



Equality  
Network



Scottish  
Trans

## Written evidence for stage 1 of the Gender Recognition Reform (Scotland) Bill

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### Introduction

This submission is on behalf of both the Equality Network and Scottish Trans. The Equality Network is a national lesbian, gay, bisexual, transgender and intersex (LGBTI) equality organisation in Scotland existing since 1997. Scottish Trans, a project based within the Equality Network since 2007, focusses specifically on trans equality.

This response is based on our knowledge, expertise, and experience in trans law, equality, and human rights. It comes from our own analysis as well as the opinions and experiences of trans people across Scotland, who we have consulted in depth for several years around their views on the need to reform the Gender Recognition Act 2004.

We are broadly in support of the Gender Recognition Reform (Scotland) Bill, and think it would make a significant improvement to the process by which trans men and woman can receive a gender recognition certificate (GRC), which is what allows them to change the sex registered on their birth certificate and obtain legal recognition of how they live their lives.

Throughout this response we will provide more details on the issues with the current 2004 Gender Recognition Act (GRA), and why these reforms would make positive change.

The key problems with the process required to obtain a Gender Recognition Certificate prescribed by the current Act are that:

it pathologises and stigmatises trans people by requiring a psychiatric diagnosis as part of the application, as well as detailed medical evidence reports,

it is difficult, humiliating, and inaccessible for many trans people, requiring a large amount of time, money, and evidence to apply, and

it is not in-line with international human rights best practice in this area, which acknowledges that trans people themselves should be able to take decisions about obtaining legal recognition of their gender, and instead places the opinions of doctors and judges above the self-knowledge of trans people.

While we think that the Bill still falls short of international best practice in this area, and provide further details of how it would need to be amended to be a truly world-leading piece of legislation in the questions below, we are strongly supportive of the significant improvements that the Bill would make to the existing process by which trans men and trans women can obtain legal gender recognition in Scotland.

The current Gender Recognition Act 2004 (GRA) and the provisions in the Bill provide trans people who have transitioned and are living permanently in their gender the ability to apply for legal gender recognition. Therefore throughout this response, when we use the term “trans” (short for transgender) we will be using it as an inclusive umbrella term for trans men, trans women and non-binary people, who have transitioned or who intend to transition to permanently live in their gender.

As both the current law, and the proposed reforms, would only allow trans people to change the sex recorded on their birth certificate to “male” or “female”, we sometimes will instead refer to “trans men and women”. This is to explicitly acknowledge that non-binary people do not currently have access to legal gender recognition, and would not as a result of the Bill’s provisions.

## Q1 The removal of the requirement for a medical diagnosis of gender dysphoria and supporting medical evidence

We strongly support the removal of the requirement for a medical diagnosis of gender dysphoria and supporting medical evidence proposed in the Gender Recognition Reform (Scotland) Bill.

As the Scottish Government acknowledges in its Policy Memorandum on the Bill, a number of jurisdictions (the ones listed are Belgium, Colombia, Denmark, France, Ireland, Malta and Norway) have now introduced legal gender recognition processes that are entirely de-medicalised, administrative processes.<sup>1</sup> Rather than requiring evidence of any medical treatments or diagnoses, or evidence that a person has been living in their gender, instead it relies on the declaration of the individual applying. This type of gender recognition process is commonly referred to as a 'self-declaration' system.

As well as the countries listed in paragraph 31 of the Policy Memorandum, we are also aware of such systems in: Australia (Tasmania)<sup>2</sup>, Argentina<sup>3</sup>, Canada (Alberta<sup>4</sup>, Newfoundland and Labrador<sup>5</sup>, Northwest Territories<sup>6</sup>, Nova Scotia<sup>7</sup>, Yukon<sup>8</sup>),

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<sup>1</sup> Gender Recognition Reform (Scotland) Bill Policy Memorandum: <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-recognition-reform-scotland-bill/introduced/policy-memorandum-accessible.pdf>

<sup>2</sup> "How Tasmania is going from worst to best on transgender rights" *The Guardian* Martine Delaney 8<sup>th</sup> April 2019: <https://www.theguardian.com/commentisfree/2019/apr/08/how-tasmania-is-going-from-worst-to-best-on-transgender-human-rights>

<sup>3</sup> TGEU webpage on Argentinian gender identity law: <https://tgeu.org/argentina-gender-identity-law/>  
Human Rights Watch news report: <https://www.hrw.org/news/2021/07/22/argentina-recognizes-non-binary-identities>

<sup>4</sup> Sex indicator amendment on an Alberta birth record: <https://www.alberta.ca/birth-record-sex-amendment.aspx>

<sup>5</sup> Newfoundland & Labrador Digital Government and Service NL Changing your sex designation: <https://www.gov.nl.ca/snl/birth/changing-your-sex-designation/>

<sup>6</sup> Northwest Territories Changing your sex designation: <https://www.hss.gov.nt.ca/en/services/changing-your-sex-designation>

<sup>7</sup> Justice Trans webpage: <https://justicetrans.org/en/nova-scotia/#:~:text=If%20you%20would%20like%20to,toll%20free%20in%20Nova%20Scotia>

<sup>8</sup> Yukon Change sex on a birth certificate: <https://yukon.ca/en/births-marriages-and-deaths/births/change-sex-birth-registration>

Iceland<sup>9</sup>, Luxembourg<sup>10</sup>, Mexico<sup>11</sup> (Mexico City, Michoacán, Nayarit), Portugal<sup>12</sup>, Spain (Andalucía<sup>13</sup> and Community of Madrid<sup>14</sup>), United States of America (California<sup>15</sup>, Montana<sup>16</sup>, Nevada<sup>17</sup>, New Jersey<sup>18</sup>, New York City<sup>19</sup>, New York

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<sup>9</sup> Iceland review news story: <https://www.icelandreview.com/news/icelands-gender-autonomy-act-is-a-step-forward-for-trans-and-intersex-rights/>

<sup>10</sup> TGEU webpage on Luxembourg gender recognition reform: <https://tgeu.org/luxembourg-adopts-self-determination-law/>

