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MSPs

The Scottish Parliament

Edinburgh

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9 December 2022

Dear Colleague,

The Equalities, Human Rights and Civil Justice Committee concluded its Stage 2 consideration of the Gender Recognition Reform (Scotland) Bill on 22 November 2022.

I would like to pass on my thanks to the members of the Committee in dealing with the 152 amendments proposed to the Bill by MSPs during Stage 2, including 28 amendments in my name. Of the remaining 124 amendments, 60 were either withdrawn, not moved or pre-empted, a further 19 were agreed to and 44 were disagreed to. The 19 amendments accepted into the Bill came from members across the political spectrum.

I have met or chatted with many of you during the passage of this Bill, and through those conversations I have been conscious that some of the details of the proposed reforms have become lost within the wider discussions around trans rights and the perceived conflict with the rights of women and girls. I have also been asked by members to provide some information in writing, particularly after Stage 2 amendments were agreed, and I thought this would be of use to all MSPs ahead of Stage 3. I therefore hope the annexes below covering the following areas will provide you with clarity on specific issues in relation to the Bill.

- The two-stage process for GRC applications under the Bill, including the effect of a Statutory Declaration;
- Amendments agreed to at Stage 2, including those relating to 16 and 17 year olds and the Equality Act 2010;
- The proposed changes to sex offender notification requirements that I announced at Stage 2; and
- The definition of acquired gender under the Bill.

I would also like to take this opportunity to restate that this support for trans rights does not in any way conflict with our work and commitment to protect women from discrimination and

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advance women's rights and equality. My response to the points raised in correspondence to the UK Government from Reema Alsalem, UN Special Rapporteur on violence against women and girls, its causes and consequences can be found on the Scottish Parliament's website: <https://www.parliament.scot/-/media/files/committees/equalities-human-rights-and-civil-justice-committee/correspondence/2022/gender-recognition-reform-letter-from-cabsecsjhlq-to-ehrcj-committee-on-un-special-rapporteur-letter.pdf>.

As I have said before, my door remains open to any member who wishes to discuss the Bill with me, and I will be happy to discuss the Bill in advance of Stage 3.

I hope this is helpful.

Yours sincerely,



SHONA ROBISON

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THE TWO-STAGE PROCESS FOR GRC APPLICATIONS UNDER THE BILL

The Statutory Declaration

1. Under the terms of the Bill as introduced, any application to the Registrar General must include a statutory declaration made by the applicant. In the statutory declaration, the applicant must declare that they:
 - are aged at least 16,
 - are the subject of an entry in a birth or adoption record kept by the Registrar General for Scotland, or are ordinarily resident in Scotland,
 - have lived in their acquired gender for at least the previous 3 months; and
 - intend to live permanently in their acquired gender.

2. A statutory declaration is an existing feature of the process for obtaining legal gender recognition, and the retention of this requirement has been a feature of the Scottish Government's plans for reform of the process for obtaining legal gender recognition since the first public consultation in 2017. We are of the opinion that retaining the requirement for a statutory declaration ensures the process will continue to be as serious and significant a step as under the current system.

3. 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 (affidavits are generally used in relation to court proceedings and statutory declarations used in other contexts). The relevant legislation on statutory declarations is the Statutory Declarations Act 1835. Statutory declarations under the Bill will be made in the presence of a notary public (most solicitors in Scotland are notaries public), a justice of the peace or a local councillor.

4. Guidance is provided by the Law Society of Scotland to solicitors on acting as a notary public, including both in relation to the identity of the person making a declaration, and in relation to their understanding of the declaration:

“Identity of the deponent. It is essential that the notary must be satisfied as to the identity of the deponent. If the deponent is unknown to the notary, the notary should ask for proof of identity, e.g. passport, medical card, etc.

The deponent understands the document. It is essential that the notary is satisfied that the deponent understands what he or she is signing. If the document is short, it is prudent to read over the document to the deponent and ask if he or she understands what is written. Strictly speaking this is not necessary, but if the document is lengthy the notary must endeavour to paraphrase or summarise the contents before signature.”

5. In essence therefore, the notary must be satisfied as to the identity of the applicant, based on evidence if the person is not known to them, and they must be satisfied that the applicant understands the contents of the statutory declaration. The notary must also sign the declaration and either stamp or write their name and address, and the capacity in which they are notarising it.

