scotland. Available at: <https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/population/population-estimates/mid-year-population-estimates/mid-2018>.

<sup>116</sup> At: <https://www.gov.uk/government/publications/national-lgbt-survey-summary-report> in Annex 3 Characteristics.

<sup>117</sup> Source is the Government of Ireland, Department of Employment Affairs and Social Protection Client Identity Service.

identified and which has been considered as part of decisions made in relation to the draft Bill provisions.<sup>118</sup>

4.2 The Gender Identity Development Service (“GIDs”), a specialised clinic for young people presenting with difficulties with their gender identity commissioned by NHS England has published details of the ages of those children and young people who are referred to the GIDs in 2018-2019.<sup>119</sup> Of 2590 referrals in that year, 85% of referrals were for those aged 11 to 17. The average age of referrals to the Young Person’s Gender Service at Sandyford, Glasgow was 13.8 years old in 2017.<sup>120</sup>

4.3. Evidence indicates that there may be a difference of experience between boys and girls. The GIDs has published statistics on the numbers of girls and boys who are referred to them each year. In 2017/2018, the most recent year for which there is complete data, 1,657 of the young people referred were registered as female at birth, and 624 were registered as male.<sup>121</sup>

4.4. There is evidence that trans young people are more than twice as likely as non-trans people to be diagnosed with depression (50.6% compared to 20.6%) and with anxiety (26.7% compared to 10%).<sup>122</sup> There is evidence that this is not an inherent feature of their being transgender.<sup>123</sup> There is also some evidence that transitioning to living in their preferred gender and being supported with gender confirming medical interventions may help improve mental health, in many cases reaching levels experienced in the general population.<sup>124</sup>

4.5. The independent analysis report for the responses to the 2018 consultation<sup>125</sup> notes that a small number of respondents highlighted that a higher proportion of young people referred to gender identity clinics were autistic.<sup>126</sup> The draft EQIA at Annex J considers this more generally.

<sup>118</sup> The draft CRWIA published as part of the 2018 consultation is available at: <https://www.gov.scot/publications/review-gender-recognition-act-2004/pages/25/>.

<sup>119</sup> At: <https://gids.nhs.uk/number-referrals>.

<sup>120</sup> The Scottish Public Health Network, at: [https://www.scotphn.net/wp-content/uploads/2017/04/2018\\_05\\_16-HCNA-of-Gender-Identity-Services.pdf](https://www.scotphn.net/wp-content/uploads/2017/04/2018_05_16-HCNA-of-Gender-Identity-Services.pdf), page 46

<sup>121</sup> At: <https://gids.nhs.uk/number-referrals>.

<sup>122</sup> Mental Health of Transgender Youth in Care at and Adolescent Urban Community Health Centre: A Matched Retrospective Cohort Study, Sari L. Reisner and Ors, Journal of Adolescent Health March 2015 Vol 56 Issue 3 pages 274-279 at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4339405/>

<sup>123</sup> Rebeca Robles et al “Removing transgender identity from the classification of mental disorders: a Mexican field study for ICD-11” [http://dx.doi.org/10.1016/S2215-0366\(16\)30165-1](http://dx.doi.org/10.1016/S2215-0366(16)30165-1)

<sup>124</sup> Dhejne C et al “Mental Health and gender dysphoria: A review of the literature (2016)

<sup>125</sup> At: <https://www.gov.scot/publications/review-gender-recognition-act-2004-analysis-responses-public-consultation-exercise-report/>, page 51

<sup>126</sup> The GIDs website <https://gids.nhs.uk/evidence-base> indicates that there seems to be a higher prevalence of autistic spectrum conditions in young people diagnosed with gender dysphoria than in the general population, but also notes that the reasons why this is the case are still unknown.

4.6. The draft Bill includes protections for those who are legally recognised but who are later demonstrated not to have had the capacity to understand the effect of obtaining a gender recognition certificate or to have been able to validly make an application. In such a situation, the certificate can be revoked by a court. The guidance and support available to all applicants for gender recognition, including applicants who may be more vulnerable, will be carefully considered when a Bill is introduced.

#### The views of trans, and non-trans, children and young people

4.7. Scottish Government officials met members of LGBT Youth Scotland groups aged 13 and over in 2017. The Cabinet Secretary for Social Security and Older People has met with members of the LGBT Youth Commission on Gender Recognition and the Minister for Older People and Equalities also met a group of young people from LGBT Youth Scotland. The groups expressed their strong view that a person should be able to transition and live with documentation consistent in disclosing their acquired gender before they have to take their qualifications or go to university. They felt that this would better support their rights not to be discriminated against, for example, at school. A high proportion expressed the desire for their parents (or other people with responsibility for them) to be involved and supporting them through the recognition process. However, they were also of the view that legal gender recognition should be made available to people younger than 16 and for those who identify in a non-binary way and not as men and women, boys and girls.

4.8. LGBT Youth Scotland gave evidence to the Women and Equality Select Committee inquiry into Transgender Equality which set out the views of trans people aged under 18<sup>127</sup> about the benefits of legal gender recognition in terms of reducing discrimination and improving their mental health. LGBT Youth Scotland also responded to the 2018 consultation and set out the views of individuals in their response.<sup>128</sup>

4.9. Section 5 below sets out a range of consultation meetings before, and after the 2018 consultation and summarises points made by respondents to the 2018 consultation as highlighted in the published analysis report.<sup>129</sup> This includes a meeting with members of the Scottish Youth Parliament.

<sup>127</sup> At: <https://gids.nhs.uk/number-referrals>  
<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Women%20and%20Equalities/Transgender%20Equality/written/19582.html>

<sup>128</sup> At: <https://webarchive.nrscotland.gov.uk/20190711105605/https://www2.gov.scot/Resource/0053/00539375.pdf>.

<sup>129</sup> At: <https://www.gov.scot/publications/review-gender-recognition-act-2004-analysis-responses-public-consultation-exercise-report/>

## **5. Has there been any public or stakeholder consultations on the policy/measure?**

5.1. Prior to publication of the 2018 consultation, the Scottish Government met:

- Members of LGBT Youth Scotland<sup>130</sup> groups aged 13 and over; and
- Gender identity specialists from the Sandyford Clinic,<sup>131</sup>
- Gender identity specialists from the Chalmers Centre in Edinburgh;<sup>132</sup> and
- a representative from the support group TransparenTsees,<sup>133</sup> which supports parents and family members as well as children and young people.

*The 2018 consultation: views on proposals*

5.2. The 2018 consultation sought views of respondents on reducing the age at which gender recognition can be obtained from 18 to 16, on whether gender recognition should be extended to those under 16 and if so, what the best option was for doing so.

5.3. A majority of respondents to the 2018 consultation, (61% of those answering the question), agreed that people aged 16 and 17 should be able to apply for and obtain legal recognition of their acquired gender.

5.3. Around 4 in 10 respondents who were in favour of this proposal considered that it is in line with other age-related rights and legal provisions in Scotland. Around 1 in 5 of such respondents commented that, by age 16, young people know their own minds and have the capacity and understanding to make their own choices and decisions. Further comments included that young people should be enabled to make decisions for themselves and that the UNCRC requires that minors are not discriminated against and that they are heard according to their maturity and evolving capacity in all matters that concern them.

5.4. Respondents in favour of the proposal to reduce the minimum age for legal gender recognition to 16 also highlighted ways in which being able to obtain a GRC could help young people in moving into adulthood. Around 1 in 6 respondents in favour of the proposal pointed to the positive impact it could have on 16- and 17-year olds' health and wellbeing. Respondents commented on the very significant and detrimental effect that not being able

<sup>130</sup> At: <https://www.lgbtyouth.org.uk/>.

<sup>131</sup> At: <https://www.sandyford.org/sexual-health-services/what-are-our-services/gender-identity-service/>

<sup>132</sup> At: <http://lothiansexualhealth.scot.nhs.uk/services/gjc/Pages/default.aspx>

<sup>133</sup> TransparenTsees was founded in 2013 by a parent. In 2016, three other autonomous groups were established in Edinburgh, Perth and Elgin. TransparenTsees offers email and telephone support as well as the opportunity for parents and other family members to meet each other.



to obtain legal recognition of their gender can have on the mental health of the young people affected.

5.5. Of around 2,540 respondents who disagreed with the above proposal, 7 in 10 commented that 16 years old is too young to be able to apply for and obtain legal recognition. Many issues were raised including the comment that 16 is too young to make a life-changing decision. Some respondents suggested that 16 and 17-year olds are often still going through puberty and may not yet be clear about their gender identity or sexuality. Around 1 in 5 commented on the potential confusion, particularly around their gender identity and sexuality that young people may experience. Further points included that gay or lesbian young people may see themselves as trans rather than recognising and accepting their sexuality.

5.6. Respondents who disagreed with this proposal noted that there are services that do not treat 16- and 17-year olds as adults. Examples given included that 16- and 17-year olds are still considered children from a clinical perspective and that young people held in custody are considered to need enhanced levels of protection compared with adults. Neither the GRA nor the draft Bill make provision relating to medical treatment or support.

*The 2018 consultation: views on the draft CRWIA for that consultation*

5.7. Specifically on the draft CRWIA published with the 2018 consultation, the independent analysis of the consultation responses noted the following points made by consultation respondents:

(a) there is no consideration of the impact on children who are not trans of being in single sex spaces with a child who is trans.

(b) That Article 3(3), which covers the care or protection of children, particularly in the areas of safety and health, may be relevant in relation to health advice and treatment provided to trans children and to children concerned about their gender identity.

(c) On Article 5, some respondents considered that the right to gender reassignment is not recognised in the UNCRC.

(d) Article 13, on children's right to freedom of expression, could be an issue if children are considered transphobic if they for example questioned a trans child or professionals may feel they are transphobic if they were to offer an alternative view.

(e) Article 17, which covers the important function performed by the mass media and ensuring that children have access to information and material from a diversity of national and international sources,

may be relevant in relation to trans children and there may be actions the Scottish Government could take in relation to the supply of information to meet the needs of individual trans children and to meet the wider needs of children.

5.8. On single sex spaces, the consultation on the draft Bill sets out relevant provisions of the Equality Act 2010, which make exceptions to the general provisions of that Act on non-discrimination. The 2010 Act is mainly reserved to the Westminster Parliament. Some of these exceptions are relevant when considering the position of non-trans boys and girls in relation to gender recognition. Further information is available in the draft EQIA at Annex J on the outcomes of this review.

5.9. The Implementation Handbook, published by UNICEF, says that gender identity is an aspect of identity.<sup>134</sup>

5.10. The draft Bill does not affect the professional responsibilities of those offering treatment and support to those distressed or concerned about their gender identity, nor does it otherwise affect the right to access such services in Scotland.

#### *Meetings with groups/organisations after the publication of the 2018 consultation*

5.11. Since the 2018 consultation, the Cabinet Secretary for Social Security and Older People has met with a range of groups to gather further information and evidence:<sup>135</sup>

- Women's Spaces in Scotland;<sup>136</sup>
- CARE for Scotland;<sup>137</sup>
- The Free Church of Scotland;<sup>138</sup>
- Equality Network;<sup>139</sup>

<sup>134</sup> At : [https://www.unicef.org/publications/index\\_43110.html](https://www.unicef.org/publications/index_43110.html)

<sup>135</sup> In addition, a meeting was scheduled on a number of occasions with the group Women and Girls in Scotland who were unable to attend: <https://wgscotland.org.uk/about/>. Their views were instead set out in correspondence.

<sup>136</sup> Two of the local groups of Women's Spaces in Scotland responded to the consultation and their responses can be accessed at:

<https://webarchive.nrsotland.gov.uk/20190116052027/https://www2.gov.scot/Topics/Justice/aw/17867/gender-recognition-review/review-of-gender-recognition-act-2004-list-of-orga/published-responses-from-organisations>. Women's Spaces in Scotland also met separately with Scottish Government officials

<sup>137</sup> Their 2018 consultation response is at:

<https://webarchive.nrsotland.gov.uk/20190711105341/https://www2.gov.scot/Resource/0053/00539279.pdf>. CARE also met separately with officials from Scottish Government.

<sup>138</sup> Their 2018 consultation response is at:

<https://webarchive.nrsotland.gov.uk/20190711105501/https://www2.gov.scot/Resource/0053/00539309.pdf>. The Free Church of Scotland also met separately with Scottish Government officials.

<sup>139</sup> Their 2018 consultation response is at:

<https://webarchive.nrsotland.gov.uk/20190711105447/https://www2.gov.scot/Resource/0053>

- Stonewall Scotland;<sup>140</sup>
- LGBT Health and Wellbeing;<sup>141</sup>
- LGBT Youth Scotland;<sup>142</sup>
- Scottish Women's Aid;<sup>143</sup>
- Rape Crisis Scotland;
- Engender;<sup>144</sup>
- Close the Gap;
- Zero Tolerance;
- The Chair of the First Minister's National Advisory Group on Women and Girls; and
- Members of the Scottish Youth Parliament.