<sup>11</sup> Human Rights Watch News Report: <https://www.hrw.org/news/2018/10/29/mexico-transgender-ruling-beacon-change>

<sup>12</sup> TGEU webpage on Portuguese gender recognition reform: <https://tgeu.org/portugual-votes-for-self-determination-keeps-medicalization-for-minors/>

<sup>13</sup> ILGA “Trans Legal Mapping Report” 2016: [https://ilga.org/downloads/TLMR\\_ENG.pdf](https://ilga.org/downloads/TLMR_ENG.pdf) (page 79)

<sup>14</sup> Ibid

<sup>15</sup> State of California, Department of Public Health – Vital Records “Affidavit to amend a record:

<https://www.cdph.ca.gov/CDPH%20Document%20Library/ControlledForms/VS24.pdf>

<sup>16</sup> NBC News “Jude blocks Montana’s transgender birth certificate law: <https://www.nbcnews.com/nbc-out/out-news/judge-blocks-montanas-transgender-birth-certificate-law-rcna25563>

<sup>17</sup>

<http://dpbh.nv.gov/uploadedFiles/dpbhngov/content/Programs/BirthDeath/Packet%20-%20Transgender.pdf>

<sup>18</sup> Changing Sex (Gender) and Name on a Birth Certificate Per Nevada Administrative Code 440.030 and 440.035:

[https://www.njleg.state.nj.us/2018/Bills/A2000/1718\\_R2.PDF](https://www.njleg.state.nj.us/2018/Bills/A2000/1718_R2.PDF)

<sup>19</sup> NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE BOARD OF HEALTH Notice of Adoption of Amendment to Article 207 of the New York City Health Code: <https://www1.nyc.gov/assets/doh/downloads/pdf/notice/2018/noa-amend-article207-section207-05.pdf>

State<sup>20</sup>, Oregon<sup>21</sup>, Washington State<sup>22</sup>), Uruguay<sup>23</sup>, New Zealand<sup>24</sup>, and Switzerland<sup>25</sup>.

The first country to pass a legal gender recognition law based on a self-declaration model was Argentina, in 2012. The most recent state in Europe to do so was Switzerland, at the beginning of this year. Changes in these jurisdictions to a self-declaration model of legal gender recognition reflect a growing international consensus that such models are the appropriate way to uphold trans people's human right to recognition of their identity, and the best way to realise international human rights standards.

The Gender Recognition Act 2004 was a world-leading law at the time of its introduction due to it not requiring trans men or women to be sterilised in order to obtain legal gender recognition. Subsequent developments in the understanding of trans people, and how to ensure they have equal access to their human rights, mean that the requirements of the current process now see it fall far short of human rights best practice.

For example, the 2006 Yogyakarta Principles, which are a summary of existing international human rights protections applying to LGBT people, state that governments should "Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity."<sup>26</sup> It is acknowledged in international human rights that gender identity is a

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<sup>20</sup> Lambda Legal blog on New York State gender recognition reform:

[https://www.lambdalegal.org/blog/20200310\\_victory-new-york-state-transgender-minors-birth-certificates](https://www.lambdalegal.org/blog/20200310_victory-new-york-state-transgender-minors-birth-certificates)

<sup>21</sup> Oregon Health Authority Application to change the Name and/or Sex on a Record of Live Birth to Support Gender Identity Information Sheet:

<https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/CHANGEVITALRECORDS/Documents/OHA-2673.pdf>

<sup>22</sup> Washington State Sex Designation Change on a Birth Certificate:

[https://doh.wa.gov/licenses-permits-and-certificates/vital-records/sex-designation-change-birth-certificate#:~:text=The%20422%2D143%2DRequest%20to,\(i.e.%20certified%20court%20order\).](https://doh.wa.gov/licenses-permits-and-certificates/vital-records/sex-designation-change-birth-certificate#:~:text=The%20422%2D143%2DRequest%20to,(i.e.%20certified%20court%20order).)

<sup>23</sup> Pink News report on Uruguay gender recognition reform:

<https://www.pinknews.co.uk/2018/10/22/uruguay-trans-rights-law/>

<sup>24</sup> New Zealand Births, Deaths, Marriages and Relationships Registration Bill:

[https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL\\_74854/births-deaths-marriages-and-relationships-registration](https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_74854/births-deaths-marriages-and-relationships-registration)

<sup>25</sup> Reuters news report on Swiss gender recognition reform:

<https://www.reuters.com/world/europe/swiss-allow-simple-legal-gender-transition-jan-1-2021-12-26/>

<sup>26</sup> The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007):

<https://yogyakartaprinciples.org/>

deeply personal characteristic, and that only individuals are able to know their gender identity.<sup>27</sup>

The Council of Europe passed Resolution 2048 in 2015, which calls for ‘quick, transparent and accessible’ legal gender recognition processes ‘based on self-determination’.<sup>28</sup> The Resolution also calls for member states to “abolish sterilisation and other compulsory medical treatment, as well as a mental health diagnosis, as a necessary legal requirement to recognise a person’s gender identity in law”.<sup>29</sup>

In 2018, the UN Independent Expert on protection against violence and discrimination on the basis of sexual orientation and gender identity recommended that legal gender recognition procedures should:

- “Be based on self-determination by the applicant
- Be a simple administrative process
- Not require applicants to fulfil abusive requirements, such as medical certification, surgery, treatment, sterilization or divorce”<sup>30</sup>

The current requirements to provide a psychiatric diagnosis and supporting medical evidence clearly fall short of international best practice and human rights principles in this area. By requiring the corroboration of medical practitioners to obtain legal gender recognition, trans men and trans women are unable to access their human right to recognition of their gender identity. The UN Independent Expert on protection against violence and discrimination on the basis of sexual orientation and gender identity outlines that:

“The right to effective recognition of one’s gender identity is linked to the right to equal recognition before the law established in article 6 of the Universal Declaration of Human Rights, subsequently set out in international human rights law, beginning with article 16 of the International Covenant on Civil and Political Rights, and also present in other universal human rights treaties and regional human rights instruments.”<sup>31</sup>.