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6. It is an existing criminal offence to knowingly make a false statutory declaration, and the Bill also introduces a new offence of knowingly making a false application. The maximum penalty for these offences is imprisonment for up to 2 years or an unlimited fine or both.

The process to be followed by the Registrar General

7. Once a person has made the required statutory declaration, they can then apply to the Registrar General for Scotland for a Gender Recognition Certificate, providing them with their statutory declaration. The Registrar General must issue a Gender Recognition Certificate if the applicant meets the requirements of the Bill, or otherwise reject the application.

8. Section 8B of the 2004 Act, inserted by section 3 of the Bill as introduced, sets out the information which the Registrar General must provide to the applicant in relation to the handling of the application. This includes certain information as to the effect of the issue of a GRC (for example that in accordance with section 12 of the 2004 Act, obtaining a GRC does not affect a person's status as the 'father' or 'mother' of a child). Section 8B 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.

9. The intention of the statutory period of reflection is to further affirm the seriousness of the process and provide further assurance that applicants have fully and carefully considered their decision. The Bill as introduced does not however require applicants to confirm that the facts and circumstances set out in their application and statutory declaration remain unchanged since their application was submitted for consideration, or to provide any evidence, as a pre-condition of their application being granted after the expiry of the reflection period.

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

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THE EFFECT OF AMENDMENTS AGREED AT STAGE 2

CHRISTINE GRAHAME MSP

1. A number of amendments were brought forward by Christine Grahame in relation to 16 and 17 year olds and agreed to at Stage 2, and I made clear my support for them to the Committee.
 2. The combined impact of these amendments is to (a) increase the period that 16- and 17-year-olds must declare that they have lived in their acquired gender from 3 to 6 months, (b) place an additional requirement on applicants aged 16 or 17 to confirm to the Registrar General (RG) that they have discussed the implications of their application with either someone whose role involves in giving guidance, support or advice to young people, or someone aged over 18 who knows them personally and (c) placing a duty on the RG to publish online information about the process and effect of a GRC.
- Six months living in the acquired gender
3. The Bill as introduced requires all applicants to have lived in their acquired gender for at least three months before applying for a GRC, and to affirm this (amongst other relevant facts) in a statutory declaration which is then submitted as part of their application.
 4. A separate three month 'reflection period' would then begin after which the applicant would have to confirm that they wish to proceed, before a GRC could be issued. No change is proposed to this reflection period.
 5. The effect of the amendments is that applicants will have to state in their Statutory Declaration either:
 - They are aged 16 or 17 on the day of application and have lived in their acquired gender for at least six months, or
 - They are aged 18 or over on the day of application and have lived in their acquired gender for at least three months.
 6. This will provide additional assurance that these applicants have had time to fully understand the change they are making, and to be confident that they really do want to live the rest of their life in their acquired gender.
 7. This will not introduce an additional delay for someone who has already been living in their acquired gender for at least 6 months: they could still apply on their 16th birthday and after the three month reflection period could obtain a GRC.

Accessing guidance, support and advice

8. In keeping with the Bill's key principle of self-determination, applicants for a GRC under the Bill are required to affirm in their statutory declaration that they have lived in their acquired gender for the required period and that they intend to do so for the rest of their lives (and some other factual information).

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9. The Cabinet Secretary for Social Justice, Local Government and Housing has previously committed that all applicants aged 16 or 17 on the day of their application would be offered, and encouraged to take up, a conversation with staff at National Records of Scotland (NRS) about the application process and the effect of a GRC.
10. The RG in evidence to the Committee made clear that NRS staff cannot give direct support or advice that goes beyond this. Such support is currently available through schools, third sector organisations, and other sources.
11. The effect of the amendments is to introduce a requirement that applicants who are 16 or 17 on the day of application must, as well as submitting a statutory declaration covering the required points, also confirm as part of their application that they have discussed the implications of obtaining a GRC either with someone who has a role which involves giving guidance, support or advice to young people, or with an adult known personally to them.
12. The description of who the discussion(s) should be with is broad in the provision, but examples of those covered could include:
- Third sector support organisations such as Childline
 - A parent or guardian
 - Other adult family member in a supportive role
 - A teacher or school staff member
 - A doctor
 - A counsellor
 - A faith leader
13. The affirmation of having accessed support would not form part of the statutory declaration or the application itself, but would be made directly to the RG's staff. This means it is not covered by the offences of making a false statutory declaration or a false application. The Bill provision is not prescriptive in the means for making this confirmation, to allow for flexibility depending on independent circumstances. However, the intention is that it would be by telephone, virtual meeting or in-person appointment wherever possible.
14. The intention behind this change is to provide greater assurance that younger applicants would have taken advice and support as part of careful consideration before applying, and addressing a concern that simply signposting to potential sources of support.