5.12. In addition, Scottish Government officials met with:

- A member of Forwomen.scot;
- The Scottish Catholic Education Service; and
- The Catholic Parliamentary Office of the Bishops' Conference of Scotland.<sup>145</sup>

### *Correspondence*

5.13. The points made in correspondence with Scottish Government concerning access to gender recognition for children and young people have also been considered. Such correspondence reflected the range of views expressed by respondents to the 2018 consultation, as highlighted at paragraph 5.2-.5.5 above.

[/00539302.pdf](#). Scottish Government officials also met separately with the Equality Network and Scottish Trans Alliance, Stonewall Scotland and LGBT Youth Scotland.

<sup>140</sup> Their 2018 consultation response is at:

<https://webarchive.nrscotland.gov.uk/20190711105724/https://www2.gov.scot/Resource/0053/00539455.pdf>

<sup>141</sup> Their 2018 consultation response is at:

<https://webarchive.nrscotland.gov.uk/20190711105603/https://www2.gov.scot/Resource/0053/00539374.pdf>

<sup>142</sup> Their 2018 consultation response is at:

<https://webarchive.nrscotland.gov.uk/20190711105605/https://www2.gov.scot/Resource/0053/00539375.pdf>

<sup>143</sup> Their 2018 consultation response, setting out the results of a survey of their local groups, is at:

<https://webarchive.nrscotland.gov.uk/20190711105713/https://www2.gov.scot/Resource/0053/00539450.pdf>

<sup>144</sup> Their 2018 consultation response submitted for the coalition of women's groups is at:

<https://webarchive.nrscotland.gov.uk/20190711105437/https://www2.gov.scot/Resource/0053/00539300.pdf>. Engender also met separately with Scottish Government officials.

<sup>145</sup> The 2018 consultation response is at:

<https://webarchive.nrscotland.gov.uk/20190711105343/https://www2.gov.scot/Resource/0053/00539280.pdf>.

**6. Has there been any estimate of the resource implications of the policy/measure?**

Capital costs, expenditure, recruitment and training costs for the workforce etc.

Initial set-up expenditure for a new statutory declaration-based system of gender recognition for Scotland (including a new IT system, staff resourcing and training) have been estimated at £300,000 to £350,000, with running costs in the first year of around £150,000. There is a separate draft Business and Regulatory Impact Assessment covering the anticipated costs of implementing the draft Bill.

### CRWIA Stage 3

#### Data Collection, Evidence Gathering, Involvement of/Consultation with Stakeholder Groups - key questions

##### 1. What does the evidence tell you?

The evidence base may include demographic information, academic research, service monitoring/inspection reports, service evaluation reports, user surveys etc. Identify any gaps in the evidence base. In particular, look at what the evidence tells you about children and young people's views and experiences of the relevant service(s); and/or what it tells you about children and young people's views of the policy proposal.

The evidence suggests that:

- An increasing number of children and young people are seeking advice and support from gender identity clinics.
- A number of children and young people identify as being trans and undertake a social transition.
- There is little consistency internationally in relation to the minimum age at which people can apply for legal gender recognition.

In Scotland, young people receive a number of rights which can be seen as analogous to a right to determine whether to seek legal gender recognition, such as the right to marry or register a civil partnership. Further, gender recognition has no effect on the rights to access treatment or surgery where an appropriate diagnosis must be in place under the existing protocols in NHS Scotland and in accordance with international best practice on gender identity health services.

##### 2. What further data or evidence is required?

Is the evidence up to date, robust and reliable, sufficiently relevant to what is being proposed, or do you need to commission new research?

The consultation seeks respondents' views on reducing the minimum age of applicants to 16 from 18.

##### 3. Has there been any consultation on the development of the proposal(s)?

Public or targeted consultation with children and young people, their parents/carers, the children's workforce - is there enough information on the views of the children and young people who will be affected by the policy/measure?

3.1. As referenced in Stage 2 of this draft CRWIA, there was a full public consultation in 2018 including on the proposal to reduce the minimum age of applicants to 16 from 18. A draft CRWIA formed part of that 2018

consultation. This CRWIA forms part of a further public consultation on the provisions of a draft Bill.

3.2. As highlighted in Stage 3, since the 2018 consultation, the Cabinet Secretary for Social Security and Older People has met with a range of groups to gather further information and evidence:<sup>146</sup>

- Women's Spaces in Scotland;
- CARE for Scotland;
- The Free Church of Scotland;
- Equality Network;
- Stonewall Scotland;
- LGBT Health and Wellbeing;
- LGBT Youth Scotland;
- Scottish Women's Aid;
- Rape Crisis Scotland;
- Engender;
- Close the Gap;
- Zero Tolerance;
- The Chair of the First Minister's National Advisory Group on Women and Girls; and
- Members of the Scottish Youth Parliament.

3.3. In addition, Scottish Government officials met with:

- A member of Forwomen.scot;<sup>147</sup>
- The Scottish Catholic Education Service; and
- The Catholic Parliamentary Office of the Bishops' Conference of Scotland.

**4. Should children and young people be further involved in the development of this policy? Are there particular groups of children and young people whose views should be sought?**

Specify how - outline the purpose, format, timetable and the questions you want to ask

Yes. The Scottish Government welcomes responses to the consultation from children and young people and from those organisations who work with them to advocate for them or represent their views.

**5. Should other stakeholders and experts be further involved in the development of this policy?**

<sup>146</sup> In addition, a meeting was scheduled on a number of occasions with the group Women and Girls in Scotland who subsequently were unable to attend:

<https://wgscotland.org.uk/about/>. Their views were instead set out in correspondence.

<sup>147</sup> Their website is: <https://forwomen.scot/>.

Specify how - outline the purpose, format, timetable and the questions you want to ask

The Scottish Government would particularly welcome any further evidence which professionals working with young people may have for the purposes of finalising this draft CRWIA should the draft Bill proceed.

**APPENDIX A- CRWIA STAGE 2- SCREENING- EVIDENCE BASE  
SCOTTISH GOVERNMENT’S UNDERSTANDING OF LEGAL GENDER  
RECOGNITION PROCESSES FOR CHILDREN IN OTHER COUNTRIES**

<b>Country</b>	<b>Minimum age</b>	<b>Court process</b>	<b>Admin. process</b>	<b>Who can apply and evidence required</b>
Argentina	None	Only where disagreement	National Registry of Persons’ office	By person’s legal representatives but must be express consent of person under 18. If they cannot agree, application is made through a court.
Australian Capital Territory <sup>148</sup>	None	-	Registrar-General	For under 18s, those with parental responsibility must apply. They must declare that application is in child’s best interests. In addition, a doctor or psychologist must confirm the child has had appropriate clinical treatment for alteration of their sex. <sup>149</sup>
Belgium	16	-	Civil Registrar	Persons aged 16 and 17 may request the

<sup>148</sup> Births, Deaths and Marriages Registration Act 1997, section 24(2).

<sup>149</sup> At the URL below

[https://www.accesscanberra.act.gov.au/app/answers/detail/a\\_id/1691/kw/CHANGE%20OF%20SEX](https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/1691/kw/CHANGE%20OF%20SEX)



<b>Country</b>	<b>Minimum age</b>	<b>Court process</b>	<b>Admin. process</b>	<b>Who can apply and evidence required</b>
				civil registrar to change their recorded sex, provided there is parental authorisation and after consultation with a psychiatrist.
British Columbia <sup>150</sup>	None	-	Vital Statistics Agency	People aged 18 and under apply themselves. Their legal guardians must consent and they must also enclose a statutory declaration from a physician or psychologist confirming their gender identity.
Chile	14	Yes		An individual aged 14 to 17 can apply to the family court. The court will consider evidence, including psychological or psychosocial reports.
France	16	Yes	-	Emancipated minors (those

<sup>150</sup> Information on the process is at [https://www2.gov.bc.ca/assets/gov/health/forms/vital-statistics/vsa509c\\_fill.pdf](https://www2.gov.bc.ca/assets/gov/health/forms/vital-statistics/vsa509c_fill.pdf). The legislation is the Vital Statistics Act, at section 27 here-  
[http://www.bclaws.ca/civix/document/id/complete/statreg/96479\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96479_01).

<b>Country</b>	<b>Minimum age</b>	<b>Court process</b>	<b>Admin. process</b>	<b>Who can apply and evidence required</b>
				aged 16 and above who have been emancipated by an order of the guardianship judge) may apply using the same court based procedure as a person of 18.
Republic of Ireland <sup>151</sup>	16	Yes- for 16 and 17 year olds an order of court must be submitted with application.	Client Identity Services of Department of Social Protection.	Court must be satisfied that applicant's parents or legal representative's consent. Two medical reports must confirm the applicant's capacity and that they have transitioned or are transitioning to live in their preferred gender.
Malta <sup>152</sup>	None	Yes		Parents apply to the Civil Court of Registry who must 1. ensure that the best interests of the child are the paramount

<sup>151</sup> At <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html>

<sup>152</sup> At <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>

Country	Minimum age	Court process	Admin. process	Who can apply and evidence required
				consideration and 2. give due weight to the child's views based on their age and maturity
New Zealand <sup>153</sup>	18, (those aged 16 and over can apply if they are married or in civil union or de facto relationship) <sup>154</sup>	Yes		The person must demonstrate they:  1. have assumed the gender identity of person of the nominated sex; 2. have undergone appropriate medical treatment; and 3. will maintain a gender identity of a person of the nominated sex.
Norway	6 <sup>155</sup>		Tax office-National Population Register	Application by both child seeking recognition <u>and</u> those with parental responsibilities . If parents don't agree,

<sup>153</sup> At [https://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Services-Births-Deaths-and-Marriages-Information-for-Transgender-Applicants?OpenDocument](https://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Births-Deaths-and-Marriages-Information-for-Transgender-Applicants?OpenDocument).

<sup>154</sup> At [http://www.legislation.govt.nz/act/public/1995/0016/latest/versions.aspx?search=ts\\_act%40bill%40regulation%40deemedreg\\_births+deaths+marriages+and+relationships+act+1995\\_resel\\_25\\_a&p=1](http://www.legislation.govt.nz/act/public/1995/0016/latest/versions.aspx?search=ts_act%40bill%40regulation%40deemedreg_births+deaths+marriages+and+relationships+act+1995_resel_25_a&p=1) and <http://youthlaw.co.nz/rights/legal-ages/#16-years> .

<sup>155</sup> Unless the child has an intersex condition/variation in sex characteristics, in which case an application can be made notwithstanding they are under 6 years of age.

Country	Minimum age	Court process	Admin. process	Who can apply and evidence required
				application is to the County Governor of Oslo and Akershus.

**The Scottish Government  
December 2019**

## ANNEX H: DRAFT FAIRER SCOTLAND DUTY ASSESSMENT

<b>Title of policy/ practice/ strategy/ legislation etc.</b>	The Gender Recognition Reform (Scotland) Bill
<b>Lead Minister</b>	Cabinet Secretary for Social Security and Older People
<b>Directorate</b> <b>Division</b> <b>Team</b>	Justice Civil Law and Legal System Family Law Unit

### **1. What is the aim of your policy/strategy/plan?**

The aim of the Bill is to replace the current system for obtaining legal gender recognition, which involves applying to a UK tribunal (the Gender Recognition Panel) with a system which involves applying instead to the Registrar General for Scotland.

### **Who will it affect (particular groups/businesses/geographies etc)?**

The changes to the system will affect trans people who apply for a full Gender Recognition Certificate (GRC). The Scottish Government expects, based on international experience, that the numbers from Scotland applying for a GRC might increase from around 30 a year to around 250 a year.

### **What main outcomes do you expect the policy/strategy/plan to deliver?**

The key aim is to establish a more straightforward system for obtaining legal gender recognition in Scotland.

### **2. What is your timeframe for completing the Fairer Scotland assessment?**

This is a draft assessment for consultation purposes: a question seeking comments on the Impact Assessments, including this one, is included in the consultation.

The Scottish Government will publish a final version of this Fairer Scotland Duty Assessment when we introduce the Gender Recognition Reform (Scotland) Bill into Parliament.

### **3. Who else in the organisation will be involved in the assessment and what roles will they be playing?**

This Assessment has been drawn up by a policy official who has sought comments from other policy officials and from colleagues in Analytical Services.

## **STAGE 2 - EVIDENCE**

**Please answer the questions below to help meet the duty's evidence requirements.**

### **4. What does the evidence suggest about existing inequalities of outcome, caused by socio-economic disadvantage, in this specific policy area?**

There is some evidence that people with the protected characteristic of gender reassignment may experience socio-economic disadvantage when compared with the population generally.