Removing the requirement for a psychiatric diagnosis (which many trans people do not wish to obtain as they do not see their identity as a mental illness) would also significantly destigmatise the current process. In 2019, The World Health Organisation reclassified “gender identity disorder” as “gender incongruence”, and moved the diagnosis from the “mental and behavioural disorders” chapter into the “conditions related to sexual health” chapter of the International Classification of

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<sup>27</sup> ‘Council of Europe Parliamentary Assembly Resolution 2048 on discrimination against transgender people in Europe’, 2015:

<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736>

<sup>28</sup> Ibid

<sup>29</sup> Ibid

<sup>30</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity A/73/152 (2018):

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/220/41/PDF/N1822041.pdf?OpenElement>

<sup>31</sup> Ibid

Diseases 11. They stated that this “reflects evidence that trans-related and gender diverse identities are not conditions of mental ill health, and classifying them as such can cause enormous stigma.”<sup>32</sup> By removing the psychiatric diagnosis requirement to obtain legal gender recognition as proposed in the Bill, this will bring Scotland’s approach to legally recognising trans people in line with current understandings that trans identities should not be seen as a mental health condition.

When using mental health services, 29% of trans people have had their gender identity treated as a symptom of a mental health issue, rather than a genuine identity.<sup>33</sup> Trans identities have historically been conflated with mental illness, and continue to be misunderstood in this way, not just by the general public but also in parts of the medical profession. Requiring trans people to have a diagnosis of gender dysphoria in order to have their gender legally recognised reinforces this outdated assumption that being trans is a mental health problem.

Under the current process, medical treatments are not necessary to obtain gender recognition. However, applicants still need to provide detailed medical evidence reports to the Gender Recognition Panel, outlining what medical interventions they have or have not had.<sup>34</sup> This is an intensely intrusive and humiliating requirement, and it is unacceptable that trans people are required to provide detailed information about their bodies and medical history, even when these are not conditions to obtaining legal gender recognition. By no longer requiring these reports the Bill’s proposals would result in a process of obtaining legal gender recognition that is far less intrusive for applicants than the current one.

Many trans people encounter problems with fulfilling the medical evidence requirements for the current process. This is often because the Gender Recognition Panel (GRP) require medical reports to be worded in a very particular way, meaning trans people often have to return to medical practitioners several times to ensure their evidence will be deemed satisfactory. This is due to a precedent set soon after the formation of the GRP around the level of detail needed for medical reports.

We have been contacted by trans people who have had their medical evidence report rejected by the GRP simply because it does not give the exact dosage of their current hormone treatment, even though the report would have been accepted if they had never had any hormone treatment. Likewise, we have been contacted by trans people who have had their medical report rejected simply for using less specific terminology such as ‘genital reconstruction surgery’ rather than ‘penile inversion vaginoplasty’, or such as ‘chest reconstruction surgery’ rather than ‘masculinising chest reconstruction surgery involving bilateral mastectomy with nipple grafts’.

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<sup>32</sup> World Health Organisation Regional Office for Europe  
<https://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/who-europe-brief-transgender-health-in-the-context-of-icd-11>

<sup>33</sup> *Trans Mental Health Study* (2012) McNeil, J., Bailey, L., Ellis, S., Morton, J. and Regan, M.

<sup>34</sup> GOV.UK: Apply for a Gender Recognition Certificate: <https://www.gov.uk/apply-gender-recognition-certificate/documents-you-must-provide>

The current gender recognition process, by virtue of requesting medical evidence, causes confusion about whether trans people who decide against surgery will be treated fairly by the GRP. The UK Government's National LGBT Survey found that 15% of trans respondents who didn't have a GRC incorrectly thought that surgery was a requirement of the current process.<sup>35</sup> In a particularly disturbing case, we were contacted by an extremely distressed young trans person in their early 20s who had been informed by the gender recognition panel that they would not grant her legal gender recognition until she decided for certain whether or not to undergo genital surgery. She had been transitioned for several years but had not yet had any sexual relationship and did not wish to make a decision about genital surgery until she was older and had the chance to explore her sexuality. She was being expected to dangerously rush her decision about irreversible major surgery purely to overcome the bureaucratic pedantry of a faceless tribunal panel.

In addition, for trans people who do not want to access medical transition treatments, there may be no reason for them to seek a psychiatric diagnosis of gender dysphoria, as this would not be necessary for them to access mental health support, peer support, or to socially transition. This effectively excludes them from the current process, or forces them to join a years-long Gender Identity Clinic waiting list to obtain a diagnosis, to be able to apply for a GRC.

In our experience the current medical evidence requirements for obtaining a GRC also often include many "unseen" costs. In particular, trans men and women may have to spend several hundred pounds to obtain the medical evidence required alongside their application. This has been particularly true for the last several years, as waiting lists at NHS Gender Identity Clinics have been prohibitively long – the current waiting time for a first appointment at Scotland's largest Clinic, in Glasgow, is around four years. This means that if people want to obtain legal gender recognition sooner than waiting times at NHS services would allow, they may have to spend a significant amount of money on accessing private healthcare. As a result, these unseen costs involved in producing the required evidence for obtaining legal gender recognition mean that some trans men and women (such as those with lower incomes/living in poverty) do not currently have access to having their gender legal recognised.

In the European Commission's report on Legal Gender Recognition in the EU (including the UK), they note that many trans people's negative experiences within trans-specific healthcare and healthcare in general may create barriers to them accessing vital healthcare. This suggests that relying on their access to healthcare for medical and psychiatric evidence is problematic, especially if being awarded "evidence" relies on a trans person's conformity to the expectations of medical professionals: "Studies highlight that those who do not conform to certain gender stereotypes, including people who are not heterosexual, those who are non-binary,

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<sup>35</sup> Government Equalities Office (2018) National LGBT Survey Research Report: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721704/LGBT-survey-research-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf)

and those who do not want to undergo a full medical transition, may be at greater risk of discrimination.”<sup>36</sup>

Furthermore, the Commission’s report also makes an important point about the impacts of these requirements on the mental wellbeing of the trans people subject to them: “Some [participants] also felt that trans individuals may internalise the stigma of having to receive a medical diagnosis or treatment.”<sup>37</sup>

The current psychiatric diagnosis and medical evidence requirements are intrusive and humiliating, violate trans people’s right to privacy, and further stigmatise trans identities. They fall far short of international best practice in this area, with a growing number of jurisdictions around the world introducing ‘quick, accessible and transparent’ processes, on the basis of self-determination.

