**SCPO Briefing Paper: Gender Recognition Reform (Scotland) Bill**

**Prepared 22 April 2022**

**Background**

In March 2022 the Scottish Government introduced the Gender Recognition Reform (Scotland) Bill. This Bill will reform the existing Gender Recognition Act 2004 in Scotland. The legislation has been introduced to make changes to the way that transgender people apply for a Gender Recognition Certificate (GRC).

The Gender Recognition Act allows transgender adults aged 18 and over to obtain a GRC by applying to the Gender Recognition Panel. A GRC allows people to be issued with a new birth certificate that matches their gender identity; other forms of ID such passports and driving licences can be changed without needing a GRC. The GRA extends across the whole of the UK, however Gender Recognition itself is a devolved matter.

The Gender Recognition Act was originally introduced by the UK Government to comply with the European Convention of Human Rights Article 8 (the right to respect for private and family life) and Article 12 (the right to marry) in regard to the rights of transsexual[[1]](#footnote-1) people following two cases heard in the European Court of Human Rights. The Act was brought into Scots Law via a legislative consent motion. The Gender Recognition Bill was passed in the House of Commons on 25 May 2004. It achieved Royal Assent on 1 July 2004, and came into force on 4 April 2005[[2]](#endnote-1).

6,010 GRCs have been granted across the UK to date. It is estimated up to 30 GRCs are granted to people born in or adopted in Scotland each year, although there are currently no figures available for Scotland. The current Bill makes provision for the Registrar General to report annually on the number of applications and the number of GRCs granted, and is intended to monitor the impact of the legislation. The Scottish Government has predicted that there could be an increase to 250-300 applicants a year if the Bill passes[[3]](#endnote-2).

**Current Process**

At present, to qualify for a GRC applicants must be able to give evidence to a Gender Recognition Panel that they have had a diagnosis of gender dysphoria from a registered medical specialist or psychologist working in the field of gender dysphoria. Applicants must also be able to evidence that they have lived in their acquired gender for a minimum of two years. People applying for a GRC must sign a statutory declaration that they will continue to live in their acquired gender permanently until death and must declare if they are married or in a civil partnership. Successful applicants who are issued a GRC are considered, in law, to be of their acquired gender from the date of issue. There is no requirement for applicants to have received hormone treatment or to have undergone any gender reassignment surgery, although these must be declared to the Gender Recognition Panel if they have happened[[4]](#endnote-3).

At present there are three routes to obtaining a GRC but most applicants use what is known as the Standard track which applies to most people diagnosed with gender dysphoria and have lived in their acquired gender for two years, and intend to continue doing so until death. Alternate pathways are:

* the Alternative track (used by people with the above criteria but who were also in a protected marriage or Civil Partnership before 10 December 2014, or 16 December 2014 in Scotland, and have lived in their acquired gender for 6 years prior to these dates), and
* the Overseas track (for those whose acquired gender has been legally accepted in an approved country or territory)[[5]](#endnote-4).

Interim GRCs may also be granted for those in marriages and civil partnerships where one or both of the partners wishes to end their union before a full GRC is obtained[[6]](#endnote-5).

**Consultation**

Following an enquiry on Transgender Equality in 2016, the House of Commons Women and Equalities Committee called for changes to the GRA. The enquiry heard that the current application process was “bureaucratic”, “expensive” and “humiliating”. The process of declaring a medical diagnosis was described as “pathologising [treating as a disease] transgender identities [and] causing significant offence and distress”[[7]](#endnote-6), and concerns were raised about way that medical and surgical reports were assessed by the Gender Recognition Panel.

Based on the evidence heard in the enquiry, and with reference to international comparisons, the Committee recommended that the GRA should be updated and a self-declaration model should be adopted[[8]](#endnote-7). Since 2017 there have been extensive public consultations on reforming the GRA in Scotland and in England and Wales[[9]](#endnote-8) [[10]](#endnote-9) [[11]](#endnote-10).

The most recent consultation was carried out in Scotland between 17 December 2019 and 17 March 2020. A number of issues were consulted on, including removing the requirement for a medical diagnosis of gender dysphoria, introducing a statutory declaration system (self-declaration), reducing the time lived in the acquired gender from 2 years to 3 months, the introduction of a 3-month reflection period, and lowering the legal age from 18 to 16.

