

# Gender Recognition Reform (Scotland) Bill

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## Policy Memorandum

### Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy 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 Financial Memorandum (SP Bill 13-FM);
  - a Delegated Powers Memorandum (SP Bill 13-DPM);
  - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 13-LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill.

## Background

### General

4. The Gender Recognition Act 2004 (the 2004 Act)<sup>1</sup> was introduced following two European Court of Human Rights rulings in 2002, in the cases of *Christine Goodwin v The United Kingdom*<sup>2</sup> and *I v the United Kingdom*,<sup>3</sup> that the UK had breached the Convention rights of two trans people under Article 8 (the right to respect for private life) and Article 12 (the right to marry and found a family).

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<sup>1</sup> [Gender Recognition Act 2004 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>2</sup> [CHRISTINE GOODWIN v. THE UNITED KINGDOM \(coe.int\)](https://www.coe.int)

<sup>3</sup> [I. v. THE UNITED KINGDOM \(coe.int\)](https://www.coe.int)

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5. Those rulings concerned the applicants' experiences as trans people in relation to a range of issues, such as pension rights (the state pension age then being different for men and women), and discrimination at work and in marriage. The Court held that medical and societal views on transgenderism had evolved to the point where the lack of recognition for the correct genders of trans people in UK law was no longer acceptable and it would not place a disproportionate burden on society to require the Government to accommodate the needs of trans people by issuing new birth certificates.

6. The 2004 Act is UK-wide legislation<sup>4</sup> permitting a person, aged at least 18, or a person who has changed gender under the law of a country or territory outside the UK, to make an application for a gender recognition certificate (GRC). A GRC is the document that shows that a person has satisfied the criteria for legal recognition of the acquired gender. From the date of issue of the full certificate, the holder's gender becomes the acquired gender for all purposes (subject to some exceptions). Applications are handled by the Gender Recognition Panel (GRP), a UK tribunal. Successful applicants receive either an interim GRC, which does not give legal gender recognition, or a full GRC which does give legal gender recognition, subject to exceptions.

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

7. Under the 2004 Act there are three routes or 'tracks' by which a person can seek legal gender recognition, the standard, the alternative and the overseas tracks.

8. The standard track is most often used by applicants.<sup>5</sup> The standard track can be used by applicants who:

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

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

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<sup>4</sup> The Scottish Parliament approved a Sewel Motion (now known as a Legislative Consent Motion).

<sup>5</sup> [Tribunal Statistics Quarterly, July to September 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2021)

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

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

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

13. The alternative track arrangements are set out in sections 3A-3F of the 2004 Act. The alternative track can be used by applicants who, in summary:

- have been diagnosed with gender dysphoria or who have had surgery for the purpose of changing their sexual characteristics
- ordinarily reside in England, Wales, Scotland or Northern Ireland
- intend to live in their acquired gender for the remainder of their life
- are 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
- have lived in their acquired gender for at least 6 years before 10 December 2014, or 16 December 2014, or have lived in the acquired gender on 13 January 2014, depending on which jurisdiction their marriage or civil partnership was solemnised or registered in.

14. The overseas track can be used by an applicant if their acquired gender has been legally accepted in one of the approved countries or territories.<sup>7</sup> The applicant must provide evidence of this with their application (section 3(5)) and a statutory declaration as to whether or not they are married or a civil partner (section 3(6)(a)).

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<sup>6</sup> General guidance can be found here: [Apply for a Gender Recognition Certificate - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/apply-for-a-gender-recognition-certificate). Specific guidance on evidence for living in the acquired gender is in section 5 of guidance note T451 here: [Form T450: Apply for a Gender Recognition Certificate - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/form-t450-apply-for-a-gender-recognition-certificate)

<sup>7</sup> [The Gender Recognition \(Approved Countries and Territories\) Order 2011 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2011/1224)

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## Applicants who are married or in a civil partnership

15. The GRP is required to handle applications from applicants who are married or in a civil partnership, who otherwise meet the criteria for legal gender recognition, in accordance with the following summary as to when an interim or a full GRC is issued:

- where the applicant is in a marriage solemnised in Scotland, or a marriage made under the law of England & Wales, Northern Ireland or outside the UK, and their spouse has issued a statutory declaration of consent to remaining in the marriage, the GRP must issue the applicant with a full GRC (section 4(2) and section 4(3C))
- where the applicant is married but either does not wish to remain married after gender recognition, or their spouse has not issued a statutory declaration of consent to remain married following gender recognition, the GRP must issue them with an interim GRC (section 4(3) and section 4(3D))
- equivalent provision is made for civil partnerships to that for marriage.

16. For applicants with an interim GRC who are in a marriage or civil partnership solemnised in Scotland, they do not need to end their relationship in order to obtain a full GRC. Where a spouse or civil partner gives consent to the continuation of the marriage or civil partnership after the issue of an interim GRC, the GRP can issue a full GRC (section 4A(2)) for a marriage or civil partnership made in England and Wales or Northern Ireland or outwith the UK and for those in a marriage or civil partnership solemnised in Scotland (section 4C).

17. An applicant with an interim GRC can apply for a full GRC if their marriage or civil partnership is dissolved or annulled, or if their spouse or civil partner dies, provided they do so within six months of the dissolution or annulment proceedings being instituted or the death, and provided that they are not remarried or in a new civil partnership (sections 5 and 5A).

18. Once an interim GRC has been issued, an applicant can apply to the sheriff for a full GRC without having their spouse or civil partner's consent to the continuation of the marriage or civil partnership (section 4E) but must make the application within 6 months from the date the interim GRC is issued.

## Other documentation

19. Trans men and women who have not obtained legal gender recognition may have already changed the sex marker on other documents, including Government issued identity documents such as a passport and driving licence. However, they will not be able to change their birth certificate, resulting in inconsistent documentation.

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## The Equality Act 2010

20. The Equality Act 2010 (the 2010 Act) is generally reserved to the UK Parliament. Under the 2010 Act, it is generally unlawful to discriminate against people who have a ‘protected characteristic’, as defined under the Act.

21. One of the protected characteristics in the 2010 Act is ‘sex’. Section 11 of the 2010 Act provides—

“In relation to the protected characteristic of sex—

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

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

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

“A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex.”

24. As a consequence, the “gender reassignment” protected characteristic is wider than people who have obtained a full GRC: it covers people whose gender identity is different from the sex assigned at birth. To have the protected characteristic a person does not need to have undergone medical or surgical treatment.