We therefore strongly support the proposals in the Gender Recognition Reform (Scotland) Bill to remove these requirements, as this would result in a significant improvement to how trans men and women are able to obtain legal recognition of who they are.

Q2 Provisions enabling applicants to make a statutory declaration that they have lived in the acquired gender for a minimum of three months (rather than the current period of two years) and that they intend to live permanently in their acquired gender

We support the provision to reduce the amount of time in which a person is required to have lived in their acquired gender, before they can make an application for gender recognition, and believe that three months is significantly more preferable and practical than two years. We also strongly support the removal of the requirement to provide evidence that a person has been living in their acquired gender.

Trans men and trans women find the current requirement to have been living in their acquired gender for two years, and the evidence they need to provide to demonstrate this to the Gender Recognition Panel, to be a significant barrier in obtaining legal gender recognition. The vast majority of trans people we engage with express significant confusion and anxiety about how much evidence they need to provide to prove they have been living in their acquired gender for over two years. The UK Government’s National LGBT Survey found that 38% of trans respondents

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<sup>36</sup> European Commission “Legal gender recognition in the EU The journeys of trans people towards full equality” Section 8:  
[https://ec.europa.eu/info/sites/default/files/legal\\_gender\\_recognition\\_in\\_the\\_eu\\_the\\_journeys\\_of\\_trans\\_people\\_towards\\_full\\_equality\\_sept\\_en.pdf](https://ec.europa.eu/info/sites/default/files/legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_sept_en.pdf)

<sup>37</sup> Ibid

who did not have a GRC had not applied for one because the process is too bureaucratic.<sup>38</sup>

We have been informed by some trans people that they have been verbally chastised by the administrators who assist the Gender Recognition Panel for submitting 'too much evidence'. We are aware of a trans person who had their application rejected at first, but then accepted afterwards when it was resubmitted with less evidence. The panel appears to be very inconsistent and unclear in the degree to which it requires evidence to be spread across the entire two year time period.

Furthermore, the complexity of the different kinds of evidence required causes many trans people to struggle to complete their application. When they make errors with their evidence, the tribunal panel's requests for further information are often written in very difficult to follow, legalistic phrasings that even our Scottish Trans staff have struggled to understand. We are in contact with trans people who have abandoned their gender recognition applications due to frustration at not being able to understand the panel's requests for further information. The UK Government's National LGBT Survey found that 17% of trans women and 23% of trans men who responded and did not have a GRC had not applied because they could not get the help they needed to make an application.<sup>39</sup>

We have also been contacted by trans people who have been unable to apply for legal gender recognition despite having transitioned many years ago. In some instances, this is because they have lost paperwork due to homelessness, fleeing domestic violence, or fire or flood damage to their home.

We feel strongly that the existing complex and onerous evidence requirements are a direct product of the current system which, rather than being underpinned by the right to self-determination, instead pathologises trans identities and allows a panel to scrutinise the choices and identity of individuals before granting them legal gender recognition. Built into the current process is the notion that trans people's identities are up for debate, and that their privacy and dignity is secondary to the knowledge and expertise of other professionals who can verify whether they are deemed "trans enough" to receive legal gender recognition.

This is why, alongside demedicalising the process, replacing the evidence requirements with a process based on self-declaration is so crucial, because it removes the idea that there is any external 'expert' required to verify trans people's identities, and acknowledges that trans people themselves are the only experts on who they are, in line with human rights principles.

Due to the complexity, cost and indignity of the current GRA process, most eligible trans people have not applied for a GRC to change their birth certificate. This leaves them in a risky legal limbo, where all their day-to-day identity documents, such as

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<sup>38</sup> Government Equalities Office (2018) National LGBT Survey Research Report: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721704/LGBT-survey-research-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf)

<sup>39</sup> Ibid

driving licence and passport, can be updated through self-declaration to reflect their gender identity, but where their birth certificate remains in contradiction to how they live and identify. This can result in trans people unwittingly experiencing serious harmful errors, inconsistencies and difficulties, such as with pension eligibility, proving their right to work in the UK, and a lack of privacy about their trans status in employment and when accessing services.

The provisions in the Bill that would remove the requirement that a trans man or woman has been living in their acquired gender for two years, and to provide evidence that they have done so, is therefore very welcome.

However, we do not feel that it is necessary for someone to have been living in their 'acquired gender' for three months, and to state this in their statutory declaration, to be eligible to apply for legal gender recognition, and believe that this requirement should be removed.

Including a requirement that an applicant has been living in their 'acquired gender' for three months before being able to apply for a GRC, and that they state this in their statutory declaration, is arbitrary and not supported by evidence. We are unaware of any jurisdiction anywhere in the world which uses a self-declaration model that sets a time requirement before a person can make an application for legal gender recognition.

In explaining their rationale for taking this approach, the Scottish Government states in paragraph 80 of the Policy Memorandum: "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."<sup>40</sup>

While we agree that obtaining legal gender recognition is a serious step for trans people, we do not see how the proposed intention to require an applicant to have lived in their acquired gender for three months prior to applying, and to state this in their statutory declaration, is necessary. We believe that the requirement for an applicant to swear a legal oath that they are living permanently in their acquired gender, and that they intend to live permanently in their gender for the rest of their life, in a statutory declaration witnessed by a notary public, is a suitable mechanism for ensuring that only those trans men and trans women who have thought seriously about their transition, and who are certain that they are ready to apply for legal gender recognition, will do so.