17,058 responses were analysed and the findings were published in September 2021[[12]](#endnote-11).

Most respondents were found to fall into two general positions described as either broadly supportive of a self-declaration (via a statutory declaration) based system, or broadly opposing.

Those broadly supportive tended to agree with the need for reform. They were mostly supportive of a simpler process (self-declaration) and of reducing the legal age for applicants to 16. These respondents were also generally opposed to the need to live in the acquired gender, and generally opposed for the requirement for a further 3-month reflection period. This was the position of almost all Lesbian, Gay, Bisexual and Transgender (LGBT) groups, Children and Young People's Groups, Trade Union or Political Parties, Local Authorities, Health and Social Care Partnerships or NHS respondents, and Third Sector Support Organisations.

Those broadly opposing were more likely to call for the scrapping of the Bill in its entirety and there were some specific concerns about removing the need for a medical diagnosis. Many in this group were also very concerned about the potential wider societal impacts, and in particular protections and safety of women and girls. This group was more likely to oppose the lowering of the age limit to 16, and was the position of most Women’s Groups and Religion or Belief Groups that responded.

It was also noted that a high number of responses to this consultation came from outside of Scotland (46%), and there were criticisms that the proposals made no provisions for non-binary people or those with other gender identities. In April 2020 the Gender Recognition Reform (Scotland) Bill was one of several bills that were halted due to the Covid-19 Pandemic.

**The Bill**

In March 2022 the Scottish Government introduced the Gender Recognition Reform (Scotland) Bill. The Bill proposes reforms based on the findings from previous consultations and with reference to wider international developments[[13]](#footnote-2) [[14]](#endnote-12) [[15]](#endnote-13) [[16]](#endnote-14).

The lead committee for the Bill is the Equalities, Human Rights and Civil Justice Committee. Views are being sought from the public on the proposals in the Bill and the Call for Views closes on the 16 May 2022.

The Scottish Government belives that the Bill, if it passes, will simplify and improve the process of applying for legal gender recognition.

The proposed legislative reforms are to:

* Remove the Gender Recognition Panel, applications will be made to the Registrar General for Scotland
* Remove the requirement for a medical diagnosis of gender dysphoria, a statutory declaration will be made instead
* Reduce the minimum age for application from 18 to16
* Reduce the period that an applicant must have lived in their acquired gender from 2 years to 3 months
* Introduce a 3-month reflection period following application
* Introduce a new duty on the Registrar General to report annually on the number of applications and the number of GRCs granted.

Applicants must have been born or adopted in Scotland, or ordinarily resident in Scotland to apply. The Bill also provides for automatic recognition of gender recognition obtained outwith the UK in most circumstances[[17]](#endnote-15).

**Some Wider Considerations**

The nature and tone of the public debate surrounding trans issues is a cause for concern for many people. It is a debate which is often conducted online on social media and has become increasingly polarised in recent years. Campaigners and politicians on all sides of the debate have noted instances of ostracisation and bullying of people for holding opposing views.

Since the UK Government announced that they would consult on the issue of Gender Recognition reform in 2018 the public debate on gender identity has intensified. In September 2020 the Minister for Women and Equalities, Liz Truss, announced that there would not be any reforms to the GRA in England and Wales, instead administrative changes would be made to the current process and the application fee reduced to £5[[18]](#endnote-16), a move widely denounced by many LGBT charities and campaigners. The House of Commons Women and Equalities Committee reported earlier this year that the length of time it took for the UK Government to respond the consultation further fuelled tensions in an already strained public debate[[19]](#endnote-17).

In early 2022 the Equalities and Human Rights Commission (EHRC), the regulatory body responsible for enforcing the Equality Act 2010, seemingly backtracked on its previous position on Gender Recognition reform given in both Scottish Government and UK Government consultations. In a highly publicised letter[[20]](#endnote-18) to the Cabinet Secretary for Social Justice, Housing and Local Government, Shona Robison[[21]](#footnote-3), Baroness Kishwer Falkner, Chairwoman of the EHRC, advised that more detailed consideration is needed before any change is made to the provisions in the Act,

“based on the concerns of some lawyers, academics, data users and others about the potential implications of changing the current criteria for obtaining a Gender Recognition Certificate (GRC).These concerns centre on the potential consequences for individuals and society of extending the ability to change legal sex from a small defined group, who have demonstrated their commitment and ability to live in their acquired gender, to a wider group who identify as the opposite gender at a given point.”

