

GENDER RECOGNITION REFORM (SCOTLAND) BILL

EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.3.2A of the Parliament’s Standing Orders, these Explanatory Notes are published to accompany the Gender Recognition Reform (Scotland) Bill, introduced in the Scottish Parliament on 2 March 2022.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 13–FM);
 - a Policy Memorandum (SP Bill 13–PM);
 - a Delegated Powers Memorandum (SP Bill 13–DPM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 13–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL: OVERVIEW

5. The Bill amends the Gender Recognition Act 2004 (“the GRA”), to reform the grounds and procedure for obtaining legal gender recognition. The process under the GRA has been in place since 2005.

Overview of current grounds and procedure

6. Under the GRA, a person aged at least 18 is able to make an application for a gender recognition certificate (“GRC”) on the basis of living in the other gender or having changed gender under the law of a country or territory outside the United Kingdom.
7. There are three routes that applicants can take – the “standard track”, the “alternative track” and the “overseas track”.

8. Under the standard track, applications for GRCs are made to the Gender Recognition Panel (“the GRP”), a UK Tribunal. Section 2(1) of the GRA requires the GRP to grant an application if it is satisfied that the applicant—

- has or has had gender dysphoria,
- has lived in their acquired gender for the preceding 2 years,
- intends to continue to live in their acquired gender until death, and
- complies with the requirements of section 3 of the GRA.

9. Section 3 requires the applicant to provide reports from two registered medical practitioners, or one registered medical practitioner and one registered psychologist, providing details of the applicant’s diagnosis of gender dysphoria, as well as statutory declarations concerning the applicant’s having lived, and intending to continue to live, in their acquired gender, whether the applicant is married or in a civil partnership and, if relevant, the intentions of the applicant and their spouse or civil partner as to the continuation of the marriage or civil partnership if a full GRC is issued to the applicant.

10. Under the alternative track, an application for a GRC can be made by a person who—

- has been diagnosed with gender dysphoria or has had surgery for the purpose of changing their sexual characteristics,
- ordinarily resides in England and Wales, Scotland or Northern Ireland,
- intends to live in their acquired gender until death,
- is in a marriage solemnised or civil partnership registered in Scotland or a marriage or civil partnership made in England and Wales or Northern Ireland on or before the date of the application,
- has lived in their acquired gender for at least 6 years before 10 December 2014 or 16 December 2014, or lived in the acquired gender on 13 January 2014, depending on which jurisdiction their marriage or civil partnership was solemnised or registered in.

11. The alternative track is therefore only available to people who meet the residency requirement, are married or in a civil partnership entered into under the law of Scotland, England and Wales or Northern Ireland, and were living in their acquired gender on or before the relevant date.

12. The evidence requirements under the alternative track are different to those under the standard track. The main difference from the evidence requirements under the standard track is that only one report from a registered medical practitioner or registered psychologist detailing the applicant’s diagnosis of gender dysphoria or surgery is to be provided, rather than two reports.

13. Under the overseas track, a person can apply for a GRC if their acquired gender has been legally accepted in one of the approved countries or territories.¹ The applicant must provide

¹ [The Gender Recognition \(Approved Countries and Territories\) Order 2011 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

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)).

14. Successful applicants receive either an interim GRC, which does not give legal recognition, or a full GRC which does give legal recognition. Section 9 of the GRA (which is not amended by the Bill) provides that, where a full GRC is issued to a person, the person's gender becomes for all purposes their acquired gender (i.e., the gender in which they are living when they apply for a GRC).

15. An interim GRC is issued to an applicant who is married or in a civil partnership, if either partner to the marriage or civil partnership does not declare that they want the marriage or civil partnership to continue after a full GRC is issued. A person to whom an interim GRC is issued can apply for a full GRC if the circumstances relating to the marriage or civil partnership change within 6 months of the interim GRC being issued.