As many trans people spend several years considering their own gender, identity, and transition before "coming out", 3 months is an arbitrary amount of time to require a trans person to wait before making their application for legal gender recognition. Even for those who do not come out after a long period of reflection, the wording of the statutory declaration, and the fact that it is a witnessed legal oath, means that it is highly unlikely that someone will apply for legal gender recognition until they are

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<sup>40</sup> Gender Recognition Reform (Scotland) Bill Policy Memorandum: <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-recognition-reform-scotland-bill/introduced/policy-memorandum-accessible.pdf>

ready to do so, and where obtaining legal gender recognition is appropriate for their circumstances. Whilst we imagine that in the vast majority of circumstances this will be after a period of three months of having been permanently living as a man or a woman (and indeed in most circumstances we imagine that this period may be longer than three months), individual trans men and women should be able to make the application when they feel ready, not after a certain amount of time has passed for which they are given no explanation.

We therefore think that new Section 8C(1)(a)(iii), the three month requirement, should be removed from the Bill.

In addition to this, we have concerns about the way that the requirement for a trans man or woman to have been living in their acquired gender for three months may interact with new Section 8U of the Bill. This includes new Section 8U(1)(c), which allows for the Registrar General by regulations to make provision for or about “information or evidence to be included in an application or a notice 10 under section 8B(3) (in addition to the information and evidence required by this Act)”. We are concerned that this may include the introduction of evidence from applicants that they have been living in their acquired gender for three months, in addition to stating that they have done so within their statutory declaration. This would fundamentally undermine the purpose and intentions of the Bill – reintroducing scrutiny of evidence from applicants, and removing the principle of self-declaration that is central to the rationale for reforms to the current Act, and the most welcome part of the Bill’s provisions.

We think that the balance of ensuring that only those trans men and trans women who are certain that they wish to obtain legal gender recognition apply, and do so in full knowledge that it is a serious decision with legal consequences, is adequately achieved by having to make a statutory declaration saying they are living permanently in their acquired gender and intend to do so until death. Knowingly making a false statutory declaration is a criminal offence.

### [Q3 Whether applications should be made to the Registrar General for Scotland instead of the Gender Recognition Panel, a UK Tribunal](#)

We believe that applications being made to the Registrar General instead of the GRP would be a great improvement on the current system, and a necessary change alongside the proposals in the Bill to demedicalise the current process, ensuring that Scotland has a system of legal gender recognition underpinned by the human rights principle of self-determination.

Under the current system, we are aware of trans people who have encountered difficulties providing the evidence requested by the GRP, as covered in our answers to questions 1 and 2. This is not necessarily due to these people being ineligible for a GRC under the current requirements of the law, but instead due to the panel

demanding unreasonable levels of detail, or highly specific wording, in the evidence submitted alongside an application.

We have been contacted by trans people who feel deeply upset and angry that, not only is a psychiatric diagnosis report required, but also that the Gender Recognition Panel rejected their diagnosis reports as inadequate unless they included information about their childhood gender expression, including what toys they played with as a child. This is a grossly offensive reinforcement of gender stereotypes, and does not even relate to the (now outdated) ICD-10 diagnostic criteria used for 'gender identity disorder'. Similarly, we have had trans people tell us that the panel expected details of their sexual orientation and current relationships to be included in the psychiatric diagnosis report, which is completely unacceptable and irrelevant to whether or not someone has experienced gender dysphoria.

We have been contacted by trans people who had their psychiatric diagnosis report rejected by the Gender Recognition Panel simply because the report did not specify the exact number and dates of the gender identity clinic appointments the person attended prior to the diagnosis being made.

A trans man, who had been living permanently as a man for several years and had undergone hormone treatment, informed us that his application for gender recognition was rejected by the panel because he had given birth to a child while living as a man. This could be viewed as the panel punishing trans people for utilising their reproductive rights.

We have also been contacted by a trans person who had their application for gender recognition rejected, despite them having transitioned to live permanently as a woman, because their psychiatric diagnosis report mentioned that they had discussed a non-binary aspect of their gender identity.

We have also been contacted by several trans people who have been transitioned for decades, including having undergone hormones and surgeries, who are unable to get legal gender recognition because the doctors who diagnosed them and approved their hormones and surgeries never applied to be added to GRP's tiny list of named specialists they will accept diagnoses from.

The current requirements of a psychiatric diagnosis, medical evidence reports, and making an application to the GRP positions trans people's gender as something in need of validation or scrutiny by an external source before it can be legally recognised. As the model of self-declaration positions trans people as experts on their own gender and experience, it is incongruous with this view for them to submit "evidence" of their transition or identity to a panel or tribunal.

Moving applications to the Registrar General would allow the process to be quicker, simpler for applicants, and more transparent, in line with Council of Europe resolution 2048. This would make Scotland's process for legal gender recognition closer to that of other countries with self-declaration models such as Ireland and Iceland, where the process of obtaining legal gender recognition is an administrative one, rather than one which requires scrutiny from a tribunal of doctors and judges.

We feel any retention of the GRP would be entirely unacceptable, as it would serve to perpetuate the idea that trans people must somehow prove themselves to others before being recognised as who they are. Retaining the panel would also undermine the provisions in the Bill which remove the requirements for a psychiatric diagnosis, medical evidence reports, and evidence of living in your acquired gender to be submitted alongside an application. Without these requirements, there is nothing of substance for such a panel to scrutinise, and therefore no reason for them to continue to be involved in the improved demedicalised process.

As the provisions in the Bill would also mean that Scotland would have a different process than the rest of the UK, it also makes sense administratively for applications to be decided within Scotland, rather than expecting the UK tribunal to fulfil two very different functions.

#### Q4 Proposals that applications are to be determined by the Registrar General after a further period of reflection of at least three months

We do not believe that a further period of reflection of at least three months before obtaining a GRC should be required. As in our answer to question 2, we feel that this is an arbitrary requirement, which is not supported by evidence.