Guidance and support for applicants and potential applicants

15. This amendment inserts a new section setting out a duty on the Registrar General to publish online information covering:
- The effect of obtaining a GRC
 - How to make an application for a GRC
 - The requirement to make a statutory declaration before applying
 - The consequences of making a false application
 - Other relevant information that the RG considers appropriate
16. This will help ensure all applicants can easily access information to inform their decision to apply for a GRC.

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17. In addition to these amendments from Christine Graham MSP, further amendments to the Bill were agreed in the following areas:

Interaction with the Equality Act 2010

18. There has been much discussion on the interaction between the proposals in the Bill and the existing provisions of the Equality Act 2010. The Scottish Parliament can of course only legislate on devolved issues in Scotland, and the Equality Act is generally reserved to the UK Parliament.

19. The Equality Act makes no specific provision about the effect of a GRC in relation to the protected characteristics of gender reassignment, sex or the single-sex exceptions. The 2004 Act came before the Equality Act so it would have been possible for legislators to make specific provision about the effect of having legal gender recognition for various provisions in the Equality Act, but it does not do so.

20. The amendment to the Bill in the name of Pam Duncan-Glancy MSP, agreed to by the members of the Committee on 22 November 2022 inserts a new section into the legislation under the heading of “Impact of Act on Equality Act 2010” and states that *“For the avoidance of doubt, nothing in this Act modifies the Equality Act 2010”*.

21. The Bill amends the 2004 Act to introduce a new process for applying for legal gender recognition in Scotland, and new criteria which require to be satisfied by applicants. The Bill does not however amend the legal effects of obtaining legal gender recognition which are set out principally in section 9 of the 2004 Act, with the intention that the rights and responsibilities of those obtaining legal gender recognition would remain the same as they are now under the 2004 Act.

22. The effect of a GRC upon the sex of a person for the purposes of the protected characteristic of “sex” is not changed by the Bill. Again, the rules in the 2010 Act are not altered by this Bill.

Reporting on and Reviewing the Operation of the Act

23. I have always been in agreement with members that it will be important to review and report on this legislation, and I am content that there should be a requirement to do so on the face of the Bill. That notwithstanding, I have also always been clear that we need to consider carefully in what areas it is possible and appropriate for information to be gathered, and the most suitable timescales, in order to ensure the effectiveness of any review.

24. A number of amendments were brought forward at Stage 2 in relation to the operation and impact of the Bill across a number of areas. I consider that the best approach will be to have a single review which covers a wide range of suitable areas, and undertook to seek to coalesce a number of reporting requirements into a single provision for post-legislative scrutiny at Stage 3.

25. To this end I supported a number of Amendments at Stage 2 from which I intend to draw on including:

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- An amendment in the name of Maggie Chapman MSP to review the impact on trans people of the period they are required to live in their acquired gender under section 8C of the 2004 Act, and the reflection period under section 8B of the 2004 Act;
- An amendment in the name of Jamie Greene MSP on the impact of the Bill on the placement of transgender people in prison;
- An amendment in the name of Claire Baker MSP on the operation of section 22 of the 2004 Act in light of the changes made by the Bill.

26. I also supported an amendment in the name of Pam Duncan-Glancy MSP which places a duty on Ministers to initiate a review of the Act within 3 years of commencement, which is an appropriate timescale to allow for the system to bed in and for data to be collected, and thus ensuring an effective review. I will use this as the basis of the single provision and include other items at Stage 3.

Aggravation of Offences

27. As introduced, the Bill included offences of knowingly making a false statutory declaration or including other false information in an application for a GRC. At Stage 2 the Committee agreed to an amendment proposed by Jamie Greene MSP to the effect that an offence is aggravated *“if the circumstances of the offence are proven to be connected to the fact that the person has fraudulently obtained a gender recognition certificate”*.

28. Whilst it is not immediately clear how the possession of a GRC would enable someone to go on and commit an offence, if this were to happen to would obviously be a serious matter. I agreed in principle with the creation of a new statutory aggravation, and urged the Committee to support this amendment. I recognise that there may be benefits in terms of the collection of data, given the requirement to record offences which are aggravated, and that this amendment reflects the seriousness of abusing the gender recognition process in order to do harm, if that were to occur.