For example, a Scottish Public Health Network Report on Healthcare Needs Assessment of Gender Identity Services in Scotland noted that:

“Service Data highlighted a potential socio-economic gradient in referrals to Scottish GICs nationally, with higher proportions of referrals from adults and especially young people from more deprived areas” (page 108).<sup>156</sup>

The same report notes evidence from probability sample surveys in the US which suggested that trans people were more likely to be below the poverty line, or to be unemployed, although these findings may not be entirely transferrable to Scotland (page 29).

Research carried out by Stonewall in Great Britain found that around 1 in 4 of the trans people who responded to the survey had experienced homelessness.<sup>157</sup> It should be noted that this was not a random sample and findings cannot be generalised to the British trans population as a whole. In Scotland, at least 8% of the general population had experienced homelessness at some point in their lives, as of 2015.<sup>158</sup>

An LGBT Survey was carried out by the UK Government Equalities Office in 2017. The survey was carried out online with a self-selected sample, which means respondents are drawn from a non-representative sample of LGBT people across the UK and findings cannot therefore be generalised to the trans population in the UK as a whole.

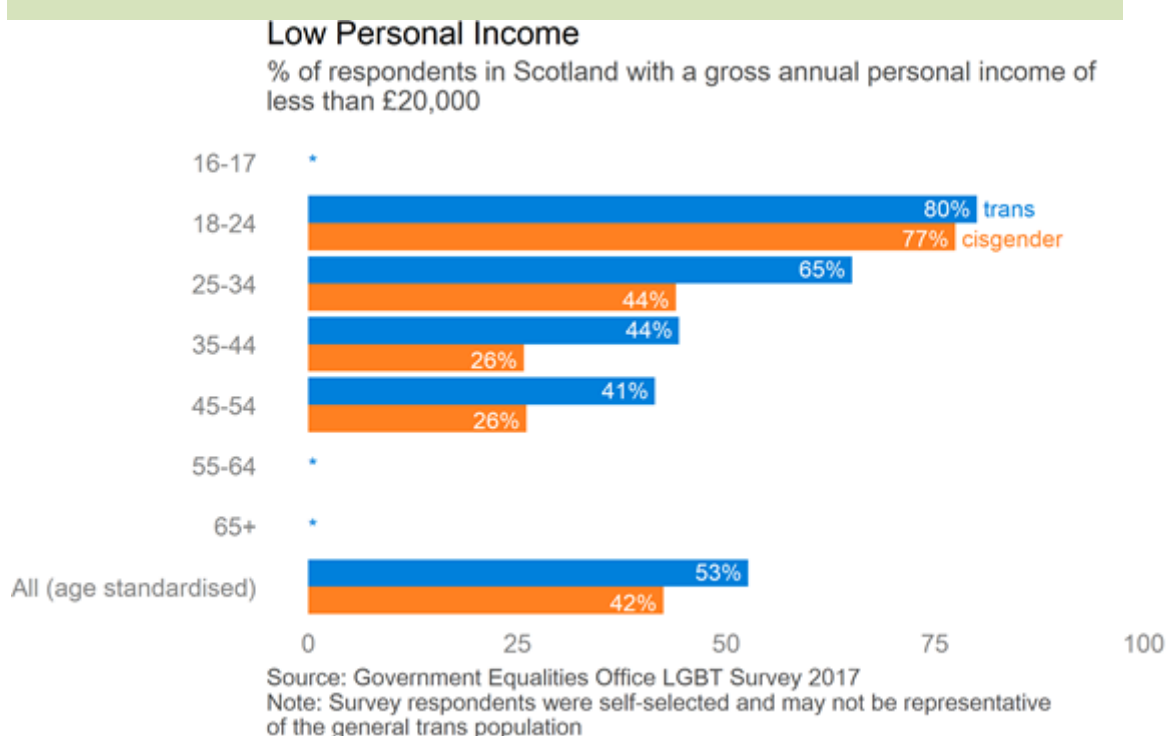
<sup>156</sup> [https://www.scotphn.net/wp-content/uploads/2017/04/2018\\_05\\_16-HCNA-of-Gender-Identity-Services.pdf](https://www.scotphn.net/wp-content/uploads/2017/04/2018_05_16-HCNA-of-Gender-Identity-Services.pdf)

<sup>157</sup> [https://www.stonewall.org.uk/system/files/lgbt\\_in\\_britain\\_-\\_trans\\_report\\_final.pdf](https://www.stonewall.org.uk/system/files/lgbt_in_britain_-_trans_report_final.pdf).

<sup>158</sup> <https://www.gov.scot/publications/health-homelessness-scotland/pages/1/>

A greater proportion of the 1,160 self-selecting trans respondents in Scotland had a personal income of less than £20,000 compared with non-trans respondents (53% and 42% respectively). By comparison, the Family Resources Survey found that for the general population, 57% of adults in Scotland had an income less than £20,000. However direct comparisons between the surveys are difficult to make due to differences in the income questions asked.

There was little difference for the 18-24 age group, where 80% of trans respondents and 77% of non-trans respondents had a personal income of less than £20,000. For all age groups older than 25, there was a relatively large difference between trans and non-trans respondents, with the largest gap (15 percentage points) seen in the 45-54 age group.



There were also differences in the proportion of trans and non-trans respondents neither in education or employment across all age groups. The largest gap was seen in the 35-44 age group where 21% of trans respondents in Scotland weren't in education or employment in contrast to 6% of non-trans respondents.

Overall 78% of survey respondents in Scotland were in employment, which is broadly consistent with the Annual Population Survey where 74% of the Scottish population aged 16-64 were in employment in 2017.

The survey also asked about trans respondents' reasons for not applying for a GRC. The most common reasons that trans women gave for having not applied for a GRC were the process being too bureaucratic (48%), not meeting the requirements (35%) and the cost of the application (33%). For

trans men, not meeting the requirements was the most common reason for not applying for a GRC (51%), followed by the application cost (37%) and the process being too bureaucratic (33%).

The differences between men and women may partly be explained by the different age profiles of the respondents, with trans men respondents being younger and fewer having completed transitioning.

The survey was carried out online with a self-selected sample, and promoted via stakeholders, at Pride events, through national media coverage, and through the Government Equalities Office's and other government social media channels. The methodology used means respondents are drawn from non-representative sample of LGBT people across the UK. Whilst the sample size is large enough to produce statistics for the trans respondents from Scotland, it isn't possible to generalise to the general Scottish trans population. For example, the survey doesn't include people who are unwilling to disclose their LGBT status on a government survey (even anonymously), and will under represent trans people who are less engaged with Pride events and LGBT organisations. As such, lived experiences of the respondents may differ from the experiences of trans people who didn't take part in the survey.

## **5. What does the evidence suggest about any possible impacts of the policy/programme/decision, as currently planned, on those inequalities of outcome?**

Broadly positive.

At the moment, the UK Gender Recognition Panel (GRP) charges a fee of £140 for applications.<sup>159</sup> This fee can be reduced if the applicant is on certain benefits or a low income.

The fees for applications are, under section 7(2) of the Gender Recognition Act 2004 as it currently stands, laid down by the UK Secretary of State.<sup>160</sup>

Under the Gender Recognition Reform (Scotland) Bill, fees under the proposed new system could be charged by the Registrar General for dealing with applications. No decision has yet been taken on whether fees should be charged or on what level any fees should be. However, it is likely that any fees would be lower than £140, as there would be no need to meet the costs associated with a tribunal.

The general approach taken by the Registrar General is to meet the costs of providing the day to day service through fees. This would not include the initial set-up costs of establishing the service (e.g. changes to IT; initial recruitment of staff; the initial preparation of forms and guidance) which would be met by Government.

<sup>159</sup> <https://www.gov.uk/apply-gender-recognition-certificate/how-to-apply>

<sup>160</sup> <http://www.legislation.gov.uk/ukpga/2004/7/section/7>



Under the current system for obtaining legal gender recognition and the proposed new system, applicants have to provide statutory declarations. In Scotland, these are made before a notary public (most solicitors in Scotland are notaries public) or a justice of the peace. Notaries public can be expected to charge for this service but it is currently provided without charge by justices of the peace.<sup>161</sup>

**6. Is there any evidence that suggests alternative approaches to the policy/programme/decision? E.g. Evidence from around the UK? International evidence?**

There are a variety of systems in place across the world for obtaining legal gender recognition, including systems similar to the one being proposed now for Scotland.

**7. What key evidence gaps are there? Is it possible to collect new evidence quickly in areas where we don't currently have any? For example, through consultation meetings, focus groups or surveys?**

There is a lack of evidence on the income levels of trans people when compared with the general population. The Scottish Government would welcome evidence in this area during the consultation.

However, there is no robust evidence about how many trans people live in Scotland, or about other characteristics of the trans population as a whole, which means that it is not currently possible to know the degree to which the samples of trans people in surveys are representative of the transgender population. National Records of Scotland are currently proposing to include, and have tested, a 'trans status' question for the 2021 Census. This will provide the first official estimate of the trans population in Scotland, the characteristics of this population and their outcomes across a range of policy areas.

**8. How could you involve communities of interest (including those with lived experience of poverty and disadvantage) in this process? The voices of people and communities are likely to be important in identifying any potential improvements to the programme/policy/decision.**

Comments during the consultation would be welcome.

<sup>161</sup> <https://www.scotcourts.gov.uk/the-courts/jp-court/signing-documents>

### **STAGE 3 – ASSESSMENT AND IMPROVEMENT**

#### **9. What options could strengthen this programme/policy/decision in terms of its impacts on inequalities of outcome?**

- A. The Registrar General not charging a fee.
- B. The Registrar General charging differential fees, depending on the income levels of the applicant.

#### **10. What are the pros and cons of these options?**

On A, there would be a clear benefit to applicants. The disadvantage is that the costs of providing the service would fall on Government, rather than users.

On B, the advantage is that fee levels could reflect the applicant's financial circumstances. The disadvantage is that charging differential fees could lead to a considerable amount of administrative work in relation to a service which is unlikely to be used by a large number of people. As a result, it is possible that differential fees might give rise to more costs than savings.

#### **11. How could the programme/policy/decision be adjusted to address inequalities associated with particular groups? Particular communities of interest or communities of place who are more at risk of inequalities of outcome?**

This is covered by the answers above.

## STAGE 4 - DECISION

Key questions to discuss at this summary stage are:

**12. What changes, if any, will be made to the proposal as a result of the assessment? Why are these changes being made and what are the expected outcomes?**

Consideration will be given to whether in principle, any fees for gender recognition applications should be charged and to the level of fees charged by the Registrar General. There will be a further consultation before any fees are laid down.

**13. If no changes are proposed, please explain why.**

Not applicable

**Sign off of the Fairer  
Scotland Assessment  
template**

**TO BE COMPLETED WHEN FSDA FINALISED.**

**FAIRER SCOTLAND DUTY  
SUMMARY TEMPLATE**

<b>Title of Policy, Strategy, Programme etc.</b>	The Gender Recognition Reform (Scotland) Bill
<b>Summary of aims and expected outcomes of strategy, proposal, programme or policy</b>	The key aim is to establish a more straightforward system for obtaining legal gender recognition in Scotland.
<b>Summary of evidence</b>	There is some anecdotal evidence that people with the protected characteristic of gender reassignment may be on lower incomes when compared with the population generally.
<b>Summary of assessment findings</b>	Consideration will be given to the level of fees charged by the Registrar General. There will be consultation before any fees are laid down.
<b>Sign off</b>	<b>TO BE COMPLETED WHEN FSDA FINALISED.</b>

**The Scottish Government  
December 2019**

## **ANNEX I: DRAFT DATA PROTECTION IMPACT ASSESSMENT (DPIA)**

### **Introduction**

The purpose of this impact assessment is to assess and report on any potential data protection impacts as a result of the draft Gender Recognition Reform (Scotland) Bill on which the Scottish Government is consulting.

The Gender Recognition Act 2004 (“the GRA”) is UK wide legislation permitting a trans man or woman person aged at least 18 to make an application for a gender recognition certificate (“GRC”). A successful applicant will receive a full GRC which give legal recognition of their acquired gender in the UK. The gender in which a trans man or woman is living is called their “acquired gender” under the GRA.

The Scottish Government is consulting on the provisions of a draft Gender Recognition Reform (Scotland) Bill to reform the legal gender recognition process in Scotland. In this draft Data Protection Impact Assessment (“DPIA”), applications made under the provisions of the draft Bill are called “Scottish applications” and applicants in Scottish applications are called “Scottish applicants”.

Under the draft Bill, the data controller of data pertaining to Scottish applications would be the Registrar General.

### **Document metadata**

Name of Project: Consultation on the draft Gender Recognition Reform (Scotland) Bill

Author of report: Family Law Unit, Civil Law & Legal System, Justice Directorate, Scottish Government

Date of report: [ To be completed when finalised. ]

Name of Information Asset Owner (IAO) of relevant business unit: Gavin Henderson Deputy Director, Civil Law & Legal System.