Key changes made by the Bill

16. The Bill repeals sections 1 to 8 of the GRA, which deal with the grounds and procedures for applying for GRCs, and for the issuing of full or interim certificates, for Scotland and replaces them with new provision about the grounds and procedure for obtaining legal gender recognition. The Bill makes some adjustments to the other provisions of the GRA in consequence of the new procedures, but does not alter the substance of those provisions.

17. The key differences between the current grounds and procedure and those provided for in the Bill are—

- the removal of the requirement for an applicant to have or have had gender dysphoria (and, correspondingly, the removal of the requirement for an applicant to provide medical reports with their application),
- a reduction in the minimum age for applicants from 18 to 16,
- the removal of the GRP from the process, with applications instead being made to the Registrar General for Scotland (“the Registrar General”),
- a reduction in the period for which an applicant must have lived in their acquired gender before submitting an application from 2 years to 3 months,
- the introduction of a mandatory 3 month reflection period and a requirement for the applicant to confirm after the end of that period that they wish to proceed with the application before the application can be determined,
- the introduction of a new duty placed on the Registrar General to report, on an annual basis, the number of applications for GRCs made, and the number of certificates granted.

18. The new provisions also restate some aspects of the current process (for example, in relation to the granting of a full GRC after an interim GRC is issued).

19. The Bill also creates a specific offence of knowingly making a false statutory declaration in an application for a GRC², and creates an offence of knowingly including information which is false in a material particular in an application for a GRC or a notice of confirmation. A person who commits such an offence is liable to imprisonment for up to two years and/or a fine.

20. Applicants must either (a) be the subject of an entry in a birth or adoption record kept by the Registrar General³ or (b) be ordinarily resident in Scotland (or both).

21. The Bill also provides for automatic recognition of gender recognition obtained outwith the United Kingdom (unless it would be manifestly contrary to public policy to do so).

THE BILL: SECTION BY SECTION

References to 2004 Act

Section 1: Meaning of “2004 Act”

22. Section 1 provides that, in the Bill, the “2004 Act” means the Gender Recognition Act 2004. Sections 2 to 14 insert new sections 8A to 8U, 10A, 11D and 22A into the GRA, and Part 1 of the schedule makes further modifications of that Act, including the repeal for Scotland of the current procedural provisions in sections 1 to 8.

Application for gender recognition certificate

Section 2: Persons who may apply

23. Section 2 inserts new section 8A into the GRA, making provision about who can apply for a GRC in Scotland, and to whom an application is to be made.

24. Under section 8A, an application can be made to the Registrar General for Scotland for a GRC on the basis of the applicant living in the other gender. The minimum age at which a person can apply for a GRC is 16. Applications can be made by a person who (a) has a Scottish birth register entry (i.e., is the subject of an entry in a birth or adoption register kept by the Registrar General for Scotland) or (b) is ordinarily resident⁴ in Scotland (or both).

² The offence of knowingly and wilfully making a statement in a statutory declaration which is false in a material particular under section 44(2)(a) of the Criminal Law (Consolidation) (Scotland) Act 1995 is consequently disapplied in relation to statutory declarations made under the new procedures.

³ This includes a person who is 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 The term “ordinarily resident” is not defined by the Bill and thus takes its normal meaning. Whether a person is ordinarily resident in Scotland will depend on their individual circumstances. Broadly speaking, a person is ordinarily resident in a place if they live there on a settled basis, lawfully and voluntarily.

Section 3: Notice to be given on receipt of application

25. Section 3 inserts new section 8B into the GRA. Section 8B makes provision about notifications which the Registrar General must provide to an applicant for a GRC.

26. Section 8B(1) sets out the information which the Registrar General must provide to the applicant in relation to the handling of the application. Section 8B(2) requires the Registrar General to provide certain information as to the effect of the issue of a GRC (for example that in accordance with section 12 of the GRA, obtaining a GRC does not affect a person's status as the 'father' or 'mother' of a child). The information to be provided to the applicant includes the evidence that an applicant who is married or in a civil partnership must provide under new section 8D (inserted by section 5 of the Bill) in order for the Registrar General to issue a full GRC instead of an interim GRC.