25. The 2010 Act has a number of exceptions to the general provisions on non-discrimination.<sup>8</sup>

26. The Act allows for people to be treated differently due to gender reassignment in the following circumstances:

- an organisation is taking positive action to encourage or develop trans people to participate in a role or activity in which they are under-represented or disadvantaged;
- the circumstances fall under one of the exceptions to the Equality Act that allow organisations to provide different treatment or services;

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<sup>8</sup> A description of relevant exceptions in the 2010 Act can be found in chapter 5 of the Scottish Government consultation on a draft Gender Recognition (Reform) Bill: [Gender Recognition Reform \(Scotland\) Bill: consultation - gov.scot \(www.gov.scot\)](http://www.gov.scot/consultation/GRR/consultation/GRR-consultation-gov.scot)

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- competitive sports: a sports organisation can restrict participation because of gender reassignment. For example, the organisers of a women's triathlon event could decide to exclude a trans woman if they think her strength gives her an unfair advantage. However, the organisers would need to be able to show this was the only way it could make the event fair for everyone; or
- a provider of single-sex services: if you are accessing a service provided for men only or women only, the organisation providing it should treat you according to your gender identity. In specific circumstances it is lawful for an organisation to provide a different service or to refuse the service to someone who is undergoing, intends to undergo or has undergone gender reassignment. An example set out in the Equality Act Explanatory Notes (paragraph 740<sup>9</sup>) is that of a group counselling session provided for female victims of sexual assault, where the organisers do not allow transsexual people to attend as they judge that the clients who attend the group session are unlikely to do so if a male-to-female transsexual person was also there. The Explanatory Notes state that this would be lawful.

27. The Equality and Human Rights Commission (EHRC) has provided guidance on gender reassignment discrimination and the impact of the 2010 Act, including circumstances when being treated differently due to gender reassignment is lawful.<sup>10</sup> The EHRC has also undertaken to produce further guidance.

## International developments

28. There have been international developments since the 2004 Act including the reclassification of gender identity health by the World Health Organisation from 'Mental and Behavioural Disorders' to 'Conditions related to sexual health.'

29. The 2006 non-binding Yogyakarta Principles, which include that countries should ensure state issued identity papers reflect a person's gender identity and that procedures are "efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned."<sup>11</sup>

30. In 2015, the Parliamentary Assembly of the Council of Europe adopted a resolution on discrimination against transgender people (Resolution 2048), calling on Member States to develop procedures based on self-determination for changing the registered sex of transgender people on official documents such as birth certificates and passports, irrespective of medical status or medical or psychological diagnosis.<sup>12</sup>

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<sup>9</sup> [Equality Act 2010 - Explanatory Notes \(legislation.gov.uk\)](https://legislation.gov.uk)

<sup>10</sup> [Gender reassignment discrimination | Equality and Human Rights Commission \(equalityhumanrights.com\)](https://equalityhumanrights.com)

<sup>11</sup> [Yogyakartaprinciples.org – The Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity](https://yogyakartaprinciples.org)

<sup>12</sup> [PACE - Resolution 2048 \(2015\) - Discrimination against transgender people in Europe \(coe.int\)](https://coe.int)

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31. Since Argentina became the first country to do so in 2012, a number of other countries have moved to systems of legal gender recognition primarily based on an applicant's declaration of their gender, including Belgium, Colombia, Denmark, France, Ireland, Malta and Norway.

## UK Government consideration of reform and House of Commons Women and Equalities Select Committee

32. In January 2016, the House of Commons Women and Equalities Select Committee took forward an inquiry into Transgender Equality and concluded that the current process for obtaining legal gender recognition "runs contrary to the dignity and personal autonomy of applicants."<sup>13</sup>

33. In July 2017 the UK Government launched a survey to gather information about the experience of LGBT people in the UK. A Summary Report<sup>14</sup> published in July 2018 found that only 12% of trans people who had started or finished transitioning said they had a GRC, and that of those who said they did not have one, only 8% said they would not be interested in getting one. Key reasons for not making an application included not satisfying the requirements (44% said this) and the process being too bureaucratic (38%) or expensive (34%).

34. Following this survey, the UK Government committed to reforming the Gender Recognition Act, and in July 2018 it launched a public consultation<sup>15</sup> on proposed reforms. In that consultation document the UK Government said:

"Many trans people feel that [the current gender recognition] process is overly intrusive, humiliating and administratively burdensome. Further they argue that by requiring a diagnostic psychiatric report, the process perpetuates the outdated and false assumption that being trans is a mental illness...

"Ultimately, trans people argue that the system is denying too many people access to the legal recognition that they want. It amounts to an additional burden that trans people have to face when they already face a series of other barriers to full participation in wider society and to achieving the respect that they deserve.

"The Government is persuaded by these arguments. We want to make it easier for trans people to achieve legal recognition, and that is why we are consulting on the best way to achieve this."

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<sup>13</sup> [House of Commons - Transgender Equality - Women and Equalities Committee \(parliament.uk\)](https://www.parliament.uk/business/committees/committees-a-z/women-and-equalities-select-committee/committees-reports-and-publications/2016-17-transgender-equality-report/)

<sup>14</sup> [National LGBT Survey: Summary report \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684447/national-lgbt-survey-summary-report.pdf)

<sup>15</sup> [GRA Consultation document \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684447/grc-consultation-document.pdf)

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35. An independent analysis<sup>16</sup> of the 102,818 valid responses to the UK Government consultation, published in September 2020, found that:

- Nearly two-thirds of respondents (64.1%) said that there should not be a requirement for a diagnosis of gender dysphoria in the future;
- A majority of respondents (78.6%) were in favour of removing the requirement for individuals to provide evidence of having lived in their acquired gender for a period of time; and
- The majority of respondents (83.5%) were in favour of retaining the statutory declaration requirement of the gender recognition system.

36. The UK Government announced<sup>17</sup> in September 2020 that it would not be changing the requirements for gender recognition but would instead make administrative reforms to modernise the process, by reducing the application fee and introducing a digital route for applications.