Date for review of DPIA:

Review date	Details of update	Completion date	Approval Date
Independent analysis report of consultation responses becomes available - spring 2020	DPIA will be updated in light of consultation responses		

### Description of the project

The Scottish Government is consulting on the draft Gender Recognition Reform (Scotland) Bill. The draft Bill would, if enacted:

- (a) In relation to Scottish applications, remove the current medical requirements and the need for medical evidence when applicants are seeking legal gender recognition.
- (b) Remove the need for Scottish applicants to apply to the Gender Recognition Panel (“GRP”), a tribunal. Instead, Scottish applicants would be able to apply to the Registrar General for Scotland (“the Registrar General”). The Registrar General has a number of existing functions under the GRA<sup>162</sup> in relation to registration.
- (c) Require Scottish applicants either (a) to have been born or adopted<sup>163</sup> in Scotland or (b) to be ordinarily resident in Scotland;

Personal data to be processed:

Variable	Data Source
Applicant’s name	Applicant
Applicant’s address	Applicant

<sup>162</sup> The Registrar General’s existing functions under the GRA are outlined at <https://www.nrscotland.gov.uk/registration/gender-recognition>

<sup>163</sup> Or the subject of an entry in the Parental Order Register maintained by the Registrar General for Scotland. Parental orders under section 54 and 54A of the Human Fertilisation and Embryology Act 2008 follow a surrogacy arrangement. The Parental Order Register is currently maintained by the Registrar General under the Human Fertilisation and Embryology (Parental Orders) Regulations 2018 which replaced earlier similar regulations.

Applicant's date and place of birth	Applicant
Applicant's contact information, including telephone number and email address	Applicant
A statutory declaration by the applicant declaring certain statement to be true witness by a notary public or justice of the peace	Applicant and notary public or justice of the peace
Applicant's sex (as per their birth certificate) and their acquired gender	Applicant
Details of the notary public or justice of the peace, business address etc	Notary public or justice of the peace
Data concerning an applicant's marital or civil partnership status	Applicant
Where required, a statutory declaration from their spouse or civil partner	Spouse or civil partner
Where available, the name and address of the applicant's spouse or civil partner	Spouse or civil partner
Where applicable, the details of the notary public or justice of the peace for the statutory declaration made by a spouse or civil partner	Notary public or justice of the peace
Applications for confirmatory GRCs would require applicants to submit evidence of their overseas gender recognition or a statutory declaration	Applicant and in some cases where the applicant must provide a statutory declaration, a notary public or justice of the peace

Describe how this data will be processed:

*How data will be gathered and used*

The draft Bill would, if enacted, provided a lawful basis for the Registrar General to process information in relation to Scottish applications for gender recognition.

The draft Bill makes provision for Scottish applications for gender recognition to be considered by the Registrar General and for certain specified information to be submitted as part of such an application. The documents presented as part of a Scottish application will be received and examined by the staff of the Registrar General who will extract and make a record of data concerning the application. The information provided will be used for the purposes of reaching a decision on the application, for the purposes of communicating with the applicant, and where a spouse or civil partner has submitted a statutory declaration as to their wish to continue in the marriage or civil partnership, communicating with their spouse or civil partner, all in accordance with provisions of the draft Bill. Where an applicant is married or in a civil partnership, the documents associated with an application might, at the end of the process, consist of a completed application form, a statutory declaration by the applicant, a notice of confirmation of intention from the applicant and a statutory declaration by the applicant's spouse or civil partner.

Where a successful applicant who is issued with a full GRC by the Registrar General, was born or adopted in Scotland then, as is the case now, the Registrar General will then use the data to create a new record of their birth or adoption showing their new legal sex in the Gender Recognition Register (the GRR) from which a new extract certificate of birth/adoption can be generated and issued to them. The GRR was constituted by the GRA. Information held in the GRR by the Registrar General is not publicly accessible under the 2004 Act and this would remain the case under the draft Bill. Under the draft Bill, if enacted, the GRR would contain information about successful Scottish applicants as well as data pertaining to those individuals who continue to make applications under the existing arrangements as they would continue to apply in England, Wales, and Northern Ireland.

Where a successful Scottish applicant is in a Scottish marriage or civil partnership, an updated extract from the Register of Marriages can also be issued by the Registrar General.

The appropriate content of requisite privacy notices will be considered as part of an operational DPIA.

*Who will have access to the data?*

Access to the information collected would be restricted to:

(a) staff within the team of the Registrar General's staff processing applications;



(b) those of the Registrar General's staff who might deal with a review of a decision not to issue a GRC, or which seek amendment to the type of GRC issued, or a decision of the Registrar General or a court to revoke a GRC.

Under section 22 of the GRA, it is an offence for a person who has acquired information in an official capacity about another person's application for legal gender recognition or their gender history to disclose that information to a third person. Some types of disclosure are exempt, for example in relation to the prevention or detection of crime. The draft Bill does not make provision to alter these arrangements. The Scottish Government is considering whether further exceptions to section 22 should be made, by way of subordinate legislation under existing powers in the GRA or whether Scottish Government guidance on section 22 should be issued.

As is currently the case, the data submitted as part of a Scottish application will not be publicly available nor will information in the GRR. We anticipate that the numbers of applications, successful and unsuccessful, may be publicised, along with appropriate demographical information. The published information would not be such as would enable any individual applicant to be identified. Statistical information about applications for gender recognition is currently published by HM Courts and Tribunals Service.

*How it will be transmitted and how frequently*

At present, under the GRA, the GRP has a duty to advise the Registrar General of the issue of a full GRC to a person born or adopted in Scotland or to an applicant who is in a marriage or civil partnership registered in Scotland. In respect of Scottish applications, the draft Bill requires the Registrar General to share information about full GRCs with Registrars General in other parts of the UK where they were born or adopted in another part of the UK, or are in a marriage or civil partnership constituted elsewhere in the UK. Under the GRA, on average 30 full GRCs are issued to those born or adopted in Scotland each year. We estimate that if the draft Bill were enacted and implemented, that the numbers of applicants could rise to around 250 applications per year, who could then update their records.

The current Registrar General, Paul Lowe is the Chief Executive of National Records of Scotland, a non-ministerial department of the Scottish Government. National Records of Scotland (NRS) has a published policy in respect of data protection.<sup>164</sup> This includes a commitment to ensuring staff understand their responsibilities for data protection.

*How will data be stored and disposed of?*

Information about applications received and decisions on their handling is likely to be stored in a purpose-built IT system. NRS has well-established processes for the safe storage of data and appropriate disposal of data compliant with data protection legislation. On retention periods, we will give careful consideration to the personal data which requires to be retained after an application has been processed: the draft Bill envisages appeal and revocation processes which may affect the accuracy of information held and provision is made in the draft Bill to keep the information held correct.

*Who will own and manage the data?*

Data will be owned and managed by the Registrar General.

*How will the data be checked for accuracy and kept up to date*

A quality assurance process would be used to offer assurance as to the accuracy of the data recorded when compared to the information supplied by an applicant and, where applicable, by their spouse or civil partner. The draft Bill makes provision for processes allowing for the correction of information held in respect of Scottish applications and errors in GRCs or the type of GRC issued by the Registrar General. These reflect existing arrangements under the GRA.

<sup>164</sup> At <https://www.nrscotland.gov.uk/record-keeping/legislation/primary-information-legislation/data-protection>.

Explain the legal basis for the sharing with internal or external partners:

The GRA currently makes provision for a copy of the GRC issued by the GRP to be sent by the GRP to a Registrar General in the relevant constituent part of the UK where the applicant was born or adopted there or was married or registered a civil partnership there. The draft Bill contains similar provision requiring the Registrar General to send a copy of a full GRC issued to a successful Scottish applicant to a Registrar General in another constituent part of the UK where they were born or adopted in that other constituent part, or where they were married or entered into a civil partnership there.

## Stakeholder analysis and consultation

The Scottish Government consulted on a draft Privacy Impact Assessment (“PIA”) as part of the consultation on proposals to reform the Gender Recognition Act 2004 (“the 2018 consultation”).<sup>165</sup> A further consultation is being conducted on the draft Bill and the consultation will include seeking views on this draft DPIA. Responses to the 2018 consultation were independently analysed.<sup>166</sup>

The analysis highlighted that only a very small number of respondents commented on the partial PIA. Points made included:

- (a) that any impacts of the General Data Protection Regulation should be noted (which this draft DPIA addresses);
- (b) that reference to exceptions to section 22 of the GRA (which creates an offence in relation to the disclosure of certain information about gender recognition applications) and which is covered in this DPIA; and
- (c) concerns that a trans person’s right to privacy may place other people, in particular women, at risk (the draft Bill does not alter existing arrangements for disclosure of data about applications to be a criminal offence subject to exceptions for disclosures required, including for the prevention of crime).

The Scottish Government also consulted with the Information Commissioner’s Office under Article 36(4) of the General Data Protection Regulation. The Scottish Government met with the Scottish Information Commissioner’s Office. We have considered their advice in relation to this draft DPIA. No concerns were raised on the proposals in the draft Bill.

<sup>165</sup> At: <https://www.gov.scot/publications/review-gender-recognition-act-2004/>

<sup>166</sup> At: <https://www.gov.scot/publications/review-gender-recognition-act-2004-analysis-responses-public-consultation-exercise-report/>

Method used to communicate the outcomes of the DPIA .

The draft DPIA has been published on the Scottish Government website as part of a consultation on the draft Bill. The views of respondents are welcomed on all the draft Impact Assessments in the consultation.

### **Questions to identify privacy issues**

Involvement of multiple organisations

The current arrangements involve both the Gender Recognition Panel and the Registrar General handling data about applications for legal gender recognition, as well as other Registrars General in the other constituent parts of the UK. Under the draft Bill, the Registrar General would replace the GRP for Scottish applications, but where an applicant was born or adopted in another part of the UK or entered into a marriage or civil partnership in another part of the UK, the Registrar General would send a copy of a full GRC to the relevant Registrar General in the relevant part of the UK. The need for security and privacy in relation to such data sharing between the Registrars General would be a consideration in finalising procedures should the draft Bill be enacted.

Anonymity and pseudonymity

The potential use of pseudonymisation of personal data will be considered when an operational DPIA is developed. The Scottish Government recognise the need for the processes and technology deployed to meet the requirements of the GDPR.

## Technology

This will be considered when an operational DPIA is developed. The Scottish Government recognise the need for the processes and technology deployed to meet the requirements of the GDPR.

## Identification methods

As is now the case, successful Scottish applicants would be issued with a GRC. A unique identifier might be used to ensure that a link between a particular issued GRC to recorded information about the relevant application can be made. However, personal data will not be available to the public and would be restricted to a limited number of the Registrar General's staff.

## Sensitive/Special Category personal data

Under the provisions of the draft Bill, Scottish applicants would not have to submit any medical evidence to the Registrar General. Data concerning health is special category personal data. (Under the GRA, typically applicants must produce two medical reports, which must detail a diagnosis of gender dysphoria and in certain cases, any surgery or treatment that the applicant has undertaken).

Under the provisions of the draft Bill, Scottish applicants must be aged 16 and over. The draft Bill does not extend to people younger than 16. The current minimum age of applicants under the GRA is 18. We note that section 208 of the Data Protection Act 2018 specifies that a person aged 12 and over is presumed to be of sufficient age and maturity to have the understanding to exercise a right conferred by data protection legislation to give consent for the purposes of data protection legislation, unless the contrary is shown. If the draft Bill proceeds, further consideration will be given to suitable guidance and privacy notices to ensure that younger applicants are aware of the processing of personal data involved in the handling of a Scottish application, as well as to ensure all applicants are clear on how their personal data will be processed.

### Changes to data handling procedures

The Registrar General would not make the personal data publicly available.

The draft Bill, if enacted, would not involve:

- new or changed data collection policies or practices that are unclear or intrusive; or
- changes to data quality assurance, processes and standards that may be unclear or unsatisfactory; or
- new or changed data security access or disclosure arrangements that may be unclear or extensive; or
- new or changed data retention arrangements that may be unclear or extensive; or
- a change in the medium for disclosure of publicly available information such that the data becomes more readily accessible than before.

### Statutory exemptions/protection

None of the arrangements would require statutory exemptions/protections in data protection legislation. The GRA has a number of exceptions permitting the disclosure of data about gender recognition applications by a person who holds the information in an official capacity, including for the prevention of crime, where disclosure is in accordance with an order of a court or tribunal or where it is made to the Registrar General for England and Wales, the Registrar General for Scotland or the Registrar General for Northern Ireland.

### Justification

This does not apply in relation to the draft Bill.

### 5.9 Other risks

No other risks have been identified.