27. 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 (subsection (3)). This notice is referred to in the Bill as the "notice of confirmation".

28. Under new section 8U(1)(b) 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 to be given. By virtue of an amendment to section 24 of 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.

29. 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 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 the application.

Section 4: Grounds on which application to be granted

30. Section 4 inserts new section 8C into the GRC. Section 8C makes provision about the circumstances in which the Registrar General must grant an application for a GRC.

31. New section 8C(1) requires the Registrar General to grant an application for a GRC if the applicant has provided a statutory declaration in relation to certain matters, and the application and notice of confirmation comply with new section 8D (inserted by section 5 of the Bill) in relation to the applicant's marriage or civil partnership status, and any regulations made by the Registrar General made under new section 8U(1)(c) (inserted by section 11 of the Bill).

32. In the statutory declaration to be included in the application, the applicant must declare that the applicant:

- is aged at least 16,

- is the subject of an entry in a birth or adoption record kept by the Registrar General for Scotland or is ordinarily resident in Scotland,
- has lived in their acquired gender for at least the previous 3 months, and
- intends to live permanently in their acquired gender.

33. 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 1835.⁵ 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.

34. Section 14 of the Bill inserts a new section 22A into the GRA, which creates new specific offences of knowingly making a false statutory declaration under the GRA, and knowingly including information which is false in a material particular in an application for a GRC or a notice of confirmation under section 8B(3).

35. New section 8C(2) provides that the Registrar General must reject an application that the Registrar General is not required to grant under subsection (1). The Registrar General therefore has no discretion to grant an application which does not meet the requirements of subsection (1).

36. Section 8C(3) defines “the acquired” gender for the purposes of the 2004 Act. The acquired gender of a person who applies for a GRC is the gender they are living in when they make the application.

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

37. Section 5 inserts new section 8D into the GRA. Section 8D makes provision about the statutory declarations and other evidence to be provided with an application for a GRC in relation to marriages and civil partnerships. New section 8E of the GRA (inserted by section 6 of the Bill) makes provision about the circumstances in which a full GRC or an interim GRC is to be issued to an applicant who is married or in a civil partnership.

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

39. Where the applicant is married or in a civil partnership,⁶ 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

⁵ The 1835 Act is at www.legislation.gov.uk/ukpga/Will4/5-6/62/contents

⁶ See paragraph 46 for an explanation of when the parties are still, or have since become, parties to a marriage or civil partnership.

- 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.

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

41. 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.

42. 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). If that is the case, the notice of confirmation must include evidence of the dissolution, annulment or death.

Section 6: Certificate to be issued

43. Section 6 inserts new section 8E into the GRA. Section 8E sets out the circumstances in which the Registrar General must issue either a full GRC or an interim GRC to an applicant, in a case where the Register General grants an application made under new section 8A(1) of the GRA.

44. Where the applicant was not married or in a civil partnership at the time the application was made, or ceases to be married or in a civil partnership 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)).

45. 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.

46. 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.)

47. 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.

48. 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

49. Section 7 inserts new sections 8F, 8G, 8H, 8I, 8J, 8K and 8L into the GRA. 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: Issue of full certificate by Registrar General for Scotland to applicant who is married or civil partner

50. Where an applicant for a GRC is married or in a civil partnership when they make their application, and is still married to or in a civil partnership with the same person when their application is granted, the Registrar General will issue a full GRC to the person if satisfied that both parties wish the marriage or civil partnership to continue after a full GRC is issued. Otherwise, the Registrar General will issue an interim GRC. The parties' wishes are demonstrated by statutory declarations to be given under section 8D(3) (inserted by section 5 of the Bill).

51. New section 8F(1) and (2) 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 the applicant was married or in a civil partnership when the interim GRC was issued and is still married to, or in a civil partnership with, the same person,⁷ and the application contains a statutory declaration by either or both of the parties to the marriage or civil partnership that they wish the marriage or civil partnership to continue after the issue of a full GRC (where such a declaration was not previously provided in relation to the application under section 8A(1)). This caters for cases where the applicant, or their spouse or civil partner, changes their mind and decides to stay in the relationship.