37. The House of Commons Women and Equalities Select Committee carried out a further inquiry into reform of the 2004 Act in England and Wales and the UK Government response to its consultation. The Committee published their recommendations in a report<sup>18</sup> in December 2021 which concluded:

- The process for obtaining gender recognition should be improved for trans people, whilst ensuring the appropriate safeguards for those with concerns;
- This should include removing the current requirement for a diagnosis of gender dysphoria to obtain a GRC;
- Another system should exist in place of the GRP (and that the UK Government should conduct a review on whether the Registrar General for England and Wales could perform this function);
- The requirement to live in the acquired gender for a certain period of time should be removed;
- The requirement for spousal consent should be removed;
- The minimum age for applicants should remain at 18;
- No fee should be charged for applications.

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<sup>16</sup> [CP 294 – Gender Recognition Act – Analysis of consultation responses – September 2020 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

<sup>17</sup> [Government responds to Gender Recognition Act consultation - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

<sup>18</sup> [Reform of the Gender Recognition Act \(parliament.uk\)](https://parliament.uk)



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38. Overall, the Select Committee's recommendations are similar but not identical to the conclusions of the Scottish Government's consultations and the draft Gender Recognition Reform (Scotland) Bill.

39. The Select Committee calls on the UKG to bring forward urgent proposals to reform the 2004 Act for England and Wales.

## Consultation

40. The Scottish Government committed to reforming the 2004 Act in the Fairer Scotland Action Plan in 2016 and to undertake a public consultation exercise.<sup>19</sup>

41. Following on from this commitment, there have been two public consultation exercises. Between November 2017 and March 2018, the Scottish Government consulted on the principles of reform<sup>20</sup> (the first consultation) and between December 2019 and March 2020 on a draft Bill (the second consultation).<sup>21</sup> The Scottish Government has published an analysis of the responses to each consultation,<sup>22</sup> and has also published the responses from organisations and groups, where permission to publish was given.<sup>23</sup>

## First consultation

42. The consultation sought views on a number of areas including reducing the minimum age of applicants, removing medical requirements and requirement for applicants to demonstrate they have been living in their acquired gender for a minimum of two years preceding application, and retaining the requirement for an applicant to make a statutory declaration. The consultation also sought views on options for people younger than 16 and non-binary people, but the Scottish Government did not set out a view on the way forward in those areas.

## Consultation outcome

43. There were 15,697 responses available for analysis, of which 15,532 were from individual members of the public and 165 were from groups or organisations. Overall, 49% of respondents to the consultation were resident in Scotland, with 38% resident in the rest of the UK and the remaining 13% resident elsewhere in the world.

44. The consultation paper set out the Scottish Government's view that applicants for legal gender recognition in Scotland would not have to demonstrate a medical diagnosis and evidence or having lived in their acquired gender. The majority of respondents, 60%

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<sup>19</sup> [Fairer Scotland Action Plan - gov.scot \(www.gov.scot\)](http://www.gov.scot)

<sup>20</sup> [Review of the Gender Recognition Act 2004: consultation - gov.scot \(www.gov.scot\)](http://www.gov.scot)

<sup>21</sup> [Gender Recognition Reform \(Scotland\) Bill: consultation - gov.scot \(www.gov.scot\)](http://www.gov.scot)

<sup>22</sup> [Review of the Gender Recognition Act 2004: consultation analysis - gov.scot \(www.gov.scot\)](http://www.gov.scot)

<sup>23</sup> [Published responses from organisations \(nrscotland.gov.uk\) Gender Recognition Reform \(Scotland\) Bill consultation - gov.scot \(www.gov.scot\)](http://nrscotland.gov.uk)

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of those answering the question, agreed with the proposal to introduce a self-declaratory system for legal gender recognition.

45. Comments by those who agreed with the proposal included that gender identity is a personal matter, with gender recognition not sought by individuals without consideration and commitment. It was suggested that the existing process is too lengthy and intrusive. Respondents sometimes related personal experiences of the difficulties they had encountered when applying or suggested that they had not been able to apply because of the present barriers. Other issues raised included that the existing process may contribute to mental ill health.

46. Comments by those who disagreed with the proposal included concerns about impact on women and girls and that the system could be open to abuse. There was also a concern that the proposals represent a general erosion of the identity and rights of women. Other issues raised included the lack of distinction between sex and gender and the associated view that the former was immutable.

## Second consultation

47. The consultation specifically sought views on the requirement for applicants to live in their acquired gender for 3 months prior to submitting an application, and for a 3 month reflection period before legal gender recognition is granted. Respondents were also asked whether the age at which an application for legal gender recognition can be made should be reduced from 18 to 16 and were invited to comment on draft impact assessments.

## Consultation outcome

48. There were 17,058 responses available for analysis. 16,843 responses were submitted by individual members of the public, with the remaining 215 submitted by organisations. Those resident in Scotland accounted for 55% of respondents, with 32% resident in the rest of the UK and the remaining 14% resident in the rest of the world.

49. Most respondents to the consultation tended to take one of two overall positions on the proposals, either broadly in support of, or broadly opposed to, a statutory declaration-based system.

50. An analysis of comments made suggests that a small majority of organisations broadly supported changing to a statutory declaration-based system. Around 4 in 10 organisations did not support changing to a statutory declaration-based system and around 1 in 10 either did not take a view or their view was not clear.

51. 56% of respondents who answered the question thought that the age at which a person can apply for legal gender recognition should be reduced from 18 to 16, while 42% thought it should not, and 2% did not know.

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52. Those broadly in support tended to see the case for change as being clear and pressing, with the current system in desperate need of reform. They often thought the draft Bill offers some improvement relative to the current approach, primarily because of the change to statutory declaration and, more generally, because it would make acquiring a GRC simpler. However, they generally disagreed with central elements of the proposals, including that there should be a requirement to live in the acquired gender or that there should be a reflection period. These respondents tended to agree with reducing the age at which a person can apply for legal gender recognition to 16.

53. This was the perspective of many individual respondents and all, or the considerable majority of Children and Young People's Groups, LGBT Groups, Union or Political Parties, Local Authorities, Health and Social Care Partnerships or NHS respondents and Third Sector Support Organisations.

54. Those broadly opposed generally thought a convincing case for change has not been made, and that the current system is broadly fit for purpose. This was often connected to a view that the draft Bill should simply be scrapped and to specific concerns about the removal of the need for a medical diagnosis of gender dysphoria before receiving a GRC. These respondents were often concerned about the potential impact of the proposed changes on society in general, but on the safety and wellbeing of women and girls in particular. They generally disagreed with reducing the age at which a person can apply for legal gender recognition to 16.

55. This was the perspective of many individual respondents and the considerable majority of the Women's Groups and Religious or Belief Bodies that responded.