## General Data Protection Regulation (GDPR) Principles

<b>Principle</b>	<b>Compliant – Yes/No</b>	<b>Description of how you have complied</b>
6.1 Principle 1 – fair and lawful, and meeting the conditions for processing	Yes	The draft Bill, if enacted, would provide the lawful basis for processing data pertaining to Scottish gender recognition applications. The draft Bill does not require the collection of any new personal information distinct from what is already collected by the GRP for the purposes of recognition under the GRA now. Collection of special category data is removed for Scottish applications.
<b>Principle</b>	<b>Compliant – Yes/No</b>	<b>Description of how you have complied</b>
6.2 Principle 2 – purpose limitation	Yes	Data would be collected for the same purposes as under the existing arrangements in the GRA. The purpose of data processing has not altered as a result of the draft Bill, if it was enacted.
<b>Principle</b>	<b>Compliant – Yes/No</b>	<b>Description of how you have complied</b>
6.3 Principle 3 – adequacy, relevance and data minimisation	Yes	The data to be collected will be kept to the minimum necessary. The draft Bill would remove for Scottish applicants any requirement to submit medical evidence (special category data) with their application. The draft Bill does not require the collection of any new personal information distinct from what is already collected by the GRP for the purposes of recognition under the GRA now.

<b>Principle</b>	<b>Compliant – Yes/No</b>	<b>Description of how you have complied</b>
6.4 Principle 4 – accurate, kept up to date, deletion	Yes	The draft Bill incorporates processes supporting accuracy of the data, allowing for corrections of inaccurate data. The draft Bill would not alter existing internal quality control arrangements in NRS.
<b>Principle</b>	<b>Compliant – Yes/No</b>	<b>Description of how you have complied</b>
6.5 Principle 5 – kept for no longer than necessary, anonymization	Yes	Retention arrangements will be considered in the light of final decisions on a Bill that the Scottish Government take forward following the consultation on this draft Bill. There may be a need to retain some items of personal data in relation to the possibility of a court action challenging a decision to issue a GRC.
<b>Principle</b>	<b>Compliant – Yes/No</b>	<b>Description of how you have complied</b>
6.6 GDPR Articles 12-22 – data subject rights	Yes	The draft Bill does not contain provisions affecting these rights, the form and content of a privacy notice in relation to data to be provided by applicants will be considered following enactment if a Bill proceeds. There are arrangements for review and appeal of decisions made in relation to Scottish applications as well as for correction of data held in relation to applications.
<b>Principle</b>	<b>Compliant – Yes/No</b>	<b>Description of how you have complied</b>



6.7 Principle 6 - security	Yes	The draft Bill does not affect the existing security arrangements around the data being collected for the purposes of gender recognition. The personal data required for processing a Scottish application is limited under the draft Bill in that no medical evidence is required. A limited group of staff in NRS would have access to the personal data collected as is the case now and there are criminal penalties for the disclosure of data about applications, which are not affected under the draft Bill.
<b>Principle</b>	<b>Compliant – Yes/No</b>	<b>Description of how you have complied</b>
6.8 GDPR Article 44 - Personal data shall not be transferred to a country or territory outside the European Economic Area.	-	This will be considered in an operational DPIA, following consultation on the draft Bill. The Scottish Government recognise the need to meet the requirements of the GDPR.

## Risks identified and appropriate solutions or mitigation actions proposed

Is the risk eliminated, reduced or accepted?

Risk	Ref	Solution or mitigation	Result
Depending on decisions made concerning implementation if a Bill proceeds in the Scottish Parliament, data may be stored on an IT system provided by a third party IT provider.		Any contract with an IT provider would set out steps to minimise risk of inappropriate access to and use of personal data.	Reduced risk
Personal data concerning applications for gender recognition might be released due to insecure IT system.		Work with IT provider to ensure sufficient built in safeguards to reduce risks of unauthorised access to data.  Consideration will be given in a future operational DPIA to the need for data sharing agreements - the draft Bill, if enacted, would require the Registrar General to send a copy of a full GRC issued to an individual	Reduced risk

		born or adopted in another part of the UK to the relevant Registrar General for that part.	
Personal data might be released through processing of applications		The draft Bill retains the existing legal protection against unauthorised disclosure of such information pertaining to an application for gender recognition. Privacy and data handling should continue to form an important part of training for NRS staff involved in processing applications.	Reduced risk

### **Incorporating Privacy Risks into planning**

Explain how the risks and solutions or mitigation actions will be incorporated into the project/business plan, and how they will be monitored. There must be a named official responsible for addressing and monitoring each risk.

This section will be considered and completed in the future on review of the DPIA.

<b>Risk</b>	<b>Ref</b>	<b>How risk will be incorporated into planning</b>	<b>Owner</b>

Risk	Ref	How risk will be incorporated into planning	Owner

**Data Protection Officer (DPO)**

The DPO may give additional advice, please indicate how this has been actioned.

Advice from DPO	Action

## Authorisation and publication

The DPIA report should be signed by your Information Asset Owner (IAO). The IAO will be the Deputy Director or Head of Division.

Before signing the DPIA report, an IAO should ensure that she/he is satisfied that the impact assessment is robust, has addressed all the relevant issues and that appropriate actions have been taken.

By signing the DPIA report, the IAO is confirming that the impact of applying the policy has been sufficiently assessed against the individuals' right to privacy.

The results of the impact assessment must be published in the eRDM with the phrase "DPIA report" and the name of the project or initiative in the title.

Details of any relevant information asset must be added to the Information Asset Register, with a note that a DPIA has been conducted.

**I confirm that the impact of the Gender Recognition Reform (Scotland) Bill has been sufficiently assessed against the needs of the privacy duty:**

Name and job title of a IAO or equivalent	Date each version authorised
Gavin Henderson Deputy Director Civil Law & Legal System.	<b>TO BE COMPLETED WHEN FINAL VERSION OF DPIA IS PREPARED FOR WHEN THE BILL IS INTRODUCED INTO PARLIAMENT</b>

**The Scottish Government  
December 2019**

## ANNEX J: DRAFT EQUALITY IMPACT ASSESSMENT RECORD

<b>Title of policy/ practice/ strategy/ legislation etc.</b>	The review of the Gender Recognition Act 2004 (the GRA)
<b>Minister</b>	Cabinet Secretary for Social Security and Older People
<b>Directorate: Division: Team</b>	Civil Law and Legal System
<b>Is this new policy or revision to an existing policy?</b>	New policy, although it is already possible under the GRA to obtain legal gender recognition

### Purpose of this draft Equality Impact Assessment (EQIA)

1. In line with legal duties when proposing major policy changes, including Bills, the Scottish Government has prepared this draft EQIA. The aim of EQIAs is to consider the impact of policy proposals on persons having the protected characteristics in the Equality Act 2010 (“the 2010 Act”) and to ensure that any impact is taken account of when putting forward the final proposals.
2. This EQIA is a draft. It has been prepared in-house by the Scottish Government. The consultation asks consultees for views on the draft Impact Assessments, including this draft EQIA.
3. When the Gender Recognition Reform (Scotland) Bill is introduced into Parliament, the Scottish Government will publish final versions of the Impact Assessments at the same time, including a final version of the EQIA.
4. Reform of the GRA would contribute to the Scottish Government’s National Outcome of: “We respect, protect and fulfil human rights and live free from discrimination.”<sup>167</sup>

<sup>167</sup> Information on Scotland’s National Performance Framework is at <https://nationalperformance.gov.scot/>

## The last consultation

5. The Scottish Government carried out a consultation from 9 November 2017 to 1 March 2018 on proposals for reforming the GRA.<sup>168</sup> Chapter 7 of the independent analysis of responses<sup>169</sup> recorded comments made by consultees on the draft Impact Assessments included with the last consultation. The Scottish Government has taken account of these comments when preparing this partial EQIA.

6. There are a number of policy changes since the last consultation. In particular:

- The Scottish Government has decided not to extend legal gender recognition to those under 16. In taking this decision, the Scottish Government has taken account of the mixed evidence in the Child Rights and Wellbeing Impact Assessment (CRWIA) on the effect of obtaining legal gender recognition of those under 16. The Scottish Government does consider that those uncertain of their gender identity should be supported. The consultation also seeks views on whether the minimum age for applying for legal gender recognition should be reduced from 18 to 16.
- The Scottish Government has decided not to extend legal gender recognition at this stage to non-binary people. The Scottish Government considers that legal recognition of non-binary people would raise a number of issues in relation to areas such as registration, data, rights and responsibilities, changes to legislation, service delivery and costs. The Scottish Government is setting up a working group on non-binary people.

7. Responses to the last consultation, including comments on the draft EQIA, referred to potential consequences for women as a consequence of the reform of the GRA. Chapter 5 of the consultation discusses the potential consequences for women and the section of this draft EQIA which considers the protected characteristic of “sex” also discusses the potential consequences for women of GRA reform. In particular, reference is made to various exceptions in the Equality Act 2010 (“the 2010 Act”) which allow trans people to be excluded in specified circumstances where this is proportionate and is to achieve a legitimate aim.

<sup>168</sup> The previous consultation and related documents are at <https://consult.gov.scot/family-law/review-of-the-gender-recognition-act-2004/>

<sup>169</sup> The analysis of responses is at <https://www.gov.scot/publications/review-gender-recognition-act-2004-analysis-responses-public-consultation-exercise-report/pages/8/>

## Meetings with groups/organisations

8. Subsequent to the 2018 consultation, the Cabinet Secretary for Social Security and Older People has met with a range of groups to gather further information and evidence:<sup>170</sup>

- Women's Spaces in Scotland;<sup>171</sup>
- CARE for Scotland;<sup>172</sup>
- The Free Church of Scotland;<sup>173</sup>
- Equality Network;<sup>174</sup>
- Stonewall Scotland;<sup>175</sup>
- LGBT Health and Wellbeing;<sup>176</sup>
- LGBT Youth Scotland;<sup>177</sup>
- Scottish Women's Aid;<sup>178</sup>
- Rape Crisis Scotland;

<sup>170</sup> In addition, a meeting was scheduled on a number of occasions with the group Women and Girls in Scotland who were unable to attend: <https://wgscotland.org.uk/about/>. Their views were instead set out in correspondence.

<sup>171</sup> Two of the local groups of Women's Spaces in Scotland responded to the consultation and their responses can be accessed at: <https://webarchive.nrscotland.gov.uk/20190116052027/https://www2.gov.scot/Topics/Justice/law/17867/gender-recognition-review/review-of-gender-recognition-act-2004-list-of-orga/published-responses-from-organisations>. Women's Spaces in Scotland also met separately with Scottish Government officials

<sup>172</sup> Their 2018 consultation response is at: <https://webarchive.nrscotland.gov.uk/20190711105341/https://www2.gov.scot/Resource/0053/00539279.pdf>. CARE also met separately with officials from Scottish Government.

<sup>173</sup> Their 2018 consultation response is at: <https://webarchive.nrscotland.gov.uk/20190711105501/https://www2.gov.scot/Resource/0053/00539309.pdf>. The Free Church of Scotland also met separately with Scottish Government officials.

<sup>174</sup> Their 2018 consultation response is at: <https://webarchive.nrscotland.gov.uk/20190711105447/https://www2.gov.scot/Resource/0053/00539302.pdf>. Scottish Government officials also met separately with the Equality Network and Scottish Trans Alliance, Stonewall Scotland and LGBT Youth Scotland.

<sup>175</sup> Their 2018 consultation response is at: <https://webarchive.nrscotland.gov.uk/20190711105724/https://www2.gov.scot/Resource/0053/00539455.pdf>

<sup>176</sup> Their 2018 consultation response is at: <https://webarchive.nrscotland.gov.uk/20190711105603/https://www2.gov.scot/Resource/0053/00539374.pdf>

<sup>177</sup> Their 2018 consultation response is at: <https://webarchive.nrscotland.gov.uk/20190711105605/https://www2.gov.scot/Resource/0053/00539375.pdf>

<sup>178</sup> Their 2018 consultation response, setting out the results of a survey of their local groups, is at: <https://webarchive.nrscotland.gov.uk/20190711105713/https://www2.gov.scot/Resource/0053/00539450.pdf>



- Engender;<sup>179</sup>
- Close the Gap;
- Zero Tolerance;
- The Chair of the First Minister's National Advisory Group on Women and Girls; and
- Members of the Scottish Youth Parliament.

9. In addition, Scottish Government officials met with:

- A member of forwomen.scot;
- The Scottish Catholic Education Service; and
- The Catholic Parliamentary Office of the Bishops' Conference of Scotland.<sup>180</sup>

<sup>179</sup> Their 2018 consultation response submitted for the coalition of women's groups is at: <https://webarchive.nrscotland.gov.uk/20190711105437/https://www2.gov.scot/Resource/0053/00539300.pdf>. Engender also met separately with Scottish Government officials.

<sup>180</sup> Their 2018 consultation response is at: <https://webarchive.nrscotland.gov.uk/20190711105343/https://www2.gov.scot/Resource/0053/00539280.pdf>

## **Stage 1: Framing**

### ***Results of framing exercise***

In line with usual practice, Scottish Government officials held an internal framing meeting. This is designed to ensure that officials in addition to those leading in a policy area consider at an early stage points which then need to be considered in more detail in the EQIA.

