

# **GENDER RECOGNITION REFORM (SCOTLAND) BILL**

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## **FINANCIAL MEMORANDUM**

### **INTRODUCTION**

1. As required under Rule 9.3.2 of the Parliament's Standing Orders, this Financial Memorandum is 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:
  - Explanatory Notes (SP Bill 13-EN);
  - a Policy Memorandum (SP Bill 13-PM);
  - a Delegated Powers Memorandum (SP Bill 13-DPM);
  - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 13-LC).
3. This Financial Memorandum has been prepared by the Scottish Government to set out the costs associated with the measures introduced by the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.
4. The Bill is designed to improve the process for those applying for legal gender recognition under the Gender Recognition Act 2004 (the 2004 Act). Under the 2004 Act a person, aged at least 18, or a person who has changed gender under the law of a country or territory outside the UK, can make an application for a gender recognition certificate (GRC). Applications are handled by the Gender Recognition Panel (GRP), a UK tribunal.
5. The Bill amends the 2004 Act to introduce a new process for applying for legal gender recognition in Scotland, whereby:
  - Applicants must be aged 16 and over (rather than 18 and over under the current system) and either be the subject of an entry in a birth or adoption register kept by the Registrar General for Scotland, or be ordinarily resident in Scotland;
  - Applicants will no longer apply to the GRP, but to the Registrar General for Scotland;
  - Applicants must have lived in their acquired gender for a period of three months (rather than the current two years) before submitting an application for gender recognition;
  - That after an application has been accepted by the Registrar General, the applicant must confirm after a minimum reflection period of three months that they wish to proceed.

6. The Scottish Government considers that the provisions in the Bill may have cost implications for the following groups: 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 who will receive, consider, process and file Scottish applications for legal gender recognition under the new system; employers and businesses who may engage with a transgender employee or service users; and pension providers (including businesses with their own employee pensions schemes) which may have members who change their legal gender.

7. The above notwithstanding, the Scottish Government does not consider that the provisions of the Bill will lead to significant costs. The possibility of legal gender recognition is already provided for by the 2004 Act, and the majority of the associated costs have already been incurred with the introduction of that Act. The Bill does not change the rights and responsibilities arising as a result of legal gender recognition.

### **Estimates of numbers of applications**

8. The level of the recurring costs to the Registrar General for Scotland discussed below will in part depend on the number of applicants. The UK Government's Ministry of Justice publishes quarterly statistics on GRCs applied for and granted by the GRP. They do not publish information about applications from each part of the UK. Currently, around 25-30 people per year who were born or adopted in Scotland obtain legal recognition of their acquired gender under the 2004 Act based on information held by National Records of Scotland (NRS). There are no statistics available for applicants resident in Scotland (but not born or adopted there) who apply under the current arrangements.

9. Based on international evidence from other jurisdictions with similar systems for legal gender recognition and comparative population sizes, the Scottish Government considers that the provisions of the Bill will lead to an overall increase in the number of applicants.

10. The most recent estimated population of Scotland is 5.47 million people. The Republic of Ireland has a slightly smaller population than Scotland by around 0.5 million people. Between September 2015 (when their new arrangements started) and the end of 2019, a total of 579 people obtained recognition under Ireland's Gender Recognition Act 2015 at an average of approximately 123 applicants for each year full year of operation.<sup>1</sup>

11. Denmark has a similar size population to Scotland.<sup>2</sup> Since the introduction of a reformed process for gender recognition based on an applicant's declaration, Denmark has granted an average of 220 applications per year. Norway, which has a population of 5.37 million has experienced a higher initial uptake than Denmark or the Republic of Ireland.<sup>3</sup> From the introduction of their new system on 1 July 2016 up to and including the first quartile of 2019, a total of 1560 applications were received, at an average of around 550 applications a year.

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<sup>1</sup> Source is the Department of Employment Affairs and Social Protection Client Identity Service - [gov.ie](http://gov.ie) - [Gender Recognition - Annual Reports \(www.gov.ie\)](http://www.gov.ie)

<sup>2</sup> In 2020 Denmark's population was estimated to be 5.79 million.