## Scottish Government response

56. Following consultation, the Scottish Ministers committed to introduce legislation that will improve the process for those applying for legal gender recognition and change the criteria required to be satisfied by applicants before a GRC can be obtained. That commitment was made in the last Parliament and reaffirmed in the Bute House Agreement and the Programme for Government<sup>24</sup> published 7 September 2021, which said: "Within the next year we will bring forward the Gender Recognition Reform (Scotland) Bill, removing the current medical requirements and reducing the time that applicants for gender recognition need to have lived in their acquired gender from two years to three months."

## Policy objectives of the Bill

### General

57. The Scottish Government aims to create a more equal Scotland where people and communities are valued, included and empowered and which protects and

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<sup>24</sup> [A Fairer, Greener Scotland: Programme for Government 2021-22 - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/programme-for-government-2021-22/pages/11.aspx)

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promotes equality, inclusion and human rights. The National Performance Framework<sup>25</sup> sets a national outcome for human rights: “we respect, protect and fulfil human rights and live free from discrimination.” In line with this, the policy 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 to the requirement for a medical diagnosis and supporting evidence and the intrusive and lengthy process.

58. In addition to the negative impact on those going through the process for legal gender recognition, the current legislation in this area is complex and the Bill simplifies the process applying to Scotland. Under the current process, 16- and 17-year-olds are not permitted to apply for gender recognition, despite being able to vote, get married and consent to surgical and medical procedures at that age. This has been identified as a negative impact on trans young people. The Bill therefore lowers the minimum age for applicants to 16.

59. 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 to obtain a GRC. This reflects that although the Bill changes the process by which legal gender recognition can be obtained and the criteria, it does not change the effects of a GRC and the rights and responsibilities which a person has on obtaining legal gender recognition.

60. The Scottish Government considers that the process set out in the Bill is a balanced and proportionate way of improving the current process for trans men and women seeking to obtain legal gender recognition. Retaining the requirement for a statutory declaration, and the provision for offences in the Bill for making a false statutory declaration or other false information in an application, ensures the process will continue to be as serious and significant a step as under the current system. A person who commits such an offence is liable to imprisonment for up to two years and/or a fine.

61. Based on international evidence, it is anticipated that there will likely be an increase in the number of applicants for a GRC. We estimate that the numbers of Scottish applications would be around 250-300 applications per year.

## Summary of main provisions in the Bill

62. The Bill amends the 2004 Act to introduce a new process for applying for legal gender recognition in Scotland. Applicants must either have been born in Scotland or be ordinarily resident here.

63. 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.

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<sup>25</sup> [Human Rights | National Performance Framework](#)

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Section in Bill	Provision
2	An applicant must be at least 16 and either have been born in Scotland or adopted in Scotland <sup>26</sup> or be ordinarily resident here. Section 11 gives powers to the Registrar General to make regulations about applications.
3	Once the Registrar General has considered the application, the Registrar General cannot determine it until a 3 month reflection period has passed and the applicant has confirmed in writing that they wish to proceed. (This confirmation is known in the Bill as the “notice of confirmation”).
4	The Registrar General must grant the application if it includes a statutory declaration by the applicant that the applicant is at least 16; was born or adopted in Scotland <sup>27</sup> or is ordinarily resident here; has lived in their acquired gender for at least 3 months; and intends to live in their acquired gender permanently. The applicant must also provide statutory declarations required by section 5 concerning marriages and civil partnerships. Section 14 makes it a criminal offence to make a false statutory declaration in relation to gender recognition or a false application for gender recognition or a false notice of confirmation after the reflection period has expired.
5 to 7	Makes provision about statutory declarations by the applicant on whether they are married or in a civil partnership and on what type of GRC the Registrar General should issue. Where the applicant is single, the Registrar General should issue a full GRC. Where the applicant is married or in a civil partnership and both parties wish to stay in the relationship, the Registrar General should issue a full GRC. In other cases, the Registrar General should issue an interim GRC.
7	Makes provision about the issuing of a full GRC on application to a person with an interim GRC where their spouse or civil partner consents to the marriage or civil partnership continuing or the marriage or civil partnership has ended (through divorce, dissolution or death of the spouse or civil partner), and also makes provision about the court issuing a full GRC where the court has granted a decree of divorce or dissolution on the grounds of the issue of an interim GRC.
8	Provides recognition for GRCs issued in England and Wales or Northern Ireland and for gender recognition obtained overseas.
9	Makes provision about an applicant being able to request a review of, and appeals against, gender recognition decisions made by the Registrar General.
9	Makes provision about applications to the court to quash a GRC on the grounds that the wrong type of GRC was issued, the application was fraudulent or the applicant lacked capacity.
10	Makes provision about the correction of administrative errors in GRCs issued by the Registrar General.
12	Makes provision about the Registrar General for Scotland sending a copy of a GRC issued in Scotland to other Registrar Generals in the UK, if there are records held about the recipient of the GRC by other Registrar Generals.
13	Makes provision about continuity of marriages or civil partnerships after gender recognition.
14	Creates new offences in relation to false applications under the GRA.
15	Introduces a duty to report on numbers of applications and GRCs issued on an annual basis.

<sup>26</sup> Or subject to a parental order in Scotland.

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## Removing the requirement for medical evidence

64. The first consultation on the Bill,<sup>28</sup> published on 1 March 2018, set out three broad models currently in use in processes for legal gender recognition in 16 other countries or territories. These were:

- A treatment model requiring an applicant to have had hormone treatment or to have been sterilised or had surgery before obtaining gender recognition: the Scottish Government judged this type of model to be both entirely at odds with best practice and legally unacceptable, which had been confirmed in a decision of the European Court of Human Rights<sup>29</sup>
- An assessment model where an applicants' evidence about their gender identity is supported by third party evidence and considered by either a court or administrative body (the current arrangements under the 2004 Act are a variation of this model)
- A model where the decision on whether an applicant can obtain gender recognition is entirely based on a declaration or statement of the applicant.

65. Countries that have adopted a model based on an applicant's declaration include Norway, Denmark, Malta, Colombia, Argentina, the Republic of Ireland, and more recently Switzerland and New Zealand.