The exercise identified that the following protected characteristics were particularly significant for this EQIA:

- Disability (including reduced capacity);
- Age (not just young people but older people);
- Gender reassignment;
- Sex;
- Religion/belief.

**Stage 2: Data and evidence gathering, involvement and consultation**

There is limited evidence about the numbers of trans people in Scotland and their experiences.

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
<b>AGE</b>	<p>1. The draft Child Rights and Wellbeing Impact Assessment sets out the evidence gathered in relation to people under 18.</p> <p>2. A report about the mental health and wellbeing of trans people reported that of the 889 people surveyed, the average age at which participants began living part-time in their felt gender was 23 (based on 487 who answered the question). The average age at which they began living full-time as their felt gender was 31 (based on 545 people answering the question).<sup>181</sup></p> <p>3. In the UK in 2007/2008, 392 people were issued with full GRCs. 67 (17%) were aged 58 and over.<sup>182</sup> In 2018/2019, 323 people were issued with full GRCs and the number of successful applicants aged 58 and over was 13%.</p>	<p>2. Trans Mental Health and Emotional Wellbeing Study 2012, Jay McNeil, Louis Bailey, Sonja Ellis, James Morton &amp; Maeve Regan.</p> <p>3. Tribunals and Gender Recognition Statistics (Ministry of Justice)</p>	

<sup>181</sup> At [http://www.scottishtrans.org/wp-content/uploads/2013/03/trans\\_mh\\_study.pdf](http://www.scottishtrans.org/wp-content/uploads/2013/03/trans_mh_study.pdf).

<sup>182</sup> At <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2019> - see Main Tables at Table GRP 4.

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>4. A small-scale qualitative study (life-story interviews) with 6 older trans people in Sweden (aged 62-78) highlighted some additional age-related difficulties that older trans people might experience with transitioning.</p> <p>Participants reported encountering attitudes questioning the value of transitioning later in life, that physical aging can make the performance of gender harder in some ways and fears about the amount of choice and control they may have over future care.</p>	<p>4. A. Siverskog, 2015. Ageing Bodies that Matter: Age, Gender and Embodiment in Older Transgender People's Life Stories. <i>NORA: Nordic Journal of Women's Studies</i>, 23(1): 4-19.</p>	
<b>DISABILITY</b>	<p>1. In a survey of 889 trans people in 2011, 58% (of the sample) indicated that they had a disability or chronic health condition.<sup>183</sup></p> <p>2. In the UK Government LGBT Survey carried out in 2017, 33% of trans participants indicated that they had a</p>	<p>1 and 3. Trans Mental Health and Emotional Wellbeing Study 2012, Jay McNeil, Louis Bailey, Sonja Ellis, James Morton &amp; Maeve Regan.</p> <p>2. UK Government LGBT Survey Research Report July 2018</p>	<p>The Scottish Government has considered how notaries public and justices of the peace can check whether a person making a statutory declaration knows and understands what they are doing. The consultation outlines guidance available to notaries public and justices of the peace on this type of issue.</p>

<sup>183</sup> At [http://www.scottishtrans.org/wp-content/uploads/2013/03/trans\\_mh\\_study.pdf](http://www.scottishtrans.org/wp-content/uploads/2013/03/trans_mh_study.pdf) Page 12

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>disability, whereas 14% of non-trans respondents said they did.<sup>184</sup></p> <p>3. In the survey mentioned at 1 above, 36% identified that they had a mental health issue. 88% (of 549 who answered the question) had been diagnosed with depression or considered they were or had been depressed and 48% (of 483) had attempted suicide at least once.</p> <p>4. Evidence indicates that the mental health issues experienced by trans people are related to the prejudice and discrimination they experience.<sup>185</sup></p> <p>5. Evidence indicates that transitioning to the gender with which the person identifies helps resolve distress and mental health issues.<sup>186</sup></p>	<p>4. The Lancet Psychiatry 26 July 2016</p> <p>5. Dhejne C, et al “Mental Health and gender dysphoria: A review of the literature” (2016) International Review of Psychiatry 28(1)</p>	

<sup>184</sup> At [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721704/LGBT-survey-research-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf) at page 23

<sup>185</sup> Rebeca Robles et al “Removing transgender identity from the classification of mental disorders: a Mexican field study for ICD-11” [http://dx.doi.org/10.1016/S2215-0366\(16\)30165-1](http://dx.doi.org/10.1016/S2215-0366(16)30165-1).

<sup>186</sup> Dhejne C, et al “Mental Health and gender dysphoria: A review of the literature” (2016) International Review of Psychiatry 28(1), 44-57. Abstract is at <https://biblio.ugent.be/publication/7081076>.

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>6. The Gender Identity Development Service (GIDS), commissioned by NHS England, has some information on its evidence base of a higher prevalence of autistic spectrum conditions in clinically referred gender dysphoric (GD) adolescents than in the general adolescent population.<sup>187</sup> This clinical observation is also reiterated in the wider international literature.</p> <p>7. A 2016 literature review concluded that 'Although the research is limited, especially for adults, there is an increasing amount of evidence that suggests a co-occurrence between gender dysphoria and ASD [Autism Spectrum Disorder]' and that there is 'a high prevalence of ASD in people with gender dysphoria attending clinical services'.<sup>188</sup></p> <p>A subsequently published study found that 'autistic traits appear to be more prevalent</p>	<p>6. Information collated by the Gender Identity Development Service England. Glidden, D., Bouman, W., Jones, B. &amp; Arcelus, J., 2016. Gender dysphoria and autism spectrum disorder: A systematic review of the literature. <i>Sexual Medicine Reviews</i>, 4(1), 3-14.</p> <p>7. Nobili, A., Glazebrook, C., Bouman, W., Glidden, D., Baron-Cohen, S., Allison, C., Smith, P. &amp; Arcelus, J., 2018. Autistic Traits in Treatment-Seeking Transgender Adults. <i>Journal of Autism and Developmental Disorders</i>, 48: 3984-3994</p>	

<sup>187</sup> <https://gids.nhs.uk/evidence-base>

<sup>188</sup> Glidden et al. 2016.

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>in transgender people assigned female at birth, but not in those assigned male at birth'.<sup>189</sup></p> <p>The study compared the prevalence of autistic traits as measured by a self-report instrument between a sample of adults referred to a UK transgender healthcare service between 2012 and 2016, with a non-trans sample matched for age and sex.</p> <p>No significant difference in autistic spectrum quotient (AQ) scores was found overall between the non-trans and trans groups, nor between groups for those assigned male at birth (non-trans men and trans women).</p> <p>However, trans men were significantly more likely than non-trans women to have a higher AQ score.</p> <p>The research found that the difference between groups mainly related to social behaviours, with less indication among the</p>		

<sup>189</sup> Nobili et al. 2018.

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>trans participants of difficulties around imagination or fascination with patterns and numbers, and the authors therefore hypothesise that this may indicate that ‘some transgender people do not really present with ASC [Autistic Spectrum Conditions] but the high levels of social difficulties due to anxiety, depression and years of victimisation may affect the way they interact with others’.</p> <p>Studies to date have focused on prevalence rates and primarily with those who have been referred to a gender identity clinic. We are not aware of any studies discussing the influence of ASD diagnoses on treatment outcomes for gender dysphoria.<sup>190</sup></p>		
<b>GENDER REASSIGNMENT</b>	<p>1. It appears from information held by NRS that around 30 people a year from Scotland obtain full GRCs.</p> <p>2. The average number of full GRCs issued annually across the UK since the</p>	<p>1. National Records of Scotland</p> <p>2. Tribunals and Gender Recognition Statistics (Ministry of Justice)</p>	<p>Countries which have adopted systems for legal gender recognition based on an applicant’s declaration have done so from 2012 onwards.</p>

<sup>190</sup> Glidden et al. 2016



Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>2004 Act was implemented is 384.<sup>191</sup> Up to the end of 2018/19, the Gender Recognition Panel had issued 5,233 full GRCs.</p> <p>3. One estimate of the number of trans people in Scotland is around 25,000. This is based on 0.5% of the population of Scotland. The Scottish Public Health Network Report on the Health Care Needs Assessment of Gender Identity Services suggests that 0.5% is the most often quoted likely prevalence of trans people.<sup>192</sup></p> <p>4. Of the 1,160 self-selected trans people from Scotland who responded to the UK National LGBT Survey in 2017, 3.7% said that they owned a GRC.<sup>193</sup> However this proportion also includes non-binary respondents who may be less likely to apply for a GRC. The methodology used means respondents are drawn from non-representative sample of LGBT people across the UK, and therefore it is not</p>	<p>3. The Scottish Public Health Network Report on the Health Care Needs Assessment of Gender Identity Services</p> <p>4. Government Equalities Office, National LGBT Survey (2017)</p>	<p>The Scottish Government is not aware of evidence that obtaining legal gender recognition overseas through such a process leads to adverse consequences generally for society.</p> <p>However, the Scottish Government will continue to monitor this before introducing a Bill into the Scottish Parliament to establish a statutory declaration based system for obtaining legal gender recognition.</p> <p>The Scottish Government considers the key question is whether moving to a statutory declaration based system for obtaining legal gender recognition produces benefits for Scotland, when compared with the current system in Scotland for obtaining legal gender recognition.</p>

<sup>191</sup> <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2019> . See Main Tables at Table GRP 4.

<sup>192</sup> [https://www.scotphn.net/wp-content/uploads/2017/04/2018\\_05\\_16-HCNA-of-Gender-Identity-Services.pdf](https://www.scotphn.net/wp-content/uploads/2017/04/2018_05_16-HCNA-of-Gender-Identity-Services.pdf).

<sup>193</sup> <https://government-equalities-office.shinyapps.io/lgbt-survey-2017/>

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>possible to generalise these findings to the Scottish trans population as a whole.</p> <p>5. The UK LGBT Survey also asked trans people who had not applied for a GRC why they had not done so. The most common reasons that trans women in Scotland gave for having not applied for a GRC were the process being too bureaucratic (48%), not meeting the requirements (35%) and the cost of the application (33%). 10% said that they didn't have the time, 11% said that they didn't want to share their medical information, and 5% said that it was difficult to access their medical records.</p> <p>For trans men, not meeting the requirements was the most common reason for not applying for a GRC (51%), followed by the application cost (37%) and the process being too bureaucratic (33%). 12% said that they didn't have the time, 7% said that they didn't want to share their medical information, and 6% said that it was difficult to access their medical records.</p>	<p>5. Government Equalities Office, National LGBT Survey (2017)</p>	

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>The differences between men and women may partly be explained by the different age profiles of the respondents, with trans men respondents being younger and fewer having completed transitioning.</p> <p>6. A qualitative study which conducted in-depth interviews with 28 trans individuals living in Scotland in 2012-2014 found that the complex bureaucratic nature of the current GRC application process meant that most of the research participants 'who intended to permanently transition, whether through medical procedures or not, chose to rather change their name officially by deed poll or statutory declaration, legally allowed for anyone in the UK.'</p> <p>7 In Ireland, 3 people out of the 517<sup>194</sup> who have obtained a GRC asked for it to be revoked (because they no longer wished to be recognised in an acquired gender). This is 0.6%.</p>	<p>6 S. Morgan, 2017. <i>Constructing Identities, Reclaiming Subjectivities, Reconstructing Selves: An Interpretative Study of Transgender Practices in Scotland</i>. PhD thesis, University of Glasgow.</p> <p>7 Information provided by the Government of Ireland.</p>	

<sup>194</sup> This is the position as at the end of August 2019.

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>8. In a survey of 889 trans people in 2011, in discussing the physical changes which they had undergone in relation to being trans or transitioning, 86% had no regrets, with 10% having minor regrets and 2% having major regrets. In terms of social changes that they had made in relation to being trans or transitioning, 53% (of 523) had no regrets. 34% had minimal regrets, and 9% had significant regrets.<sup>195</sup></p> <p>9. A Swedish study published in 2014 examined the outcomes of applications in Sweden for legal and surgical sex reassignment<sup>196</sup> between 1960 and 2010. This indicated that out of the 681 people who changed their sex legally and surgically, 2.2% of them later regretted this and sought to reverse their decision. The study reported a significant decline in regrets over the time period.</p>	<p>8. Trans Mental Health and Emotional Wellbeing Study 2012, Jay McNeil, Louis Bailey, Sonja Ellis, James Morton &amp; Maeve Regan</p> <p>9. Dhejne, Cecilia et al (2014). "An Analysis of All Applications for Sex Reassignment Surgery in Sweden, 1960-2010: Prevalence, Incidence, and Regrets", Archives of sexual behavior. 43</p>	

<sup>195</sup> At [http://www.scottishtrans.org/wp-content/uploads/2013/03/trans\\_mh\\_study.pdf](http://www.scottishtrans.org/wp-content/uploads/2013/03/trans_mh_study.pdf).