29. I indicated at the time that there are specific details of the amendment that need some further consideration, and that the final terms of the provision would need to be clear that fraudulently obtaining a GRC had actually facilitated a person in committing another offence. I will be working with Mr Greene ahead of Stage 3 on the final wording.

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THE PROPOSED CHANGE TO SEX OFFENDER NOTIFICATION REQUIREMENTS

1. Some MSPs and stakeholders have raised concerns about the possibility of sex offenders seeking to take advantage of the proposed process for gender recognition. While the Scottish Government think the processes for Sex Offender Notification Requirements are working well there is an existing legislative power Scottish Ministers have to vary the information provided at notification.
2. At Stage 2 therefore I made a commitment that ahead of commencement of the Bill the Cabinet Secretary for Justice will introduce regulations to amend the Sex Offender Notification Requirements so that those on the register are required to notify the Police with details as to whether they have made an application for a gender recognition certificate. This will mean additional information will be available to help identify an individual and inform their subsequent management under MAPPA (Multi Agency Public Protection Arrangements). This adds to the information that those on the register are already required to provide to the Police such as name, address, and passport so that the Police are fully informed about information relating to the person's identity.
3. A person convicted of a sexual offence included in Schedule 3 of the Sexual Offences Act 2003 becomes subject to the notification requirements of that Act. They must provide the police with certain information, notify of any changes to those details and reconfirm the information periodically. The Police may also require to take fingerprints and photographs to verify identity. Sex offender notification requirements are robustly policed so anyone breaching their terms are identified swiftly – with penalties of up to five years' imprisonment for failing to comply.
4. It is not currently a requirement to notify the police of a legal change of gender. However, a change of name (which often accompanies the gender recognition process) would require a notification. Also, further information considered relevant to the verification of the identity of a person can be requested by Police Scotland on a case by case basis. The 2003 Act also allows registered sex offenders to be subject to a Sexual Offences Prevention Order which could include a requirement to notify of a change in legal gender.
5. This does not mean there is any implied link between trans people seeking gender recognition and sex offenders, but it will mean Police Scotland will be informed of an application by someone on the Register. This will allow them to take action either in relation to the application itself, if necessary, or as part of the broader Police role in managing the registered sex offender population.
6. The action that Police Scotland could take if they believe an application is fraudulent would be to apply to a sheriff as a person with an interest for revocation of the GRC and/or work toward criminal prosecution under the offences in the Bill. Under Scottish Government amendment 60, the Registrar General if informed by Police Scotland could reject such an application following a successful application to a sheriff, meaning that the applicant would be denied a GRC. This means that it will be possible to prevent someone on the sex offenders register from fraudulently obtaining a GRC.

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THE DEFINITION OF ACQUIRED GENDER UNDER THE BILL

1. Under the process set out in the Bill, applicants for a GRC will have to make a statutory declaration that they have lived in their acquired gender for a minimum of three months before applying (or six months if aged 16 or 17), and intend to do so for the rest of their life. This is the position and language used in the GR Act 2004 which put in place the process for legal gender recognition across the UK.
2. Living in the acquired gender means living your daily life in a gender that is different to your gender recorded at birth. In the context of the Bill, this is the gender you are living in when you make an application.
3. Living in the acquired gender is a feature of the current process for obtaining a GRC. Currently must have lived in their acquired for at least two years, and to provide proof of this.
4. The aim of the Bill is to improve the process for those applying for legal gender recognition as the current system can have an adverse impact on applicants, due in part to the burdensome evidence requirements. The Bill establishes a more straightforward process based on the statutory declaration.
5. The requirement is not about looking or dressing a certain way but about the ways in which a person may demonstrate their lived gender to others. In this respect the Bill does not change the position that applies in the current 2004 Act, under which examples of appropriate evidence of living in the acquire gender include:
 - updating driving licence or passport;
 - updating other documents like utility bills or bank accounts;
 - consistently using titles and pronouns in line with the acquired gender;
 - describing themselves and being described by others, in written or other communication, in line with the acquired gender; and
 - using a name that is associated with the acquired gender.
6. None of these individually would be a requirement but are examples of what could constitute living in the acquired gender.
7. Neither the existence of a requirement to live in the acquired gender, nor what it means, is changed by the Bill.

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