66. The Scottish Government considers that Scotland should have a system for legal gender recognition based on a statutory declaration made by the applicant. This would mean that applicants under a Scottish system would not have to demonstrate a diagnosis of gender dysphoria or provide evidence of living in their acquired gender. This would align Scotland with the best international practice demonstrated in countries who have already successfully adopted such systems. This approach would assure Scotland's compliance with Resolution 2048. The arrangements would be less intrusive and onerous from the perspective of applicants, and would remove additional costs for applicants involved in gathering and providing the evidence that is currently required.

67. There has been strong support for this approach from some respondents to consultation.<sup>30</sup> The de-medicalising of the process of obtaining a GRC was warmly welcomed by many. The need to provide evidence of a medical diagnosis of gender dysphoria to the GRP was seen as one of the main problems with the current system.

68. Others opposed this approach in consultation responses, arguing that the diagnosis of gender dysphoria is a key requirement that should be retained. It was suggested that removing this requirement significantly changes the nature of the 2004 Act, which was introduced to help a small group of people with the medically recognised

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<sup>28</sup> [Review of the Gender Recognition Act 2004 - Scottish Government - Citizen Space \(consult.gov.scot\)](#)

<sup>29</sup> The case is AP, Garçon and Nicot v France [2017] ECHR 338 (06 April 2017).

<sup>30</sup> As described in the independent [analysis](#) of the second consultation.

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condition of gender dysphoria. It was argued that the proposed reform would extend the GRC process to a much larger and more diverse group.

69. The World Health Organisation (WHO) publish an International Classification of Diseases (ICD). The 11th revised version of the ICD (ICD-11) published in 2018 and approved in 2019 redefined gender identity related health. Gender identity disorders are no longer listed in the “Mental and behavioural disorders” chapter and are now in the new “Conditions related to sexual health” chapter. Consultation respondents who supported reform often pointed to this change as relevant evidence of the need to change the current system.

70. The WHO took this step to reflect evidence that trans-related and gender diverse identities are not conditions of mental ill health, and classifying them as such can cause distress. The WHO aim to ensure transgender people’s access to gender-affirming health care by continuing to include gender incongruence in the ICD. The Scottish Government does not consider that this change by itself means that the need for a medical diagnosis when obtaining legal gender recognition has to be removed from the GRA. However, it does point to the need for the current definition of “gender dysphoria” at section 25 of the GRA to be revised. Alongside removing the requirement for medical evidence, the Bill repeals the definition in the current GRA of “gender dysphoria.”

71. The Scottish Government remains of the view that removing the requirement to provide medical evidence is the best approach, and that it is central to the case for reforming the current gender recognition system.

## Application through the Registrar General

72. As set out in the above section, streamlining the existing processes by removing the need for applicants to provide evidence of medical diagnosis would also allow for applications to be considered by an administrative body, rather than by a tribunal such as the Gender Recognition Panel.

73. The policy intention is therefore that the system will be administrative in nature. The proposed system could be administered by officials based in the Scottish Government or by officials at National Records of Scotland. The Registrar General for Scotland (the Registrar General) who heads National Records of Scotland is responsible for the Register of Births as well as the Gender Recognition Register under the 2004 Act.

74. This would have a number of benefits, including lower running costs than a tribunal, as well as being more accessible for applicants. Some respondents to the first consultation were critical of the current process for providing evidence to the GRP, saying that the GRP is made up of people who are not trans and who may not be well informed on the issues involved, and noting that the GRP members do not know the individuals whose applications they are evaluating, that submitting evidence in the manner required can be intimidating or humiliating, that decisions can appear arbitrary, and that the criteria on which judgements are made are not readily accessible.

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75. Those who oppose this approach argue that the decision-making power of the GRP is needed to check the gender dysphoria diagnosis and evidence.

## Reducing the period applicants must have lived in their acquired gender and removing the requirement to submit evidence of this

76. Under the current process set out in the 2004 Act, applicants must provide evidence that they have lived in their acquired gender for two years immediately prior to making an application. The bill removes the routine requirement to submit evidence of living in their acquired gender in line with the administrative approach described above. It does require applicants to have lived in their acquired gender for a minimum period of three months, and to affirm this in a statutory declaration.

77. The Scottish Government will work with National Records of Scotland to publish supporting guidance for applicants under the new process. This will provide further information to applicants including on living in the acquired gender.

78. The period applicants need to have lived in their acquired gender is reduced from two years to three months prior to making an application.

79. The views expressed on this through consultation responses were mixed, with those broadly supportive of reforms welcoming the shortening of the period from two years to three months and the removal of requirement for evidence, but often preferring that the period be removed altogether, whereas others opposed any reduction in the period.<sup>31</sup>

80. The Scottish Government is of the view that a three month period living in the acquired gender before application is a reasonable length of time to demonstrate a serious commitment behind the application, and is preferable to the two year requirement, which leads to the current process being unnecessarily lengthy which can be a barrier to applicants.

81. The Bill includes provision allowing the Registrar General, with the consent of the Scottish Ministers, to make Regulations about a number of areas including information or evidence to be included in an application for a GRC or a notice of confirmation. 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.

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<sup>31</sup> As described in the independent [analysis](#) of the second consultation.



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## Introducing a reflection period

82. Under the new process set out in the Bill, all applicants prior to the issue of a GRC whether interim or full, will be required to have undertaken a three month reflection period starting from the point when the Registrar General identifies that their application is complete, as a pre-condition of their being issued with either an interim or a full GRC.

83. 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.

84. The Bill does not 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.

85. Two other countries have reflection periods as part of their gender recognition processes, Denmark and Belgium.

86. Consultation responses on this issue varied. Those broadly supportive of reforms generally did not agree with the proposal for a three month reflection period, arguing that any such period is unnecessary as many trans people will have been aware of their gender, and 'reflecting' on their situation, for all of their lives. Those broadly opposed to reforms also often argued against a three month reflection period but for different reasons. This was often connected to a view that the reflection period should be longer than the three months proposed, or that it would be unnecessary if applicants were required to spend a longer period living in their acquired gender.

87. The Scottish Government is of the view that a three month reflection period as set out in the Bill will provide an additional assurance that applicants have seriously considered their decision, even though the number of applicants who would choose not to pursue the process after this period is anticipated to be small, based on the operation of a similar processes in Denmark and Belgium.

## Application fees

88. Section 7(2) of the 2004 Act provides for an applicant to pay a non-refundable fee in the amount prescribed by an order of the Secretary of State. The fee can in certain circumstances be remitted and allowance is made for fees of different amounts. The UK Government in May 2021 reduced the fee for obtaining a GRC from £140 to £5.