<sup>196</sup> At [https://www.researchgate.net/publication/262734734\\_An\\_Analysis\\_of\\_All\\_Applications\\_for\\_Sex\\_Reassignment\\_Surgery\\_in\\_Sweden\\_1960-2010\\_Prevalence\\_Incidence\\_and\\_Regrets](https://www.researchgate.net/publication/262734734_An_Analysis_of_All_Applications_for_Sex_Reassignment_Surgery_in_Sweden_1960-2010_Prevalence_Incidence_and_Regrets).

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>10. A web-based survey conducted in Sweden in 2014 using an anonymous, self-selected sample of 796 trans individuals aged 15-94 found a correlation between trans people not having gender recognition and poorer reported quality of life.</p> <p>Both wanting to change legal gender and having changed legal gender were also correlated with poor self-rated health, although the association was smaller among those who had changed legal gender. The authors conclude that: 'These results suggest that ... increased access to legal gender recognition could improve the overall health and quality of life of trans people in Sweden.'</p> <p>11. There is some evidence regarding numbers of applicants for legal gender recognition from countries which have adopted self-declaration systems. In Denmark (pop. 5.8 million),<sup>197</sup> on average 289 people per year obtained legal gender</p>	<p>10. Zeluf G. et al., 2016. Health, disability and quality of life among trans people in Sweden: A web-based survey. <i>BMC Public Health</i>, 16(1): 1-15.</p> <p>11. Source is Danish Ministry of Social Security and the Interior, and Norwegian Ministry of Health and Care.</p>	

<sup>197</sup> <https://www.dst.dk/en/Statistik/emner/befolkning-og-valg/befolkning-og-befolkningsfremskrivning/folketal#>

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>recognition. In Norway (pop. 5.3 million),<sup>198</sup> where a self-declaration system for legal gender recognition was adopted in 2016, 706 people obtained legal gender recognition in the subsequent nine month period.</p>		
<p><b>MARRIAGE AND CIVIL PARTNERSHIP</b> (the Scottish Government does not require assessment against this protected characteristic unless the policy or practice relates to work, for example HR)</p>	<p>1. In 2018/19, the GRP granted 34 full GRCs to married applicants across the UK.<sup>199</sup></p> <p>2. Between 2010/11 and 2017/18, there were nine divorces in Scotland and two dissolutions of civil partnerships on the ground that an interim GRC had been issued to one of the parties to the marriage.</p>	<p>1. Tribunals and Gender Recognition Statistics (Ministry of Justice).</p> <p>2. Scottish Government Civil Justice Statistics.</p>	

<sup>198</sup> <https://www.ssb.no/en/befolkning/nokkeltall/population>

<sup>199</sup> <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2019> . See Main Tables at Table GRP 4. The Civil Partnership (Scotland) Bill, currently before the Scottish Parliament, introduces mixed sex civil partnership and makes provision so that civil partners obtaining gender recognition can stay in their civil partnership.

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
policies and practices)			
<b>PREGNANCY AND MATERNITY</b>	-	-	-
<b>RACE</b>	<p>1. Of the 1,160 self-selected trans people from Scotland who responded to the UK LGBT Survey in 2017, 93.8% said that they were White.<sup>200</sup> 1.1% preferred not to say, and the remaining 5.1% identified as belonging to a minority ethnicity.</p> <p>The methodology used means respondents are drawn from non-representative sample of LGBT people across the UK, and therefore it is not possible to generalise these findings to the Scottish trans population as a whole.</p> <p>In particular, respondents were typically younger than the general population and may not have been sampled proportionately across local authorities. Within the Scottish general population younger age groups are more ethnically diverse, and the proportion of minority</p>	1. Government Equalities Office, National LGBT Survey (2017)	

<sup>200</sup> <https://government-equalities-office.shinyapps.io/lgbt-survey-2017/>

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>ethnic people differs between local authorities.</p> <p>2. There is no statistical evidence published about the ethnic origin of people who are issued with a full GRC under the GRA.</p>		
<b>RELIGION OR BELIEF</b>	<p>1. Of the 1,160 self-selected trans people from Scotland who responded to the UK National LGBT Survey in 2017, two thirds (70%) said that they had no religion or belief.<sup>201</sup> 11% identified as Christian. 9% preferred not to say.</p> <p>The methodology used means respondents are drawn from non-representative sample of LGBT people across the UK, and therefore it is not possible to generalise these findings to the Scottish trans population as a whole.</p> <p>In particular, respondents were typically younger than the general population and</p>	1. Government Equalities Office, National LGBT Survey (2017)	

<sup>201</sup> <https://government-equalities-office.shinyapps.io/lgbt-survey-2017/>



Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>may not have been sampled proportionately across local authorities. Within the Scottish general population a higher proportion within younger age groups belong to no religion, and the proportion of the population belonging to different religions varies between local authorities.</p> <p>2. A number of respondents to the previous consultation noted that the proposed changes to the system for obtaining legal gender recognition could impact on women whose religion or belief prevented them from sharing spaces with men. Use of public toilets, changing rooms and refuges and participation in sport were given as examples.<sup>202</sup></p> <p>On this point, and as outlined in more detail in Chapter 5 of the consultation and later on in this EQIA, there are a number of exceptions in the Equality Act 2010 which allow trans people to be excluded in</p>	<p>2 Consultation responses.</p>	

<sup>202</sup> See the analysis of responses <https://www.gov.scot/publications/review-gender-recognition-act-2004-analysis-responses-public-consultation-exercise-report/pages/8/> Para 7.17 refers.

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>specified circumstances when this is proportionate and to achieve a legitimate aim.</p> <p>3. Some respondents to the previous consultation noted that gender reassignment may be contrary to religious beliefs held by some.</p> <p>The Scottish Government appreciates that some religious bodies may be opposed to the concept of legal gender recognition.</p> <p>However, as outlined in the consultation, the Scottish Government considers that a gender recognition system is required in Scotland for both policy reasons and to comply with the European Convention on Human Rights.</p> <p>Other religious or belief bodies may, of course, support the concept of legal gender recognition.</p> <p>As outlined in Chapter 5 of the consultation, and later on in this EQIA, there are exceptions in the Equality Act 2010 which allow trans people to be</p>		

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>excluded from certain forms of religious employment and also allow an approved celebrant to refuse to solemnise the marriage, or register the civil partnership, of a person that the celebrant reasonably believes acquired their gender under the GRA.</p>		
<b>SEX</b>	<p>1. A higher proportion of people legally recognised in the UK in their acquired gender under the 2004 Act are trans women (male to female) than trans men.</p> <p>2. However, the proportion of trans men (female to male) being legally recognised under the GRA has increased over time.</p> <p>3. In 2005/06, 1,181 full GRCs were granted (there was pent up demand for legal gender recognition in the early period after the GRP was established). 912 (77%) of these were to trans women and 269 (23%) to trans men.</p> <p>4. In 2008/09, 241 full GRCs were granted. 191 (79%) were to trans women and 50 (21%) to trans men.</p>	<p>1 to 5 Tribunals and Gender Recognition Statistics (Ministry of Justice).</p>	

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>5. In 2018/19, 323 full GRCs were granted. 198 (61%) were to trans women and 125 (39%) to trans men.<sup>203</sup></p> <p>6. The position in the UK similarly reflects the apparent position in other countries that there are more trans women than trans men.<sup>204</sup></p> <p>7. In Ireland, of the 517 people who have been recognised between September 2015 and August 2019, 233 (41%) were trans men (recorded as female at birth).</p> <p>8. A number of respondents to the previous consultation raised concerns about the implications of legal gender recognition for women.</p> <p>Concerns included:</p> <ul style="list-style-type: none"> <li>• access to women’s safe spaces;</li> </ul>	<p>7. Information provided by the Government of Ireland.</p> <p>8. Consultation responses.</p>	

<sup>203</sup> For all of these figures on GRCs, please see <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2019> . See Main Tables at Table GRP 4.

<sup>204</sup> See the evidence from 19 countries set out in [Meier S.C., Labuski C.M. \(2013\) The Demographics of the Transgender Population. In: Baumle A. \(eds\) International Handbook on the Demography of Sexuality. International Handbooks of Population, vol 5. Springer, Dordrecht.](#)

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<ul style="list-style-type: none"> <li>• risk of abuse;</li> <li>• a perceived erosion of the rights of women;</li> <li>• women's sports,</li> <li>• intimate medical care;</li> <li>• the accuracy of statistical information in areas such as crime recording or equality monitoring;</li> <li>• freedom of speech.<sup>205</sup></li> </ul> <p>On these points, Chapter 5 of the consultation, and this EQIA (later on) outline exceptions in the Equality Act 2010 which can be used in specified circumstances, when it is proportionate and to achieve a legitimate aim, to exclude trans people from single sex services and to exclude trans women from sporting competitions for women. There are also exceptions which can be used in relation to occupational requirements.</p>		

<sup>205</sup> Please see paragraphs 7.13 to 7.16 of the summary of consultation responses: <https://www.gov.scot/publications/review-gender-recognition-act-2004-analysis-responses-public-consultation-exercise-report/pages/8/>

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>These exceptions will remain in place after reform of the Gender Recognition Act 2004.</p> <p>On data, the Scottish Government has established a working group on sex and gender in data.<sup>206</sup></p> <p>On freedom of speech, the Scottish Government is fully committed to this and there are provisions in the European Convention on Human Rights to protect freedom of speech.</p> <p>9. There is a lack of any evidence around the actual experienced impacts of trans inclusion in services.</p> <p>Much of the literature identified does not justify a blanket exclusion of trans women from services or spaces (they themselves are a vulnerable group), but rather highlights the need for individual assessments and tailoring the service for each individual's needs, where they are also likely to encompass a wide variety of</p>	<p>9. Gottschalk, L., 2009. Transgendering women's space: A feminist analysis of perspectives from Australian women's services. <i>Women's Studies International Forum</i>, 32(3): 167-178.</p>	

<sup>206</sup> <https://www.gov.scot/groups/sex-and-gender-in-data-working-group/>

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>things unrelated to an individual's sex or gender identity.</p> <p>10. The Scottish Government has not identified any evidence supporting the claim that trans women are more likely than non-trans women to sexually assault other women in women-only spaces. Much of the literature reiterates this lack of any evidence, legal, medical or otherwise, to support this characterisation of trans women as 'deviant' or predatory.<sup>207</sup></p> <p>In addition to concerns about the inclusion of trans women in women-only spaces and services, some respondents expressed concerns that predatory men posing as trans women would seek to gain access to women only spaces and services for malicious reasons.</p> <p>11. The Scottish Government has not identified any evidence supporting a link between women-only spaces being inclusive of transgender women, and non-trans men falsely claiming a trans identity</p>	<p>10. Dunne, P., 2017. (Trans)forming single gender services and communal accommodations. <a href="#">Social and Legal Studies, 26(5)</a>.</p> <p>Eckes, S., 2017. The restroom and locker room wars: Where to pee or not to pee. <i>Journal of LGBT Youth</i>, 14(3): 247-265.</p> <p>11. Dunne 2017 and Eckes 2017</p>	

<sup>207</sup> [https://research-information.bris.ac.uk/files/139271435/Bristol\\_Pure\\_Version\\_PD.pdf](https://research-information.bris.ac.uk/files/139271435/Bristol_Pure_Version_PD.pdf)

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	to access these spaces and commit sexual violence. Other sources identified reiterated that there is a lack of any evidence to support this claim.		
<b>SEXUAL ORIENTATION</b>	<p>1. Of the 1,160 self-selected trans people from Scotland who responded to the UK LGBT Survey in 2017, around a third (32.1%) identified as bisexual.<sup>208</sup> A fifth (22%) said that they were gay or lesbian, 13.6% identified as pansexual, and 4.9% as queer. 10.4% said that they were heterosexual. 5.5% said that they did not know, or preferred not to say. The methodology used means respondents are drawn from non-representative sample of LGBT people across the UK, and therefore it is not possible to generalise these findings to the Scottish trans population as a whole.</p> <p>2. Of the 530 self-selected respondents to the 2012 Scottish Transgender Alliance survey who answered the question about sexual orientation, around a quarter identified as bisexual (27%) and another</p>	<p>1. Government Equalities Office, National LGBT Survey (2017)</p> <p>2. Scottish Transgender Alliance, <i>Trans Mental Health Study 2012</i>.</p>	

<sup>208</sup> <https://government-equalities-office.shinyapps.io/lgbt-survey-2017/>



Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>quarter identified as queer (24%). A fifth (20%) identified as straight or heterosexual.<sup>209</sup> Again, this was not a random sample and so findings cannot be assumed to be representative of the trans population as a whole.</p> <p>3. Respondents to the first consultation made a number of comments in this area, including suggestions that:</p> <ul style="list-style-type: none"> <li>• gender non-conforming children are being encouraged to transition when they would otherwise grow up to be lesbian or gay;</li> <li>• gay and lesbian people are coming under increasing social pressure to change their gender rather than to live as gay or lesbian;</li> <li>• lesbians may be accused of transphobia if they refuse to enter sexual relationships with trans women;</li> <li>• when lesbian organisations or advocacy groups are joined by trans</li> </ul>	<p>3. Consultation responses.</p>	