**The Equality Act 2010**

Supporters of Gender Recognition Act reform argue that new legislation does not give transgender people any more or any less rights than they already have under the Equality Act 2010. They state that reform is about making the process to get a GRC easier and fairer. Opponents argue that reforming the legislation, in particular self-declaration, and any increased uptake of GRCs would erode the sex-based rights afforded by the Equality Act, to women and girls in particular, increase pressure on providers of sex-segregated spaces, and could result in an increase of illegitimate male access to female-only spaces; there is also a concern that vulnerable women might choose to self-exclude from single sex spaces[[22]](#endnote-19) [[23]](#endnote-20).

The Equality Act 2010 provides protection from discrimination for people with one or more protected characteristics, which includes both sex and gender reassignment. The Act also contains some very limited circumstances where someone with a protected characteristic can be discriminated against, providing it is a “proportionate means of achieving a legitimate aim”[[24]](#endnote-21). This allows organisations to provide separate or single sex services. A number of stakeholders told an enquiry by the Women and Equalities Committee in 2021 that there is often confusion over how to apply the relevant exemptions under the Equality Act to single sex spaces, and that more guidance and clarity is needed on how to properly apply the legislation[[25]](#endnote-22).

The Scottish Government have stated that the proposed changes to the Gender Recognition Act do not change existing exemptions for single sex services under the Equality Act[[26]](#endnote-23). Additionally, the Scottish Parliament does not have competence to make any material changes to the Equality Act 2010, as this is reserved to Westminster[[27]](#endnote-24).

A 2020 report commissioned by Engender, Scotland’s feminist policy and advocacy organisation, was commissioned to address the relationship between the Gender Recognition Act and the Equalities Act. The report notes that the Equality Act does not differentiate between biological sex, or physiological differences, and socially constructed gender roles in terms of sex-based discrimination and that the Equality Act acknowledges that women specifically require protection against discrimination both in terms of biological difference from men and in terms of the “social construction of gender norms”[[28]](#endnote-25). Whilst the report did not find any risk to the provisions of the Equality Act 2010 under the proposals for Gender Recognition Act reform, it did note a lack of clarification on some key issues in relation to exemptions and that review and revision of the guidance would “enhance legal certainty”[[29]](#endnote-26).

The issue of biological differences between men and women has also highlighted other socio-cultural issues regarding the traditional presentations of gender.

The Equality Act 2010 Code of Practice of Services states that,

“Service providers should be aware that where a transsexual person is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary”[[30]](#endnote-27).

This calls into question whether a person has the ability to ‘pass’ as the gender that they present, and consequently how that person is treated socially and whether they may be challenged to prove their gender identity. The Code of Practice also noted that a transsexual person should not be routinely required to provide a GRC to prove their legal gender as this would contravene the person’s right to privacy[[31]](#endnote-28).

In an interview about her support Gender Recognition Act reform, Mhairi Black, MP for Paisley and Renfrewshire South, has previously spoken out about her experiences, as a non-transwoman, of being challenged for using female toilets as she does not dress in a stereotypically feminine manner[[32]](#endnote-29).

**Self-declaration**

A particularly contentious element of the proposed legislation is the removal of the medical diagnosis of gender dysphoria and the introduction of a statutory declaration. Opponents have argued that removing this safeguard risks the erosion of rights and protections for women and girls. Consultation analysis suggested that a majority (6 out of 10) of organisations were in favour of moving to a statutory declaration based (self-declaration) system whilst 4 out of 10 organisations did not support the move, and 1 out of 10 did not report a clear position[[33]](#endnote-30).

At present several countries and jurisdictions have systems of legal gender recognition which are based primarily on a self-declaration model. These include Argentina, Belgium, Colombia, Denmark, France, Ireland, Malta and Norway[[34]](#endnote-31).