89. In the Republic of Ireland, which has adopted arrangements for gender recognition based on applicants making a statutory declaration of their intention to remain in their lived gender, no fee is charged and their Gender Recognition Act 2015 specifies at section 8(2) that no fee shall be charged by the Minister for considering the application.

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90. The draft Bill as consulted on contained a provision conferring power on the Registrar General, with the approval of the Scottish Ministers, to prescribe a statutory fee for an application for gender recognition. This would be in keeping with other similar arrangements for fees for services provided by the Registrar General.

91. Some responses to the consultation highlighted the (then) £140 as being higher than for other comparable applications and that this could be a barrier to applicants.

92. The Scottish Government is of the view that financial barriers should not stand in the way of applicants for gender recognition and that therefore no fee should be charged. The provision in the draft bill conferring power on the Registrar General to prescribe a fee has therefore been removed before introduction.

## Reporting on operation of the Bill

93. Through consultation responses and meetings with stakeholders, it is clear there is an interest in reviewing and monitoring the impact of the Bill. For example, some stakeholders consider that the actual number of applications may be higher than estimated and it will be important to understand the number of applications and how this changes over time. The Scottish Government's estimates are based on international evidence, including from Ireland. The Scottish Government will report on actual numbers on an annual basis.

94. It is standard practice to review and monitor the impact of legislation. Placing in the Bill a requirement to measure and report on the operation of the gender recognition process in Scotland, and in particular the number of applications made and GRCs granted, will contribute to our understanding of the operation of the process and provide information to those with an interest.

95. In Republic of Ireland, Section 6 of their Gender Recognition Act 2015 places a duty on the Minister for Social Protection to prepare a report on the performance of his or her functions under the Act in the immediately preceding year, and cause copies to be laid before each House of the Oireachtas.<sup>32</sup>

96. The Scottish Government intends to report on an annual basis on the operation of the gender recognition process, and the Bill includes provision that expands the existing duty on the Registrar General to report to Scottish Ministers on numbers of births, deaths and marriages.<sup>33</sup> This will add an additional requirement to report on the number of applications for a GRC and the number of GRCs issued, on an annual basis. It will also provide scope for additional information to be provided at the discretion of the Registrar General and Scottish Ministers.

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<sup>32</sup> [Gender Recognition Act 2015, Section 6 \(irishstatutebook.ie\)](https://www.irishstatutebook.ie/eli/2015/act/12/section/6)

<sup>33</sup> [Registration of Births, Deaths and Marriages \(Scotland\) Act 1965 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1965/10)

## Alternative approaches

### No legislative change

97. The first consultation in 2017 sets out the view of the Scottish Government that Scotland should adopt a system for legal gender recognition where applicants would not have to demonstrate a diagnosis of gender dysphoria or that they had lived for a period in their acquired gender.

98. The 2017 UK Government LGBT National Survey<sup>34</sup> had heard from trans people who would seek legal gender recognition but found the process too bureaucratic, expensive and intrusive. The UK Government then conducted a consultation in 2018 asking how the process can be improved.

99. Following that public consultation exercise, the UK Government concluded in 2021 that current system under the 2004 Act allowed those that wish to legally change their sex to do so safely and fairly and that it would therefore not bring forward substantial legislative change to the 2004 Act. Instead, the application fee was reduced from £140 to £5 in May 2021, and work is being taken forward to digitise the process.

100. While this has offered some improvement in relation to the cost of application and allowing for a digital application, it is the Scottish Government's view that the current system can have an adverse impact on applicants due to the requirement for a medical diagnosis and evidence, and that trans people in Scotland should not have to go through an intrusive and lengthy process in order to obtain legal gender recognition.

### Minimum age of applicants

101. The current minimum age for applying for legal gender recognition is 18 under the 2004 Act. However, applicants are required to have lived in their acquired gender for a minimum of two years before making an application, and so that process could potentially begin from age 16.

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

- Leave home without the consent of your parent or guardian;
- Get a full time job and pay National Insurance;
- Enter into a legally binding contract;
- Consent to surgical, medical or dental procedures and treatments;
- Marry or register a civil partnership without parental consent;
- Consent to lawful sexual activity;
- Apply for a UK passport on your own behalf;
- Vote in elections to the Scottish Parliament and Scottish local authorities;
- Get a skin piercing; and
- Record a change of name officially on your own behalf.

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<sup>34</sup> [National LGBT Survey: Research report - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/research-data-and-analysis/publications/national-lgbt-survey-research-report)

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103. Respondents were asked in the second consultation whether the age at which an application for legal gender recognition can be made should be reduced from 18 to 16. 56% of all respondents who answered the question thought that the age at which a person can apply for legal gender recognition should be reduced from 18 to 16, while 42% thought it should not, and 2% did not know.

104. Respondents who agreed the minimum age should be reduced to 16 argued that a young person in Scotland is generally treated as an adult at 16, and that the proposed change would bring gender recognition into line with many other rights that can be exercised at 16. It was argued trans young people will have spent a long time reaching this decision and a delay is unnecessary and may be harmful, citing the benefits of legal gender recognition to their mental health. It was also considered that it would enable young trans people to have consistent documentation of their gender at a transitional age and would likely reduce their experience of discrimination as they go onto further education or enter employment.

105. Respondents who disagreed often stated a view that those aged 16 are children, and pointed to the UNCRC as defining children for its purposes as those under 18. These respondents frequently argued that 16 is simply too young to make an important, apparently irreversible decision. It was also considered that removing the requirement for a diagnosis of gender dysphoria left young people without the appropriate professional support to make a such a decision. Respondents pointed to some other rights that can be exercised at 16 which are reversible in a way that legal gender recognition does not appear to be, and other activities that the state has decided are not appropriate for those under 18, including getting a tattoo and buying alcohol or tobacco.

106. While supporting the proposed change, some respondents also suggested additional safeguards, information and support should be put in place for young applicants. Examples of additional safeguards include requiring parental consent for applications from 16- and 17-year-olds, maintaining a requirement for medical evidence for these applicants, or creating a role for the courts. Some of the responses in favour of reducing the minimum age from 18 argued that it should be lower than 16, with appropriate safeguards.

107. It is possible to point to comparators for what you can and cannot do at different specified minimum ages, and there are varied approaches internationally to legal gender recognition for children and young people.

108. Where additional requirements such as parental consent and a role for the courts are used in other jurisdictions, this may reflect that those systems' equivalents of parental responsibilities and rights generally extend to 16 and 17 year olds, unlike in Scotland generally.