52. Subsection (3) requires the Registrar General to reject the application if not required by subsection (1) to grant it.

53. The Registrar General must give the applicant's spouse or civil partner notice of the application, and, if the application is granted, of the issue of the full GRC (subsection (4)).

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

54. 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, new section 8G provides that the application

⁷ See paragraph 46 for an explanation of when the parties are still, or have since become, parties to a marriage or civil partnership.

is to be treated instead as an application having been made under new section 8K(1) of the GRA. New section 8K(1) (also inserted by section 6 of the Bill) provides for an application to be made for a full GRC by a person who has been issued with an interim GRC and whose spouse or civil partner has subsequently died.

55. New section 8G(2) 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) (that is, evidence of the death of the applicant's spouse or civil partner).

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

56. Under the existing provisions of the GRA, the GRP may grant and issue a full GRC an applicant who is married or a civil partner, 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. However, under existing section 4E of the GRA, a person issued with an interim GRC in these circumstances (who is in a marriage or civil partnership solemnised in Scotland) may apply to the sheriff for a full GRC.

57. 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.

58. 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 applicant is still married to, or in a civil partnership with, the same person⁸ and 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.

59. The sheriff must notify the spouse or civil partner of the application and, if it is granted, notify the spouse or civil partner of the issue of the full GRC under subsection (4). That subsection also requires the sheriff to give a copy of any GRC issued by the sheriff to the Registrar General.

60. Where a full GRC is issued following an interim GRC being issued, on the basis that both parties to the marriage or civil partnership wish it to continue after the full GRC is issued, the issuing of the interim GRC ceases to be a ground for divorce or dissolution of a civil partnership. This is not the case if a full GRC is issued under section 8H, as in that case one of the parties will not have agreed to the marriage or civil partnership continuing.

⁸ See paragraph 46 for an explanation of when the parties are still, or have since become, parties to a marriage or civil partnership.

61. In consequence of new section 8H (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: Issue of full certificate by court on divorce or dissolution of civil partnership (Scotland)

62. Under new section 8I, a Scottish 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.

63. The requirement to issue a full GRC does not apply if a full GRC has already been issued by a sheriff under new section 8H.

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

64. New section 8J 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.

65. 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 new section 8I (provided one has not already been issued to the party under new section 8H).

66. 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: Issue of full certificate by Registrar General for Scotland following death of spouse or civil partner

67. New section 8K 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, and include evidence of the death (subsection (4)).

68. Subsection (3) requires the Registrar General to reject the application if not required to grant it by subsection (1).

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

69. New section 8L 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.

Gender recognition outwith Scotland

Section 8: Gender recognition obtained outwith Scotland

70. Section 8 inserts new sections 8M, 8N, 8O and 8P into the GRA. These sections make provision about the recognition in Scotland of gender recognition obtained by a person in the rest of the United Kingdom, or in a country or territory outwith the United Kingdom.

New section 8M: Gender recognition obtained elsewhere in the United Kingdom

71. New section 8M 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: Gender recognition obtained outwith the United Kingdom

72. At present, overseas gender recognition is not recognised automatically in the UK (including Scotland) (see section 21 of the GRA). 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.⁹

73. 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.

74. New section 8N(1) provides that, where a person has obtained “overseas gender recognition”, the person is to be treated as if the person had been issued with a full GRC by the Registrar General for Scotland. “Overseas gender recognition” means legal gender recognition obtained in a country or territory outwith the United Kingdom (subsection (3)(a)).

75. But subsection (2) provides that this rule does not apply if it would be manifestly contrary to public policy to do so (for example, in a case where legal 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.

76. In broad terms, this approach is similar to the current approach taken in Scotland to validity of marriages entered into outwith Scotland¹⁰ and recognition of divorce obtained overseas.¹¹

77. Paragraph 2 of the schedule repeals section 21 of the GRA for Scotland, and paragraph 16 revokes for Scotland the current statutory instrument on approved countries and territories as it is

⁹ 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.