Section 14 of the Bill inserts a new section in the GRA, which means it will be an offence to:

* Knowingly making a false statutory declaration in an application for a GRC
* Knowingly including false information in an application for a GRC.

A person who commits any such offence is liable:

* On summary conviction to imprisonment for a term not exceeding 12 months, or a fine

not exceeding the statutory maximum (currently £10,000) (or both)

* On conviction on indictment to imprisonment for a term not exceeding two years

or an unlimited fine (or both).

**16- and 17-year olds**

There were some concerns raised during the consultation process regarding the lowering of the age limit from 18 to 16. A majority (56%) of respondents were in favour of lowering the age, whilst 42% were against and 2% said they did not know. The majority of Women’s Groups and Faith Groups that responded were against lowering the legal age to 16, whilst the majority of other Groups were in favour. Many of those who were in favour of lowering the legal age to 16 were also in favour of opening up the process to under 16s[[35]](#endnote-32).

There are a number of legal rights afforded to 16-year-olds in Scotland which include:

* Entering into a legally binding contract
* Consent to lawful sexual activity
* Marry or register a civil partnership
* Vote in Scottish Parliament and Scottish local authority elections
* Record a change of name, on your own behalf
* Enlisting in the UK armed forces

The Bill notes that although applications can only be received from applicants aged 18 the process of applying for a GRC could potentially begin at 16 already. This is because applicants must have lived in their acquired gender for 2 years at the time of application[[36]](#endnote-33).

Arguments presented during the consultation[[37]](#endnote-34) period for lowering the age to 16 included:

* The United Nations Convention on the Rights of the Child (UNCRC), the European Convention on Human Rights (ECHR) and the Yogyakarta Principles were cited as being in keeping with extending the rights of young trans people
* 16-year-olds are mature, capable and responsible enough to make decisions on their legal gender identity
* Young people would feel more accepted, supported or empowered by legally recognising their gender which could help to improve wellbeing and quality of life, and reduce depression and suicide rates
* Delays could have a negative effect on transitions to adulthood
* Legal recognition would not impact on medical treatment. In Scotland, under 16s cannot access any irreversible treatments as part of a medical transition, such as cross-sex hormones, and under 18s cannot access surgical interventions.

Arguments presented[[38]](#endnote-35) against lowering the age to 16 included:

* The UNCRC defines children as those under 18
* 16 is too young to legally change gender. Young people are susceptible to external pressure and are of an age where views, even sincerely held ones, could still change.
* There are a number of rights restricted to under 18s on safeguarding grounds (such as placing a bet, getting a tattoo, getting a credit card, drinking alcohol)
* The pressures on young people such as school work and exams would make it wrong to introduce the possibility of legal gender change at such an important time
* It could set young people on a medical pathway that is difficult to stop or reverse
* There has been a steep rise in the number of young girls expressing a desire to change gender and there were calls for the Scottish Government to investigate this phenomenon before proceeding with reforms to the 2004 Act.

The Scottish Government have noted that they will consider the need for further guidance for 16- and 17-year olds "to ensure they understand and have carefully considered their decision"[[39]](#endnote-36). Under 18s are afforded protection from discrimination under the Equalities Act 2010 and, like trans adults, are already able to change their gender identity on most documentation, including passports, without a GRC[[40]](#endnote-37).

**References**

1. Transsexual is now generally considered an outdated term. However, this is the term used in previous documents and legislation, including the Equality Act 2010, and so is used infrequently in this briefing. It may also be helpful to remember that sex and gender / male and female / man and woman are often used interchangeably in reports, in the media etc. For this briefing the choice of words is usually intentional, but it is not always possible given the different sources of information that were used in its research. [↑](#footnote-ref-1)
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6. Ibid, p.12 [↑](#endnote-ref-5)
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13. WHO reclassification of gender identity health from ‘Mental and Behavioural Disorders’ to ‘Conditions related to sexual health’; the 2006 Yogyakarta Principles; the Parliamentary Assembly of the Council of Europe (PACE) 2015 adoption of Resolution 2048, calling on Member States to develop procedures based on self-determination for changing the registered sex of transgender people on official documents. [↑](#footnote-ref-2)
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