<sup>209</sup> [https://www.scottishtrans.org/wp-content/uploads/2013/03/trans\\_mh\\_study.pdf](https://www.scottishtrans.org/wp-content/uploads/2013/03/trans_mh_study.pdf)

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>women, trans issues often take priority.<sup>210</sup></p> <p>On children, the Scottish Government has concluded that legal gender recognition should not be available to those under 16.</p> <p>On lesbian and gay people, the Scottish Government considers that people should be able to live as lesbian and gay. This Government promoted the Marriage and Civil Partnership (Scotland) Act 2014 through Parliament. A key reason for promoting that legislation was to make it clear that same sex relationships have the same standing in society as mixed sex relationships.</p> <p>On relationships, Government does not lay down who a person should enter into a relationship with. That is a personal matter for the individuals concerned.</p> <p>On organisations, the rules in the Equality Act 2010 on membership and access to a</p>		

<sup>210</sup> Please see paragraphs 7.13 to 7.16 of the summary of consultation responses: <https://www.gov.scot/publications/review-gender-recognition-act-2004-analysis-responses-public-consultation-exercise-report/pages/8/>

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	benefit, facility or service, do not apply to associations with under 25 members. <sup>211</sup> In addition, there is an exception which allows an association to restrict its membership to persons who share a single protected characteristic. <sup>212</sup>		

<sup>211</sup> <https://www.equalityhumanrights.com/en/advice-and-guidance/does-equality-law-apply-organisation-i-belong-or-want-join-or-be-guest> and <http://www.legislation.gov.uk/ukpga/2010/15/section/107>

<sup>212</sup> <http://www.legislation.gov.uk/ukpga/2010/15/schedule/16>

**Stage 3: Assessing the impacts and identifying opportunities to promote equality**

Having considered the data and evidence you have gathered, this section requires you to consider the potential impacts – negative and positive – that your policy might have on each of the protected characteristics. It is important to remember the duty is also a positive one – that we must explore whether the policy offers the opportunity to promote equality and/or foster good relations.

**Do you think that the policy impacts on people because of their age?**

<b>Age</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination, harassment and victimisation			√	Policy is not designed for this.
Advancing equality of opportunity	√			Older people particularly those who are longer term transitioned may be able to apply without having to gather documentary evidence of their transition that they may no longer have to hand.  People aged 16 and 17 would be able to apply.
Promoting good relations among and between different age groups			√	Policy is not designed for this.

**Do you think that the policy impacts on disabled people?**

<b>Disability</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination, harassment and victimisation			√	Policy is not designed for this.
Advancing equality of opportunity	√			Living openly in an acquired gender with documents which are consistent may improve a transgender person's mental health. The Scottish Government and the Registrar General will consider further the need for clear and straightforward guidance for people with learning disabilities in relation to any new system for obtaining legal gender recognition.
Promoting good relations among and between disabled and non-disabled people			√	Policy is not designed for this.

**Do you think the policy impacts on people because of their marriage or civil partnership?**

<b>Marriage and Civil Partnership<sup>213</sup></b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	Policy is not designed for this.

<sup>213</sup> In respect of this protected characteristic, a body subject to the Public Sector Equality Duty (which includes Scottish Government) only needs to comply with the first need of the duty (to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010) and only in relation to work. This is because the parts of the Act covering services and public functions, premises, education etc. do not apply to that protected characteristic. Equality impact assessment within the Scottish Government does not require assessment against the protected characteristic of Marriage and Civil Partnership unless the policy or practice relates to work, for example HR policies and practices.

**Do you think that the policy impacts on women because of pregnancy and maternity?**

<b>Pregnancy and Maternity</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	Policy is not designed for this.
Advancing equality of opportunity			√	Policy is not designed for this.
Promoting good relations			√	Policy is not designed for this.

**Do you think the policy impacts on people on the grounds of their race?**

<b>Race</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	Policy is not designed for this.
Advancing equality of opportunity			√	Policy is not designed for this.
Promoting good race relations			√	Policy is not designed for this.

**Do you think the policy impacts on people because of their religion or belief?**

<b>Religion or belief</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	Policy is not designed for this.
Advancing equality of opportunity			√	Policy is not designed for this.
Promoting good relations			√	<p>Some religious bodies may have concerns on societal or doctrinal grounds to introducing a new system for obtaining legal gender recognition.</p> <p>The Scottish Government appreciates that some religious bodies may be opposed to the concept of legal gender recognition. There are protections in the Equality Act 2010 outlined below for the interests of religious bodies.</p> <p>However, as outlined in the consultation, the Scottish Government considers that a gender recognition system is required in Scotland for both policy reasons and to comply with the European Convention on Human Rights.</p> <p>Other religious or belief bodies may, of course, support the concept of legal gender recognition.</p> <p>There are exceptions in the Equality Act 2010 which relate to occupational requirements and religious requirements.</p>



Religion or belief	Positive	Negative	None	Reasons for your decision
				<p>Paragraph 2 of schedule 9 of the 2010 Act relates to religious requirements, and covers a range of employment and office holders in organised religion, such as ministers of religion and some lay posts that promote and represent religion. If the criteria are met, it is possible to refuse to employ a trans person in these posts.</p> <p>Paragraph 3 of schedule 9 relates to other requirements relating to religion or belief, where, if the criteria are met, it is possible to refuse to employ a trans person for the work.</p> <p>Given the provisions of the 2010 Act, we have ticked the “none” box.</p>

**Sex. Do you think that the policy impacts on men and women in different ways?**

Sex	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination			√	Policy is not designed for this.
Advancing equality of opportunity			√	<p>A number of respondents to the previous consultation raised concerns about the implications of legal gender recognition for women.</p> <p>Concerns included:</p>

Sex	Positive	Negative	None	Reasons for your decision
				<ul style="list-style-type: none"> <li>• access to women’s safe spaces;</li> <li>• risk of abuse;</li> <li>• women’s sports;</li> <li>• intimate medical care;</li> <li>• the accuracy of statistical information in areas such as crime recording or equality monitoring;</li> <li>• freedom of speech.</li> </ul> <p>The Scottish Government is of the view that there is lack of evidence that including trans women in women-only services and spaces has negative impacts.</p> <p>The 2010 Act has a number of specified exceptions to the general provisions on non-discrimination. Some of these exceptions are directly relevant when considering the position of women in relation to gender recognition. Organisations and service providers can, when appropriate, make use of the exceptions in the 2010 Act to exclude trans people. However, the exceptions have to be used in a proportionate way, and to achieve a legitimate aim.</p> <p>On sport, section 195 of the 2010 Act contains provision allowing, in certain specified circumstances, restrictions on trans people</p>

Sex	Positive	Negative	None	Reasons for your decision
				<p>participating in sport to be imposed if necessary to uphold fair competition or the safety of competitors.</p> <p>On single sex services, the 2010 Act allows women-only services and allows services to exclude trans women in certain specified circumstances when it is proportionate and in pursuit of a legitimate aim. Paragraph 28 of schedule 3 the 2010 Act sets out the exception which relates to trans persons, and provides:</p> <p>(1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.</p> <p>(2) The matters are—</p> <p>(a) the provision of separate services for persons of each sex;</p> <p>(b) the provision of separate services differently for persons of each sex;</p> <p>(c) the provision of a service only to persons of one sex.</p> <p>This provision would, for example, allow the operator of a domestic abuse refuge designed for women only to exclude a trans woman from the service if the</p>

Sex	Positive	Negative	None	Reasons for your decision
				<p>operator judges that this is a proportionate means of achieving a legitimate aim. This is likely to involve carrying out a risk assessment to balance the needs of all parties: the trans person; other users of the service and staff.</p> <p>On data, the Scottish Government has established a working group on sex and gender in data.<sup>214</sup></p> <p>On freedom of speech, the Scottish Government is fully committed to this and there are provisions in the European Convention on Human Rights to protect freedom of speech.</p> <p>Given the various provisions in this area, we have ticked the “none” box.</p>
Promoting good relations between men and women			√	Policy is not designed for this.

<sup>214</sup> <https://www.gov.scot/groups/sex-and-gender-in-data-working-group/>

**Do you think that the policy impacts on people because of their sexual orientation?**

<b>Sexual orientation</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	Policy is not designed for this.
Advancing equality of opportunity			√	<p>Respondents to the first consultation made a number of comments in this area, including suggestions that:</p> <ul style="list-style-type: none"> <li>• gender non-conforming children are being encouraged to transition when they would otherwise grow up to be lesbian or gay;</li> <li>• gay and lesbian people are coming under increasing social pressure to change their gender rather than to live as gay or lesbian;</li> <li>• lesbians may be accused of transphobia if they refuse to enter sexual relationships with trans women;</li> <li>• when lesbian organisations or advocacy groups are joined by trans women, trans issues often take priority.<sup>215</sup></li> </ul> <p>On children, the Scottish Government has concluded that legal gender recognition should not be available to those under 16.</p>

<sup>215</sup> Please see paragraphs 7.13 to 7.16 of the summary of consultation responses: <https://www.gov.scot/publications/review-gender-recognition-act-2004-analysis-responses-public-consultation-exercise-report/pages/8/>

				<p>On lesbian and gay people, the Scottish Government considers that people should be able to live as lesbian and gay. This Government promoted the Marriage and Civil Partnership (Scotland) Act 2014 through Parliament. A key reason for promoting that legislation was to make it clear that same sex relationships have the same standing in society as mixed sex relationships.</p> <p>On relationships, Government does not lay down who a person should enter into a relationship with. That is a personal matter for the couple.</p> <p>On organisations, the rules in the Equality Act 2010 on membership and access to a benefit, facility or service, do not apply to associations with under 25 members.<sup>216</sup> In addition, there is an exception which allows an association to restrict its membership to persons who share a single protected characteristic.<sup>217</sup></p>
Promoting good relations			√	Policy is not designed for this.

<sup>216</sup> <https://www.equalityhumanrights.com/en/advice-and-guidance/does-equality-law-apply-organisation-i-belong-or-want-join-or-be-guest> and <http://www.legislation.gov.uk/ukpga/2010/15/section/107>

<sup>217</sup> <http://www.legislation.gov.uk/ukpga/2010/15/schedule/16>

**Do you think your policy impacts on trans people?**

<b>Gender reassignment</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	There are benefits for transgender people through having a revised system for gender recognition but this is best recognised in the next category of “advancing equality of opportunity”.
Advancing equality of opportunity	√			Introducing a revised system for obtaining legal gender recognition will enable trans people to obtain legal rights without having to go through an overly intrusive system established by the current GRA.
Promoting good relations			√	Policy is not designed for this.

#### Stage 4: Decision making and monitoring

##### *Identifying and establishing any required mitigating action*

Have positive or negative impacts been identified for any of the equality groups?	There are positive impacts for the protected characteristics of age, disabled people and transgender people.
Is the policy directly or indirectly discriminatory under the Equality Act 2010?	No
If the policy is indirectly discriminatory, how is it justified under the relevant legislation?	-
If not justified, what mitigating action will be undertaken?	-

##### *Describing how Equality Impact analysis has shaped the policy making process*

The previous consultation sought views on the EQIA prepared then. A number of consultees offered comments, in particular in relation to the protected characteristic of “sex”. As outlined in the consultation and in this draft EQIA, there are a number of existing measures (e.g. exceptions in the Equality Act 2010) which can address the concerns raised.



## ***Monitoring and Review***

National Records of Scotland will publish statistics on the number of applications received under the new system.

### **Stage 5 - Authorisation of EQIA**

Please confirm that:

- ◆ This Equality Impact Assessment has informed the development of this policy:

Yes  No

- ◆ Opportunities to promote equality in respect of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation have been considered, i.e.:

- Eliminating unlawful discrimination, harassment, victimisation;
- Removing or minimising any barriers and/or disadvantages;
- Taking steps which assist with promoting equality and meeting people's different needs;
- Encouraging participation (e.g. in public life);
- Fostering good relations, tackling prejudice and promoting understanding.

Yes  No

- ◆ If the Marriage and Civil Partnership protected characteristic applies to this policy, the Equality Impact Assessment has also assessed against the duty to eliminate unlawful discrimination, harassment and victimisation in respect of this protected characteristic:

Yes  No  Not applicable

**Declaration**

**I am satisfied with the equality impact assessment that has been undertaken for the review of the Gender Recognition Act 2004 and give my authorisation for the results of this assessment to be published on the Scottish Government's website.**

**TO BE COMPLETED WHEN FINAL VERSION OF EQIA IS PUBLISHED**

**Name:**

**Position:**

**Authorisation date:**

**The Scottish Government  
December 2019**



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