¹⁰ Section 38 of the Family Law (Scotland) Act 2006 refers: <http://www.legislation.gov.uk/asp/2006/2/section/38>

¹¹ 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>

no longer needed once gender recognition obtained overseas is automatically recognised in Scotland.

New section 8O: Issue of confirmatory gender recognition certificate by Registrar General for Scotland

78. New section 8O enables a person who has obtained ‘overseas gender recognition’ to apply to the Registrar 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. 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.

79. The application must include evidence of the overseas gender recognition or, if the applicant is unable to provide such evidence, a statutory declaration in relation to that recognition including the place or register where the details of the recognition would have been available, and the reasons why the evidence cannot be provided (subsections (3) and (4)).

80. The application must also give the applicant’s reasons for making the application (subsection (5)). A confirmatory Scottish GRC following gender recognition overseas is not generally needed as overseas legal gender recognition is usually to be treated as valid by virtue of new section 8N(1). Asking applicants why they require a confirmatory GRC will enable the Registrar General to remind applicants that obtaining legal gender recognition overseas provides legal gender recognition in Scotland and, usually, there should be no need for a confirmatory GRC.

81. The Registrar General must grant the application if satisfied that the applicant has obtained overseas gender recognition, unless the applicant does not provide evidence of that gender recognition and the Registrar General is not satisfied that such evidence is unavailable (subsection (6)). Where the Registrar General is not satisfied that evidence of the overseas gender recognition is unavailable, the Registrar General may reject the application.

82. 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 are subject to the negative procedure, by virtue of the provision made at paragraph 8(a) of the schedule.

New section 8P: Determination by court of question as to overseas gender recognition

83. New section 8P 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. Subsection (2) 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. Such a person might be a spouse, civil partner or child of a person who has obtained overseas gender recognition.

84. The court may determine the question about the person’s overseas gender recognition for all purposes, or only for specific purposes (subsection (3)).

Further provision about applications and certificates

Section 9: Review and appeal of decisions

85. Section 9 inserts new sections 8Q, 8R and 8S into the GRA. These sections make provision about the review of, and appeals against, decisions made by the Registrar General on applications under the GRA.

New section 8Q: Review of Registrar General for Scotland's decision on application for certificate

86. New section 8Q(1) and (2) 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.

87. A request for a review must be made in writing (subsection (3)).

88. The Registrar General must carry out a review if the request is made within 40 working days of the original decision and may do so if it is made after 40 working days (subsection (4)). Subsection (6) defines “working day” as a day which is not a Saturday, a Sunday or a bank holiday in Scotland.

89. Subsection (5) sets out the steps the Registrar General must take following the review. If satisfied that the application was wrongly rejected, the Registrar General must grant it and issue a GRC to the applicant. If satisfied that the wrong type of GRC was issued, the Registrar General must revoke the certificate that was issued and issue the right type of GRC to the applicant. Otherwise, the Registrar General must confirm the original determination of the application.

New section 8R: Appeal to sheriff against Registrar General for Scotland's decision following review

90. New section 8R provides that, if the applicant remains dissatisfied after a review carried out by the Registrar General under section 8Q, the applicant can appeal to the sheriff.

91. Subsection (2) provides that the appeal must be made within 28 days of the review being determined, and may be made on a point of law only. The appeal proceedings must be held in private on the request of the appellant.

92. The sheriff may allow or dismiss the appeal (subsection (3)). If the sheriff allows the appeal, the sheriff can either issue a GRC to the appellant or refer the matter back to the Registrar General.

93. If the sheriff issues a full GRC to an appellant who was married or in a civil partnership when the appeal was made, and is still married to or in a civil partnership with the same person,¹² the sheriff must give the appellant's spouse or civil partner notice of the certificate (subsections

¹² See paragraph 46 for an explanation of when the parties are still, or have since become, parties to a marriage or civil partnership.

