

## Briefing Paper on the Gender Recognition Reform (Scotland) Bill

Scottish Trans, March 2022

On 3<sup>rd</sup> March the Scottish Government [introduced a Bill](#) to reform the Gender Recognition Act 2004. This follows two public consultations: [one in 2017/2018](#) and [one in 2019/2020](#).

**We broadly support the Bill, and the proposed reforms.** Below, we outline how the current legal gender recognition process works, the problems with the current process, what changes have been proposed, and what reforms to this law will not do. Please don't hesitate to contact us with any questions you might have.

### How does the current Gender Recognition Act work?

The current law passed in 2004, following a European Court of Human Rights ruling in 2002. The court ruled that the UK Government must provide a way for trans people to update the sex on their birth certificate, and that **when determining a trans person's legal sex, the sex/gender in which they live is more important than their biological sex characteristics at birth.**

The Gender Recognition Act (GRA) allows trans men and women to apply for a gender recognition certificate (GRC), which they can use to change the sex recorded on their birth certificate provided they meet a series of strict requirements.

**Trans people were already, and are now, able to update the sex marker on all of their other identity documents** – like their passport, driving licence, medical records, etc. by a simple process of self-declaration. **It is only changing a birth certificate that requires going through the current gender recognition process.**

**Gender recognition is devolved**, but the Scottish Parliament agreed a legislative consent motion for the GRA 2004 to cover Scotland, so the current law is UK-wide.

Currently, one of the key requirements for receiving a GRC is for the applicant to have socially transitioned, and be living permanently as a man or woman. There is no requirement to have medically transitioned (i.e. undergone gender affirming surgery or taken hormones). **Neither of these requirements will change with the proposed reforms.**

### Why does the Gender Recognition Act need to be reformed?

The current process for changing the sex on a trans person's birth certificate is:

- **Stigmatising** of trans people as it requires a diagnostic psychiatric report of “gender dysphoria” which reinforces the outdated assumption that being trans is a mental illness.
- **Intrusive and humiliating** because it requires trans people to provide extensive medical evidence about their bodies, despite there being no requirement to undergo hormonal or surgical treatments.
- **Outdated** compared to international human rights best practice as described by [the Council of Europe](#), [World Professional Association of Transgender Health](#), and the [UN Independent Expert on Sexual Orientation and Gender Identity](#), which all call for legal gender recognition processes based on self-declaration.

- **Out of step** with many other jurisdictions around the world. Argentina was the first country to introduce a self-declaration model in 2012, and has been joined by nine countries since then in Europe alone, and at least fifteen further jurisdictions around the world.
- **Too complicated** for many trans people to navigate, especially if they have poor literacy, are disabled or have lost old paperwork while homeless or fleeing domestic violence.
- **Expensive** as there are many hidden costs in gaining the evidence needed to apply.
- **Needlessly slow** because trans people cannot apply until two years after they have transitioned.
- **Exclusionary** of many trans people who have transitioned, including under 18s and non-binary people.

**The above problems with the Gender Recognition Act deter most eligible trans people from applying** and that leaves them in a risky legal limbo, with the sex recorded on their birth certificate not matching their other identity documents, and contradicting how they live. This can cause serious harmful errors and difficulties, such as:

- Breach of their human right to privacy
- Increased risk of experiencing harassment and discrimination in employment and services
- Problems proving right to work in UK, applying for university/college courses and student loans, and entering a marriage or civil partnership correctly
- Their death certificate may record their gender in a way that contradicts how they lived their life

### What is in the Bill?

This Bill **does not propose any new rights for trans people**, but improves the process to allow trans men and trans women to more simply and fairly access their existing human rights.

Similarly, it will not affect women's rights or trans people's rights under the Equality Act 2010. The Equality Act includes exceptions that allow trans people to be treated less favourably in limited, specific situations in [single-sex services](#), or [sporting competitions](#), where this is justifiable. The exceptions in the Equality Act relating to how trans people are treated within those contexts are decided on the basis of trans people having the protected characteristic of ['gender reassignment'](#) which applies to a wider group of trans people than just those trans men and women who have obtained a GRC. Changing the process of obtaining a GRC therefore does not impact on how the law applies in these contexts. We would be happy to discuss this with you in more detail.

The key changes proposed by the Bill that we support are:

**A system of statutory self-declaration** whereby a trans person makes a formal legal declaration confirming that they are living in their acquired gender and intend to continue to do so for the rest of their life. This statutory declaration is already part of the existing process, but applicants would no longer need to provide a psychiatric diagnosis or invasive medical evidence alongside it.

**The reduction of the requirement for an applicant to have been living "in-line" with their gender from two years to three months.**

**Reducing the age at which people can apply from 18 to 16**, allowing younger trans men and women to apply. We support this aspect of the Bill, but would like to see a system whereby trans children and young people under 16 can apply for a GRC with parental or guardian support.

## Our concerns about the Bill

A key issue we have with the current bill is that it **still does not provide legal recognition for non-binary people**, or options for sex markers outside of “male” and “female” on birth certificates. The [EQIA for the Bill](#) states that “The Scottish Government considers that legal recognition of non-binary people would raise a number of issues in relation to areas such as registration, data, rights and responsibilities, changes to legislation, service delivery and costs.” If the Scottish Government believes this to be the case, then it should take steps to amend the practices, policy, and legislation that would cause “issues” for the legal recognition of non-binary people, rather than denying them access to legal recognition on this basis.

We do not believe that the **time delays** (of three months living in-line with gender and a three month reflection period) need to be included, and are not present in similar legislation in other jurisdictions, such as the Republic of Ireland, Norway or Luxembourg.

New section [8S \(in section 9 of the Bill\)](#) provides that “A person who has an interest in a gender recognition certificate may apply to the sheriff for the revocation of the certificate” if they believe the certificate was issued fraudulently or was otherwise invalid. The [Explanatory Notes](#) state that a “person who has an interest” is a “spouse, civil partner or child of a person who has obtained a GRC”. Whilst we support the existence of a mechanism to apply for a GRC to be revoked if the application was fraudulent, we have serious concerns that **this section is too widely drawn**. It could result in vexatious applications being made to revoke a trans person’s GRC simply because a family member opposes the decision that individual has taken to obtain one. This could mean trans men and trans women having to defend their identity and transition in court, for no reason other than a lack of acceptance by others.

New section [8U \(in section 11 of the Bill\)](#) provides that “The Registrar General for Scotland may by regulations make provision for or about [...] information or evidence to be included in an application or a notice under section 8B(3) (in addition to the information and evidence required by this Act)”. **We would like further information** about what information or evidence could be required “in addition” to the standard information and evidence required from applicants, as this suggests that the Registrar General could request information similar to that currently required (i.e. a psychiatric diagnosis of gender dysphoria), which would defeat the purpose of the Bill.

### How do we compare to the rest of Europe?

Our current law has fallen behind many countries in Europe who already base their legal recognition processes on the principle of self-declaration, as this Bill proposes Scotland will.

If this Bill passed, Scotland would move from the group of countries requiring a mental health diagnosis and medical evidence to legally recognise trans people, to the group that puts the principle of self-declaration and human rights at the centre of their laws in this area.

It would see us join Belgium, Denmark, Iceland, Ireland, Luxembourg, Malta, Norway, Portugal and Switzerland in recognising trans men and trans women as who they are, by a process that respects, and does not further stigmatise, their identity.

But the lack of recognition for non-binary people, and trans young people and children under 16, along with the time delays before and after application, prevent the proposed reforms from meaning Scotland would become a truly world-leading country for legal gender recognition.