<sup>3</sup> In Denmark and the Republic of Ireland the minimum age of application is 18. In Norway, the minimum age of application is 16, and younger people between the ages of 6 and 16 can apply with parental consent.

12. In the light of this information, the Scottish Government considers it reasonable to estimate that the numbers of Scottish applications would be between 250-300 applications per year and will use these estimated figures when considering costs below. This estimate will be kept under review during the course of Parliamentary scrutiny and as the legislation is implemented.

## **COSTS ON THE SCOTTISH ADMINISTRATION**

### **Costs on the Registrar General for Scotland**

13. The Registrar General already has a number of existing functions under the 2004 Act in relation to registration.<sup>4</sup>

14. Under the provisions of the Bill there will be costs on the Registrar General for Scotland relating to the receipt, consideration, processing and permanent filing of Scottish applications for GRCs, replacing functions that were previously undertaken by the GRP.

15. When the 2004 Act came into effect, the UK Government indicated that the cost of establishing the GRP would be £700,000.<sup>5</sup> In setting up the GRP, the UK Government was creating a new tribunal with decision-making powers. The system proposed by the Bill creates a more straightforward administrative role for the NRS, situated within an existing organisation that already carries out similar functions. The Scottish Government nevertheless considers that there will be one-off setup costs associated with IT systems and applications forms, and for recruitment, training and familiarisation events for staff dealing with applications, although these will be lower in total.

16. These costs are anticipated to be in the range of £300,000 to £350,000. The NRS have advised that the most recent comparator they have for the creation of a new IT system is in the region of £100,000. Additionally, they estimate that the on-boarding and recruitment costs for a three person casework team will be in the region of a further £200,000.

17. The Scottish Government will also work with NRS to provide information for applicants about applying for legal gender recognition. This information could also be used by local authority registrars when dealing with enquiries from applicants. Costs in relation to providing this information will be low and covered by the set-up costs noted above.

18. Based on the estimate of application numbers noted at paragraph 12 above (250-300 per year) the Scottish Government anticipates that the running costs falling on the Registrar General for Scotland for staffing and accommodation will be up to £150,000 per year. These costs assume that applications will be handled by a casework team of three staff members with support from other existing NRS registration staff. The NRS have existing casework teams of similar size who deal with other dedicated functions. For comparison, in Ireland applications are handled by four staff in the Client Identity Service (which is part of the Department of Employment Affairs and

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<sup>4</sup> [Gender Recognition | National Records of Scotland \(nrscotland.gov.uk\)](https://www.nrscotland.gov.uk)

<sup>5</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>.

Social Protection) who deal with gender recognition applications as part of a broader portfolio of work.

19. On the assumption that the Bill receives Royal Assent in early 2023, the Scottish Government anticipates that the start-up costs are likely to be accrued during the remainder of the 2023/24 financial year, with the recurring administrative costs falling from 2024/25 onwards.

*Table 1: Summary of costs on the General Registrar of Scotland*

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

### **Costs on the Scottish Courts & Tribunals Service**

20. The Scottish Government considers that any costs for the Scottish Courts and Tribunals Service (SCTS) will be minimal. While there may be an increase in the number of people making statutory declarations before a Justice of the Peace (JP) for the purposes of legal gender recognition, overall numbers are expected to remain low. SCTS do not currently levy a charge for witnessing documents, which is part of the regular duties of a JP, and will not in any event result in unique costs for the SCTS.

21. In addition, under the provisions of the Bill, an applicant who has been refused a GRC could, after their application has been reviewed, may appeal that decision to the Sheriff Court. Based on current experience however, the expected number of appeals is very low - there have only been two appeals against decisions of the GRP since the introduction of the 2004 Act, and only one in Scotland. If there is evidence that a GRC has been obtained by fraud, an application can also be made to the Sheriff Court for the GRC to be quashed - again, such applications are expected to be very rare.<sup>6</sup>

22. The Scottish Government does not currently hold data on the costs of individual proceedings. The SCTS charge court fees for various stages in the court proceedings based on Fees Orders set by Ministers. Whilst court fees may be waived if the applicant is in receipt of legal aid or otherwise qualifies for fee exemption, in the round SCTS will recover much of the costs of civil business through the court fee system.