(4) and (5)). The sheriff must also give a copy of any certificate issued by the sheriff to the Registrar General (subsection (6)).

New section 8S: Revocation of certificate on application to the sheriff

94. New section 8S enables a person who has a genuine interest (such as the spouse, civil partner or child of a person who has obtained a GRC) in a full or interim 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.

95. New section 8S 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).

96. Subsection (3) provides that, where the sheriff grants the application, the sheriff must revoke the certificate. If the wrong type of GRC was issued, the sheriff may either issue a new certificate or refer the matter back to the Registrar General for redetermination. The sheriff may make other orders in consequence of, or in connection with, the revocation of the certificate.

97. If the sheriff issues a new certificate which is a full GRC, subsections (4) to (6) also require the sheriff to notify the applicant's spouse or civil partner of the issue of the GRC to the applicant if the applicant was married to, or in a civil partnership with, the spouse or civil partner when the applicant applied for the GRC under section 8A(1). The sheriff must also send a copy of a full or interim GRC issued by the sheriff to the Registrar General.

98. 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. If the application was made on the basis that the person to whom the GRC was issued was incapable of understanding the effect of the certificate or validly making an application for it, the proceedings are also to be held in private on the request of any other person with an interest in the personal wellbeing of the person to whom the certificate was issued (for example, their spouse, civil partner or child). If the applicant in such a case does not have an interest in the personal wellbeing of the person to whom the certificate was issued (for example, the Registrar General), the applicant may request that the proceedings are heard in private and the sheriff may allow that if satisfied that it is in the best interests of the person to whom the certificate was issued to do so.

Section 10: Correction of error in certificate

99. Section 10 inserts new section 8T into the GRA. New section 8T 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 spelled 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, nor does it apply to a GRC issued by a court.

Section 11: Further provision about applications

100. Section 11 inserts new section 8U into the GRA. New section 8U(1) 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 or a confirmatory GRC is to be made,
- the form and manner in which a notice of confirmation under section 8B(3) is to be given,
- information or evidence to be included in an application for a GRC, a confirmatory GRC or a notice of confirmation,
- other matters in connection with the making of an application for a GRC or a confirmatory GRC.¹³

101. The regulations can require additional information or evidence to be included by way of statutory declaration (subsection (3)).

102. 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.

103. The power in new section 8U(1) does not include a power for the Registrar General to impose a fee for applications under the GRA.

Section 12: Copies of certificates to be given to other Registrars General

104. Section 12 inserts new section 10A into the GRA. New section 10A is concerned with the sharing of GRCs with other Registrar Generals in the United Kingdom where the GRC relates to a person whose birth or adoption is registered in England, Wales or Northern Ireland, or who was married or entered into a civil partnership there.

105. New section 10A 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

106. Section 13 inserts new section 11E into the GRA. New section 11E provides that under Scots law the continuity of a marriage or civil partnership is not affected by the issuing of a full GRC.

¹³ For example the imposition of further requirements on the Registrar General to provide certain information where an application is granted or rejected, beyond those already stated in the Bill.

107. Where the marriage or civil partnership is constituted under law that is not Scots law, this section does not affect how the marriage or civil partnership is treated under that law. If that other law does treat the marriage or civil partnership differently, that does not affect that under the law of Scotland the issue of a full GRC does not affect the continuity of the marriage or civil partnership.

Section 14: Offences

108. Section 14 inserts new section 22A into the GRA. New section 22A creates offences in relation to applications under the GRA as amended by the Bill.

109. New section 22A 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 (subsection (1)), or
- include any other information which is false in a material particular in: an application for a GRC under new section 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) (subsection (2)).

110. A person who commits any such offence is liable on summary conviction¹⁴ 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) (subsection (3)).