We also think that this requirement does not adhere to the principle of self-declaration, and reintroduces the idea that trans people require additional checks and balances to be sure of their identity. This perpetuates the problems that are present in the current process. Trans people that we speak to about GRA reform all clearly tell us the same thing – that by the time they apply for legal recognition of their gender, they have already undertaken a significant amount of reflection about who they are.

The Scottish Government's Policy Memorandum notes in paragraph 83 that the intention of this period is to "further affirm the seriousness of the process and provide further assurance that applicants have fully and carefully considered their decision."<sup>[41]</sup><sup>41</sup> Again, we would reaffirm that we do not believe that trans people apply to change their legal gender without full and careful consideration.

It is also confusing why this is paired with a requirement for applicants to have been living "in line" with their gender for at least three months before they make their statutory declaration. If the rationale of the requirement in new Section 8C(1)(a)(iii) is to ensure that trans people are certain of their gender and desire to live in this gender until they die before they swear this under oath, it is unclear why an additional period of reflection would be needed.

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<sup>41</sup> Gender Recognition Reform (Scotland) Bill Policy Memorandum: <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-recognition-reform-scotland-bill/introduced/policy-memorandum-accessible.pdf>

The Policy Memorandum notes in paragraph 85 that “Two other countries have reflection periods as part of their gender recognition processes, Denmark and Belgium.”<sup>[42]</sup><sup>42</sup> – this is out of a total of at least 32 jurisdictions that provide gender recognition via a self-declaration process, making Denmark and Belgium outliers internationally in this regard. Including a period of reflection is not only unusual among other states which provide legal gender recognition, but is particularly incongruous with a self-declaration model.

The rationale for the provisions in the Bill which move the process of legal gender recognition to one of self-declaration are underpinned by the Scottish Government’s agreement that the international human rights principle of self-determination should be the founding principle on which legal gender recognition processes are based. Including a period of reflection for an arbitrary amount of time after a person has made an application to ensure that they are absolutely certain is contrary to and undermines this central principle of self-determination.

The Bill states that the statutory declaration will require a person to say that they “[live] in the acquired gender [...] [and intend] to continue to live in the acquired gender permanently”. We think that the language in the statutory declaration is sufficiently robust that anyone who is uncertain about whether or not they intend to live permanently as a man or a woman would not make an application, as they would be unable to make a solemn declaration that this statement were true.

We think that a statutory declaration is a fair way to ensure that applicants know that they are making a serious and important decision. Whilst we think that there should be no evidence required for a person to receive legal recognition of their gender, it is still important that an applicant knows that their declaration carries real-life consequences, and that they feel comfortable making the application in the context of it being a solemn and true declaration of their intentions. Because it would be a declaration of your intentions, we think it is appropriate that the statutory declaration includes that you intend to live in your gender permanently.

However, if the Bill progresses with a requirement for a reflection period, we would want there to be a mechanism for waiving this period of reflection for certain applicants. We think this would be particularly important for any trans man or woman who found out that they only had a short amount of time left to live, and who might otherwise die between the point at which they made an application and when the reflection period was over. This is particularly important as it is only through obtaining a GRC that a trans man or woman can ensure that their death is recorded accurately in-line with how they lived their life.

We would suggest a similar approach to that taken for marriage, which allows the Registrar General to waive the 28 day period of notice for a marriage. This is outlined in Section 6(4) of the Marriage (Scotland) Act 1977, which states:

“(4)The district registrar shall not issue a Marriage Schedule under subsection (3) above—

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<sup>42</sup> Ibid

(a) within 28 days of the date of receipt (as entered by him in the marriage notice book) of a marriage notice in respect of the marriage to which the Marriage Schedule relates, except where—

(i) He has received a written request from one or both of the parties for the issue of the Marriage Schedule on a specified date within the said 28 days stating the reason for the request; and

(ii) he has been authorised to issue the Marriage Schedule on that specified date by the Registrar General<sup>43</sup>

Subsection (4ZB) makes it clear that one of the intended reasons that a notice period for a marriage could be dispensed with would be “if the request made under subsection (4)(a)(i) is made because a party to the referred marriage is gravely ill and not expected to recover.”<sup>44</sup>

There may be some other exceptional circumstances in which it would be fair to waive the reflection period for an applicant. For example, there may be an urgent situation where a trans person with a Scottish birth or adoption certificate is living outside of Scotland and facing persecution, discrimination, or lack of access to justice due to their trans status or history. This might occur in a jurisdiction with weaker legislative protections from discrimination than exist for trans people in Scotland through the Equality Act 2010, which provides a greater number of trans people than just those who have obtained legal gender recognition with a wide range of protections. In such jurisdictions, obtaining legal gender recognition may provide them with a defence against the treatment they are facing. In such a situation, we would want it to be possible for the reflection period to be waived.

#### Q5 Whether the minimum age for applicants for obtaining a GRC should be reduced from 18 to 16

We strongly welcome the provisions in the Bill that would lower the age at which a person can apply for legal gender recognition from 18 to 16.

In Scotland, young people are deemed to have full legal capacity at 16 years old. They are able to vote in elections and consent to any medical, surgical, or dental treatment, as well as having a host of other rights, and this should also extend to having their gender legally recognised. Changing the law in this way will reflect the general consensus in Scottish politics that 16 and 17 year olds are able to make decisions for themselves.

Many young trans men and women aged 16 and 17 will be at a stage of their life where they are making new starts. This may be getting a job, starting college or going to university. Because they aren't able to have their gender legally recognised,

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<sup>43</sup> Gender Recognition Act 2004 Section 6:

<http://www.legislation.gov.uk/ukpga/1977/15/section/6>

<sup>44</sup> Ibid.

they often have to “out” themselves (disclose that they are trans), because they are required to provide their birth certificate when starting these new opportunities. This can often mean that events that are supposed to be exciting and positive can be much more stressful for trans young people, and they may choose to avoid these opportunities because of fear around disclosing their trans status.