23. Associated costs for the Scottish Legal Aid Board are also expected to be minimal. The removal of any requirements for medical evidence or documentary evidence that an applicant has

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<sup>6</sup> In Ireland whilst no directly equivalent provision in relation to fraudulent applications exists, under s.14 of the relevant legislation the Minister can revoke a certificate where “information is received that would have led to the refusal of the certificate, had it been received prior to its issue”. No such revocations have been made since the inception of the new system in September 2015.

lived in their acquired gender for a specified period should reduce the likelihood of an applicant consulting a solicitor as part of their application, thus minimising the number of applicants who seek legal aid and use legal aid advice and assistance.<sup>7</sup>

24. Similarly, the removal of these requirements should reduce the possibilities of a genuine application being refused, and thereby reduce the likelihood of appeals - as noted above, the number of appeals is in any event very low. In addition, under the terms of the Bill appeals against a decision to refuse a GRC can be raised in the Sheriff Court, rather than the Court of Appeal under the present system, thus further reducing any associated legal aid costs.

## **COSTS ON LOCAL AUTHORITIES**

25. It is not anticipated that there will be any new costs falling on local authorities as a result of these provisions. Local authority registrars, who may receive enquiries about the new arrangements for gender recognition in Scotland, will signpost enquirers on to NRS.

## **COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

26. The Scottish Government does not anticipate that any substantial costs will fall on other bodies, individuals or businesses as a result of the provisions of the Bill.

### **Costs on individuals**

27. Under the present system, applications to the GRP must be accompanied by payment of a fee. Historically that fee was set at £140, but from 4 May 2021 onwards the UK Government reduced the fee to a nominal amount of £5. The Scottish Government does not intend to levy a fee for applications to the Registrar General for Scotland under the provision of the Bill.

28. It is also anticipated that the removal of the requirements for medical evidence or other documentary evidence will reduce the associated costs faced by applicants which can be substantial and have previously been identified as a barrier to application, particularly for those from socio-economically disadvantaged backgrounds.

### **Costs on businesses**

29. 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 acquired gender, irrespective of whether or not they obtain legal gender recognition under the 2004 Act.

30. 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*

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<sup>7</sup> Advice provided by a solicitor under the current Legal Aid advice and assistance scheme would be charged on the basis of detailed fees for work undertaken, and is initially limited to £95.

*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>8</sup>*

31. Overall, the organisations interviewed in preparation for the draft Business and Regulatory Impact Assessment (BRIA) carried out for the Scottish Government's 2018 consultation 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.

32. Some interviewees felt that smaller organisations might not have formulated a policy in relation to gender diverse employees or service users, and that an increase in the number of people obtaining legal gender recognition might increase the likelihood that a business would encounter a transitioned, or transitioning, employee or service user, and that this might in turn require the organisation to incur costs in formulating policies. Any such costs would not however be the direct result of the provisions of the Bill.

#### *Costs in relation to pensions*

33. The Scottish Government considers that the provisions of the Bill will have minimal impact from the perspective of a successful applicant's pension rights or those of their survivor. The state pension age has equalised for men and women, and consequently legal 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 or later stage.

34. A legal change of gender could have the possibility of affecting rights to occupational pensions as 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 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 pension entitlement as a result.<sup>9</sup>

35. As a result of the decision in *Walker v Innospec Limited* [2017] UKSC 47<sup>10</sup> changes are being introduced to public service pensions to align pensions paid for survivors of same-sex marriages and civil partnerships with those paid to widows (female survivors of mixed sex marriages). The UK Government has also announced that it intends to align survivor benefits for mixed-sex civil partners with those available for survivors of mixed-sex marriages.<sup>11</sup>

36. Private sector schemes are responsible for ensuring that they are compliant with the Walker judgment. Based on interviews conducted in relation to the Scottish Government's 2018 consultation, many schemes either make no difference in their terms, or treat civil partners and

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<sup>8</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>9</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>10</sup> The judgement and a summary can be accessed at <https://www.supremecourt.uk/cases/uksc-2016-0090.html>

<sup>11</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

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

spouses (irrespective of 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>12</sup>

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<sup>12</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 only 27% of private pension schemes had a difference in the way survivor benefits between mixed sex spouses and civil partners were calculated.

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