111. Section 44(2)(a) of the Criminal Law (Consolidation) (Scotland) Act 1995 makes it an offence to make a false statement in a statutory declaration. This applies to statutory declarations currently made under the GRA. Because new section 22A(1) creates a new offence of knowingly making a statutory declaration which is false in a material particular, paragraph 12 of the schedule of the Bill amends section 44 of the 1995 Act so that it does not apply to statutory declarations made under the GRA.

112. Subsection (4) new section 22A applies sections 45 and 46(2) and (3) of the 1995 Act to the offences created by section 22A(1) and (2) so that they apply to those offences in the same way as they apply to the current offence under section 44(2)(a). Section 45(1) and (2) of the 1995 Act creates additional offences of aiding or abetting another person committing an offence under section 44(2)(a) or inciting another person to commit an offence under that section. The remainder of section 45 is concerned with alternative charges and penalties that could be brought against a person committing an offence under section 44(2)(a), and section 46(2) and (3) is concerned with procedural matters.

¹⁴ The Scottish Sentencing Council's Jargon Buster has information on what "summary" and "indictment" mean: <https://www.scottishsentencingcouncil.org.uk/about-sentencing/jargon-buster/>

Reporting on gender recognition

Section 15: Registrar General's duty to report

113. Section 1(4) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (“the 1965 Act”) requires the Registrar General to provide an annual report of the number of births, deaths and marriages in Scotland each year. That report must include such other information as the Registrar General thinks expedient, or as the Scottish Ministers may require.

114. Section 15 of the Bill modifies section 1(4) of the 1965 Act to add a requirement for the report to include information about gender recognition. New section 1(5) requires the report to include the number of applications for GRCs made to the Registrar General in the reporting year, as well as the number of GRCs issued in that year. This includes applications for GRCs under section 8A(1) and applications for full GRCs where the applicant has been issued with an interim GRC. The report must also include the number of full GRCs, interim GRCs and confirmatory GRCs issued in the reporting year.

115. Section 15 of the Bill also inserts a new subsection (6) into section 1 of the 1965 Act to provide that the Registrar General is not required to include information in the report if it would (by itself or with other information) enable an individual who has applied for, or been issued with, a GRC or a confirmatory GRC to be identified. This might be the case, for example, if the number of certificates issued in a year is very small.

Further modification of enactments

Section 16: Further modification of enactments

116. Section 16 introduces the schedule (the content of which is explained below).

Final provisions

Section 17: Ancillary provision

117. Section 17 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.

118. 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 18: Commencement

119. Section 18 provides that the final provisions in sections 17, 18 and 19 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.

Section 19: Short title

120. Section 19 specifies the short title of the Act for the Bill.

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

Part 1 – Gender Recognition Act 2004

121. Part 1 of the schedule amends the GRA as follows.

122. Paragraph 2 repeals, for Scotland, section 1 and schedule 1 of the GRA. Section 1 provides for an application for a GRC to be made to a Gender Recognition Panel, and schedule 1 makes provision about the constitution of GRPs.

123. Paragraph 2 of the schedule also repeals for Scotland the following sections of the GRA, all of which are replaced by provision on the same matters in the Bill:

- section 2 (determination of applications),
- section 3 (evidence),
- sections 3A to 3F (relating to alternative grounds for granting applications),
- section 4 (successful applications), which relates to annulment or dissolution of marriage or civil partnership after issue of an interim GRC, other than section 4(4) which introduces schedule 2 of the GRA (which is not repealed by the Bill),
- sections 4A to 4E (relating to applications for full GRCs by married persons and civil partners after an interim GRC has been issued),
- sections 5 and 5A (issue of full certificates where applicant has been married or a civil partner),
- 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).

124. 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.

125. Paragraph 3 makes changes to section 10 (registration). It amends section 10(1) and 10(1B), and repeals section 10(1A). These changes reflect the fact that GRCs will be issued by the Registrar General in Scotland rather than by the GRP. The Bill also makes separate provision requiring courts in Scotland to send a copy of any GRC issued by them to the Registrar General.