Young trans men and women aged 16 and 17 are already able to socially transition, and come out to family, friends, in workplaces, and in education settings. They are already able to update their name and gender on other identity documents to reflect how they are living, such as their passports and driving licences. Lowering the minimum age at which they can also change their birth certificates to reflect how they live their lives and their other identity documents will ensure that they have the same right to privacy about their trans status and history as those people over the age of 18. By not allowing them to do so, a two year gap is created where a trans young person must necessarily have conflicting identity documents, which can cause personal distress as well as administrative issues. An age limit of 18 for applicants for legal gender recognition does not prevent young trans people from transitioning and living their lives in line with their gender identity, but simply creates additional barriers and difficulties for those young people who are doing so, but who are unable to amend the sex recorded on their birth certificate.

As the Scottish Government outlines at paragraph 2.9 of the Children’s Rights and Welfare Impact Assessment for the Bill: “The Scottish Government is not aware of any robust evidence to suggest that any countries who have lowered the minimum legal age for gender recognition to 16 have experienced a negative impact on children’s rights as a result.”

We agree with their assessment at 2.4 of that impact assessment that there is not: “robust evidence that lowering the application age to 16 would be harmful to children or young people, but that there is substantial evidence that keeping the age limit at 18 can negatively impact the wellbeing of young trans people and their ability to live dignified lives free from discrimination.”<sup>45</sup>

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<sup>45</sup> Gender Recognition Reform (Scotland) Bill Children’s Rights and Welfare Impact Assessment:

<https://www.gov.scot/binaries/content/documents/govscot/publications/impact-assessment/2022/03/gender-recognition-reform-scotland-bill-child-rights-wellbeing-impact-assessment/documents/child-rights-wellbeing-impact-assessment-crwia-gender-recognition-reform-scotland-bill/child-rights-wellbeing-impact-assessment-crwia-gender-recognition-reform-scotland-bill/govscot%3Adocument/child-rights-wellbeing-impact-assessment-crwia-gender-recognition-reform-scotland-bill.pdf>

## Q6 If you have any comments on the provisions for interim GRCs

Section 7 of the Bill (which would insert new sections 8F, 8G, 8H, 8I, 8J, 8K and 8L) reflects the current operation of the Gender Recognition Act 2004 in Scotland, and would see their operation continue in the same way if the Bill were to pass.

The purpose of an interim GRC is to provide a way for a spouse or civil partner of a person who is issued with a GRC to end their marriage or civil partnership if they wish to do so, without having to wait the usual non-cohabitation periods (one year with consent, two years without) for no-fault divorce or dissolution. It also provides a trans person with a way to obtain legal gender recognition where their spouse or civil partner does not consent.

We think that makes sense, as it allows both spouses or civil partners to access their legal rights, and to choose to end their marriage or civil partnership. But we note that if Scotland were in future to introduce no-fault divorce, as is now available in England and Wales, the interim GRC and related provisions in the Bill would no longer be needed.

## Q7 If you have any comments on the provisions for confirmatory GRCs for applicants who have overseas gender recognition

Section 8 of the Bill includes new Section 8O, which would allow trans men and women who had obtained legal gender recognition outwith Scotland to apply to the Registrar General for a 'confirmatory Gender Recognition Certificate'.

Given the provisions in new Section 8N, which allow for the recognition of legal gender recognition obtained outwith the United Kingdom, it is unlikely that there are many circumstances that might require a trans man or woman to apply for a confirmatory GRC. The explanatory notes for the Bill also stress this point, outlining in Paragraph 80 that:

"A confirmatory Scottish GRC following gender recognition overseas is not generally needed as overseas legal gender recognition is usually to be treated as valid by virtue of new section 8N(1). Asking applicants why they require a confirmatory GRC will enable the Registrar General to remind applicants that obtaining legal gender recognition overseas provides legal gender recognition in Scotland and, usually, there should be no need for a confirmatory GRC."<sup>46</sup>

Paragraph 78 of the Explanatory Notes however, says that:

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<sup>46</sup> Gender Recognition Reform (Scotland) Bill Explanatory Notes: <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-recognition-reform-scotland-bill/introduced/explanatory-notes-accessible.pdf>

“a person may wish to apply for a confirmatory GRC if they wish an amendment to be made to a register entry (for birth, marriage or civil partnership) held by the Registrar General.”<sup>47</sup>

This would seem to indicate that where having a Scottish issued GRC would allow for updating an entry in another register held by the Registrar General, that a confirmatory GRC may be of value to a trans man or woman who had obtained legal gender recognition overseas. This could include situations such as:

if a couple had married in Scotland, and then one of the spouses subsequently transitions and obtains legal gender recognition in their country of origin, applying for a confirmatory GRC would allow them to more simply update their Scottish marriage certificate, using the existing administrative route for doing so.

if a trans person with a Scottish birth certificate had obtained legal gender recognition whilst living overseas, applying for a confirmatory GRC would allow the Registrar General to issue them a new birth certificate, without them having to make an application under the new requirements laid out in the Bill

We therefore support these provisions, as they will ensure that all trans men and trans women are able to most simply navigate other administrative processes that rely on them having obtained legal gender recognition, and where being able to provide evidence of this using a Scottish-issued GRC is likely to provide greater ease in doing so.

It would however be useful for accessible information to be available to trans men and women about when applying for a confirmatory GRC would likely provide any benefit to them. This would ensure both that those people who would benefit from obtaining a confirmatory GRC are able to do so, but also ensure that people aren't unnecessarily making applications that are of no benefit and likely to be rejected by the Registrar General.

#### [Q8 If you have any comments on the offences of knowingly making a false application or including false information](#)

Section 14 of the draft Bill would insert new section 22A, which includes new section 22A(1): “A person commits an offence if the person knowingly makes a statutory declaration in accordance with this Act or regulations made under it which is false in a material particular.”