109. Following careful consideration, the Scottish Government has decided that the minimum age for an application for a GRC should be reduced to 16. The Scottish Government and the Registrar General will consider further the need for clear and

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accessible guidance and support for younger applicants to ensure they understand and have carefully considered their decision.

## Non-binary people

110. The first consultation on the principles of gender recognition reform discussed legal recognition of non-binary people, including options for changing official documentation, changes to administrative forms, amendments to the 2010 Act and legal gender recognition.

111. A majority of respondents, 62% of those answering the question, thought that Scotland should take action to recognise non-binary people. Of the remaining respondents, 33% did not think Scotland should take action and 4% did not know. The most frequently made comment by those who agreed that Scotland should take action to recognise non-binary people was that the non-binary gender exists and that being non-binary is just as valid as being one of the binary genders or being a trans woman or man. Of those who disagreed, the most frequently made comment was that humans are sexually dimorphic and that, apart from a small number of people who are intersex, everyone is born male or female and with XY (male) or XX (female) chromosomes.

112. The second consultation did not ask specifically about non-binary recognition, but in responses to a request for other comments on the Bill's provisions a key theme of many of the comments was that the provisions should be extended to non-binary people. This was frequently connected to a view that the reforms cannot be considered a success, inclusive of the whole trans community or a victory for equality, unless it covers non-binary people. There were also calls for the draft Bill to be inclusive of people who are gender fluid, genderqueer, agender or with other gender identities.

113. Extending policy to include legal recognition of non-binary people would have significant implications associated with the complex assessment of rights and responsibilities. It would also incur additional registration costs for National Records of Scotland.

114. Legal recognition of non-binary people would involve considerable analysis and legislative change. This could include consequential changes required to several areas of devolved law in Scotland including: parentage law would need to clearly include non-binary people; marriage law would need a new category of marriage to include a marriage involving a non-binary person; registration law would require amendment to ensure that non-binary people were included, and that forms and processes both properly reflected their needs; criminal law may require amendment to ensure that any remaining gender specific offences can be committed by people of all legal sexes.

115. There would also be impacts of legal recognition of non-binary people in reserved areas of law, such as the Equality Act 2010 where the protected characteristic of sex refers to men and women, male and female. Changes required in these areas would be for agreement with the UK Government.

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116. Legal gender recognition for non-binary people could require significant changes to UK and Scottish legislation, could raise questions on how services currently provided to men or women are delivered, and could require significant financial and administrative resource to implement.

117. The Scottish Government has decided not to include extension of legal gender recognition to non-binary people in this Bill. The Working Group on Non-Binary Equality has been established to consider steps to improve the lives of non-binary people and to work towards achieving equality. The Group is composed of key LGBTI organisations, academics and non-binary people with lived experience. The Group's aim is to put forward recommendations to Ministers to improve non-binary equality by March 2022, which will be considered by the Scottish Government. Subsequently the Scottish Government is committed to develop an action plan by Spring 2023 to improve non-binary equality and wellbeing.

## Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

### Equal opportunities

118. The second consultation on the draft Gender Recognition Reform (Scotland) Bill included a draft Equality Impact Assessment. The Scottish Government is publishing an Equality Impact Assessment.<sup>35</sup>

119. In summary, the EQIA identified the following positive impacts of the proposals:

- In relation to older people, on the grounds that in particular those who are longer term transitioned may be able to apply without having to gather documentary evidence of their transition to which they may no longer have access
- In relation to disabled people, on the grounds that living openly in an acquired gender with documents that are consistent may improve a transgender person's mental health
- In relation to trans people, on the grounds that introducing a revised system for obtaining legal gender recognition will enable trans people to obtain legal rights without having to go through an overly intrusive system.

120. As outlined in more detail below, the EQIA found that in the Scottish Government's opinion the proposals contained in the draft Bill would have no impact on people because of their religion or belief, or because of their sexual orientation, and would not impact on men and women in different ways. In doing so, the EQIA provided analysis of available evidence, and drew particular attention to the provisions of the 2010 Act and the specified exemptions contained within that Act to the general provisions on non-discrimination.

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<sup>35</sup> <http://www.scotland.gov.uk/Publications/Recent>

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121. On religion and belief, some religious bodies have expressed concerns on societal or doctrinal grounds about introducing a new process for obtaining legal gender recognition. Some religious bodies are also opposed to the concept of gender recognition more generally. There are existing protections in the 2010 Act which relate to occupational and religious requirements and the Scottish Government continues to support and promote freedom of speech.

122. On sexual orientation, of the 1,160 self-selected trans people from Scotland who responded to the UK 2017 National LGBT survey, around a third identified as bisexual. Around a fifth said that they were gay or lesbian (it is not possible to generalise these findings to the trans population in Scotland).

123. Some stakeholders and respondents generally opposed to reforms have suggested that gay and lesbian people are pressured to change their gender rather than live as gay or lesbian, or pressured to enter into a relationship with a trans man or women. The Scottish Government considers that people should be able to live as lesbian and gay and any relationship entered into is a matter for the individuals concerned.

124. On gender reassignment, 323 people were issued with a full GRC across the UK in 2019-2020. A 2018 report published by the Scottish Public Health Network suggests that trans people in Scotland comprise an estimated 0.5 per cent of the population.<sup>36</sup> Based on international evidence, it is anticipated that there will likely be an increase in the number of successful applicants. The Scottish Government estimates that the numbers of Scottish applications would be around 250-300 applications per year.

125. Improving the process for applying for legal gender recognition will enable trans people to obtain legal rights without have to go through an intrusive and medicalised process. It will promote inclusion of trans people and likely reduce their experience of discrimination in employment and society more generally.

126. On age, the Bill should have a positive impact on older trans people particularly those who are longer term transitioned. They may be able to apply without having to gather documentary evidence of their transition to which they may no longer have access.

127. The Bill will also reduce the age at which a person can apply for gender recognition and would enable young people aged 16 and 17 to obtain legal recognition of their gender. This will align with a number of existing areas in Scotland where young people obtain rights at 16. It would enable young applicants to have consistent documentation of their gender at a transitional age and would likely reduce their experience of discrimination as they go onto further education or enter employment.