126. Section 17 (trustees and personal representatives) makes provision about the position of trustees or personal representatives dealing with property where entitlement to the property could

be affected by a full GRC having been issued. Paragraph 4 amends section 17 to cover all gender recognition (including overseas gender recognition).

127. Section 18 (orders where expectations defeated) applies where the fact that a person has obtained gender recognition alters the inheritance of property. It allows a person to apply to a court for an order if they have been adversely affected by that alteration. Paragraph 15 amends section 18(2) so that applications in Scotland are to be made to the sheriff rather than the Court of Session.

128. Paragraph 6 amends section 20(1) (gender-specific offences). Section 20 provides that, if an offence can only be committed by or in relation to a person of a particular gender, the fact that a person has obtained gender recognition does not prevent the offence being committed or attempted. Paragraph 6 amends section 20(1) so that it covers all gender recognition (including gender recognition obtained outwith Scotland).

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

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

131. 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.

132. Paragraph 14 of schedule 3 of the GRA (registration) requires the Registrar General to make an entry in the Gender Recognition Register on receipt of a full GRC issued by a GRP or a court. Paragraph 19 of that schedule requires the Registrar General to cancel such an entry if a GRC is revoked. Paragraph 10 of the schedule of the Bill amends paragraphs 14 and 19 of schedule 3 of the GRA to reflect the new role given to the Registrar General in issuing GRCs and confirmatory GRCs, and that applications to revoke GRCs and confirmatory GRCs may be made to the sheriff.

133. Paragraph 20A of schedule 3 of the GRA enables the Registrar General to make regulations about the registration of qualifying Scottish marriages and qualifying Scottish civil partnership. A qualifying Scottish marriage is one solemnised in Scotland, and a qualifying Scottish civil partnership is one registered in Scotland, where a full GRC has been issued to either or both of the spouses or civil partners. Paragraph 10 of the schedule of the Bill adjusts paragraph 20A to ensure that it covers cases where gender recognition is obtained outwith Scotland.

Part 2 – Other enactments

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

135. Paragraph 11 amends section 1 of the Divorce (Scotland) Act 1976. Section 1(1)(b) of the Divorce (Scotland) Act 1976 provides that the issuing of an interim GRC to a party to a marriage is a ground of divorce. Section 1(3B) provides that that is no longer a ground of divorce if a full

GRC is subsequently issued (as a full GRC will be issued only if the parties agree to the marriage continuing), unless the full GRC is issued by a sheriff under section 4E of the 2004 Act (i.e., without the consent of the other spouse). Paragraph 11 of the schedule amends section 1 of the 1976 Act to ensure that these provisions apply where a GRC is issued by a GRP (for England and Wales and Northern Ireland) or the Registrar General (for Scotland), and to change the reference to section 4E to a reference to new section 8H (being inserted by section 7 of the Bill).

136. 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.

137. Paragraph 12 of the schedule 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)(c) of it.

138. Paragraph 13 amends section 117 (dissolution) of the Civil Partnership Act 2004. This amendment makes provision about the dissolution of civil partnership similar to the amendment to the Divorce (Scotland) Act 1976 made by paragraph 11 of the schedule.

139. 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 about 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.

140. Paragraph 15 amends schedule 1 (civil jurisdiction of summary sheriff) of the Courts Reform (Scotland) Act 2014.¹⁵ This enables summary sheriffs to deal with proceedings relating to overseas gender recognition under section 8P (inserted by section 8 of the Bill).

141. Paragraph 16 revokes, for Scotland, the Gender Recognition (Approved Countries and Territories) Order 2011¹⁶ as this will no longer be needed once gender recognition obtained overseas is automatically recognised in Scotland.

¹⁵ Information on the role of summary sheriffs is at <http://www.scotland-judiciary.org.uk/39/0/Summary-Sheriffs>

¹⁶ <http://www.legislation.gov.uk/uksi/2011/1630/contents/made>

This document relates to the Gender Recognition Reform (Scotland) Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 March 2022

GENDER RECOGNITION REFORM (SCOTLAND) BILL

EXPLANATORY NOTES

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