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<sup>36</sup> [https://www.scotphn.net/wp-content/uploads/2017/04/2018\\_05\\_16-HCNA-of-Gender-Identity-Services.pdf](https://www.scotphn.net/wp-content/uploads/2017/04/2018_05_16-HCNA-of-Gender-Identity-Services.pdf)

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128. On race, the Scottish Government is not aware of any evidence which suggests that this Bill will have an impact on this protected characteristic. The Scottish Government is not aware of statistical evidence published about the ethnicity of people who are issued with a full GRC under the 2004 Act. Of the 1,160 self-selected trans people from Scotland who responded to the UK 2017 National LGBT survey, 5.1% identified as minority ethnic (it is not possible to generalise these findings to the trans population in Scotland).

129. On disability, improving the process for obtaining legal gender recognition so people can live openly in their acquired gender with consistent documentation may have a positive impact on a person's mental health. The Scottish Government and the Registrar General will also consider further the need for clear and accessible guidance for people with disabilities in relation to a new application process.

130. On sex, a higher proportion of people legally recognised in the UK in their gender under the 2004 Act are trans women although the proportion of trans men has increased over time. A revised system should benefit both men and women applying for legal recognition of their gender.

131. A number of respondents to the consultation and some stakeholders have raised concerns about the impact of legal gender recognition on women and girls. They consider there has been a lack of consideration that a GRC enhances a person's legal rights of access to single sex services, that reform will increase the range of people eligible for a GRC, and reduce the discretion for service providers to exercise such exemptions with some women choosing to self-exclude from services.

132. The 2010 Act is generally reserved to the UK Parliament. It contains a number of exceptions to the general provisions on non-discrimination. Some of these exceptions are directly relevant when considering the position of women in relation to gender recognition. For example, a trans person can be excluded from single sex services when it is a proportionate means of achieving a legitimate aim. The 2010 Act exception for single sex services will not change under the Bill. The EHRC has undertaken to produce new guidance to supplement its existing guidance, to provide clarity on the interaction of the Gender Recognition Act and the Equality Act. When this is published, the Scottish Government will consider whether additional guidance is required for Scotland.

133. The Scottish Government established a working group on sex and gender in data. Following consultation, this group has published guidance.<sup>37</sup> The Scottish Government has also committed to developing guidance on trans inclusion and women's rights.

## Human rights

134. The Scottish Government has considered the effect of the provisions of the Bill on human rights: in particular the following Articles of the European Convention on

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<sup>37</sup> [Sex and Gender in Data Working Group - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/documents/2022/03/sex-and-gender-in-data-working-group-report/)



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Human Rights (ECHR): Article 3 (prohibition of torture), Article 6 (right to a fair trial), Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination).

135. The 2004 Act was introduced following two European Court of Human Rights rulings in 2002, in the cases of *Christine Goodwin v the United Kingdom* and *I v the United Kingdom*. Therefore, Scotland must have a system for obtaining legal gender recognition, to comply with the ECHR.

### Article 3

136. The obligations of national authorities under Article 3 may include a duty to put in place an adequate legal framework which affords protection against acts of violence by private individuals. Views have been expressed in consultation that the proposals might place women at greater risk of violence in single sex spaces. Article 3 allows national authorities to select from among the range of measures that can secure compliance with their obligations<sup>38</sup>. There are protections in criminal law, and Article 3 does not prevent reforms to the procedures and criteria for obtaining legal gender recognition as set out in the Bill.

### Article 6

137. The Bill includes provisions which require a sheriff, or a sheriff or other court (as the case may be) to determine certain matters, and certain matters on appeal. These provisions are contained in proposed new sections 8H and 8I of the 2004 Act (inserted by section 7 of the Bill), new section 8P (inserted by section 8), and new sections 8R and 8S (inserted by section 9). The sheriff or other court is an “independent and impartial tribunal” in accordance with Article 6.

### Article 8

138. The provisions in the Bill on the application process for obtaining legal gender recognition, and changing the criteria required for a person to obtain legal gender recognition, are considered to improve for applicants the enjoyment of the right to respect for private and family life under Article 8 of the ECHR.

139. In connection with Article 8, the rights of other persons (including natal women and natal men) have been considered, separately from the rights of trans persons who apply for a GRC under the Bill provisions. The balancing of the interests of these persons has been considered, so far as they could arguably conflict.

140. In *Application by J.R. 111*<sup>39</sup>, the Queen’s Bench Division in Northern Ireland held that the requirement for a medical report including the diagnosis of gender dysphoria in the 2004 Act was compatible with Article 8. However the requirement in sections 2(1)(a) and 25(1) of that Act, that applicants prove themselves to be suffering, or to have

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<sup>38</sup> E.g. European Court of Human Rights, *Talpis v Italy*, App. No. 41237/14 (2017).

<sup>39</sup> [2021] NIQB 48.

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suffered from, a “disorder” in order to obtain a GRC, breaches Article 8. The Bill removes in relation to Scotland both the 2004 Act’s provision which requires a diagnosis of gender dysphoria, and the provision which defines “gender dysphoria” as a “disorder” (paragraphs 2 and 9(e) of the schedule of the Bill).

## Article 14

141. In summary, a difference in treatment in accordance with Article 14 will be discriminatory if the facts fall within the ambit of one or more of the substantive provisions of the ECHR, and if the difference in treatment does not have objective and reasonable justification. It must pursue a legitimate aim, with a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The new section 8C(1) of the 2004 Act, inserted by section 4 of the Bill, provides for a difference in treatment as between persons aged at least 16 and persons under that age, as an application for a GRC under the new section 8A(1) of the 2004 Act, inserted by section 2 of the Bill, will require a statutory declaration by the applicant that they are aged at least 16.

142. In the context of Article 8, national authorities are not obliged to secure legal gender recognition for persons under the age of 16. It has also been considered that, across European countries, a variety of minimum ages for an application for legal gender recognition are imposed. It is considered that there is justification for setting a minimum age of 16 for an application for a GRC, in line with a number of areas of Scots law where rights and responsibilities are obtained at that age, including for example the minimum age to marry or enter a civil partnership, and to consent to lawful sexual activity.

## Islands

143. No differential impact on island communities is expected as a result of this Bill. The provisions will apply equally across all parts of Scotland.

## Local government

144. The Bill will not have a direct impact on local government. Local Government registrars, who may receive enquiries about the new arrangements for gender recognition in Scotland, will signpost enquirers on to National Records of Scotland.

## Sustainable development

145. The Bill will not have an impact on sustainable development.



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# Gender Recognition Reform (Scotland) Bill

## Policy Memorandum

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