Whilst we agree that knowingly making a false statutory declaration to obtain a GRC should be a criminal offence, we don't think that the creation of this new offence is necessary. It is already an offence to make a false statutory declaration under the Criminal Law (Consolidation) (Scotland) Act 1995 at section 44 subsection (2)(a),

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<sup>47</sup> Ibid

and the penalties included in that Act are identical to the penalties included in Section 14 new section 22A of the Bill.<sup>48</sup>

This is evident from paragraph 12 of the schedule to the Bill, which requires that a new subsection be inserted into the Criminal Law (Consolidation) Scotland Act 1995 which would state: “(2A) Subsection (2)(a) does not apply to a statutory declaration made in accordance with the Gender Recognition Act 2004 or regulations made under section 8U(1)(c) of that Act”. This is needed to disapply the existing criminal offence of making a false statutory declaration, that would already cover knowingly making a false application for a Gender Recognition Certificate.

Creating a specific offence for making a false declaration in order to obtain a Gender Recognition Certificate, when doing so is already criminal under existing law, is pointless and introduces unnecessary confusion. This new offence is unnecessary, and stigmatises the gender recognition process (and thus trans people) unfairly. As a result, we think that new section 22A(1) should be removed from the Bill.

We are also aware that some trans people are concerned about the circumstances in which they might be accused of having made a false statutory declaration. It is vital to distinguish between a case where a person deliberately falsely claims to be living in the acquired gender and to intend to do so permanently, and a case where a person honestly declares that, but some time later decides to stop living in that gender (sometimes referred to as “detransitioning” or “retransitioning”). People may do this for a number of reasons, including as a result of facing discrimination living in their acquired gender. Clearly people who have genuinely transitioned with the intention of that being permanent, and then later detransition or retransition, should not face criminalisation. They should be able to use the gender recognition process for a second time, if they wish, to update their birth certificate again.

A factsheet from Transgender Europe (TGEU) produced in October 2017 showed that in five countries that have a self-declaratory system (Argentina, Denmark, Ireland, Malta and Norway) there had only been two recorded incidents of repeat applications out of over eleven thousand.<sup>49</sup> Neither of the cases related to applications that were fraudulent; both involved trans people who experienced discrimination and difficulties with their transition and whose circumstances changed. It would be completely inappropriate, if a trans man or woman were to apply for legal gender recognition a second time due to facing similar difficulties whilst living in Scotland, that they may fear criminalisation as a result of doing so.

There is also no evidence from any of the jurisdictions around the world that have introduced a self-declaratory model of legal gender recognition, of non-trans people applying to obtain legal gender recognition for fraudulent purposes – with the exception of one case in Denmark, where a non-trans man applied for legal gender recognition to show that it was possible to do so. If such a situation were to occur in

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<sup>48</sup> Criminal Law (Consolidation) Scotland Act 1995 Section 44:  
<https://www.legislation.gov.uk/ukpga/1995/39/section/44>

<sup>49</sup> TGEU: Implementation of Legal Gender Recognition Procedures based on self-determination in Malta, Norway, Denmark, Ireland, Argentina

Scotland, it would already be a criminal offence under the existing provisions of the Criminal Law (Consolidation) Scotland Act 1995.

We support the additional offence contained in new section 22A(2) around knowingly including false information within an application for a GRC, when converting an interim GRC to a GRC, or when applying for a confirmatory GRC of overseas gender recognition, as there is no existing offence in relation to this.

#### Q9 If you have any comments on the removal of powers to introduce a fee

We strongly welcome the removal of powers to introduce a fee in the Bill as introduced. We think it should be free to apply for a GRC, to ensure that there is fair and equal access for everyone. Legal recognition of your gender identity is a human right, and we do not think that anyone should incur a fee for accessing their human rights.

By removing the power to introduce a fee, this will mean that any future intention to introduce a fee for an application for a GRC would require parliamentary approval, rather than simply allowing for Scottish Ministers to approve a request from the Registrar General to do so.

This is important as, although there is limited research in this area, some evidence suggests that trans people are likely to have lower than average incomes. The National Transgender Discrimination Survey, conducted in the US, found that respondents were four times more likely to have an income below \$10,000 than the general population.<sup>50</sup> There is also some evidence that trans people are less likely to have a job than the general population. The UK Government National LGBT Survey found that only 63% of 16-64 year old trans respondents had been in employment in the previous 12 months, compared to 80% of non-trans LGB respondents, and 75% of the general population.<sup>51</sup>

Trans people also often find themselves faced with additional financial burdens as part of transitioning. In particular, the scarcity of resourcing for trans specific NHS treatments often leads to trans people paying for private access to medical interventions. Long waiting times for first appointments at NHS Gender Identity Clinics (which are up to four and a half years at some GICs in Scotland) mean that many will also pay to see a gender specialist privately. Furthermore, the current NHS Gender Reassignment protocol caps the amount of hair removal that will be provided by the NHS for trans women or non-binary people pursuing a feminising transition, and it is often limited to laser hair removal. This means that many people pay either

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<sup>50</sup> National Transgender Taskforce *Injustice at Every Turn A Report of the National Transgender Discrimination Survey*:

[https://transequality.org/sites/default/files/docs/resources/NTDS\\_Exec\\_Summary.pdf](https://transequality.org/sites/default/files/docs/resources/NTDS_Exec_Summary.pdf)

<sup>51</sup> Government Equalities Office (2018) National LGBT Survey Research Report:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721704/LGBT-survey-research-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf)

to have additional hair removal sessions, or to access different methods of hair removal, such as electrolysis. Trans people also have to cover up front costs of travel and accommodation for surgery, even if this will be refunded by the NHS.

Furthermore, there can be costs associated with social and legal aspects of transition too. Updating other identity documents once you have changed your name and to update the gender marker, such as on a driving licence or passport, creates an additional financial burden. Furthermore, some trans people will need to request new copies of old documents reflecting their new name, such as exam certificates, which organisations may charge a fee for.

The combination of lower average incomes, being less likely to work, and having specific and particular financial burdens as a community made the previous fee to apply for a GRC (which was £140) prohibitively expensive for trans people.

We therefore welcome the intention for no fee to be charged for a person to apply for a Gender Recognition Certificate, as outlined at paragraph 92 of the Policy Memorandum<sup>52</sup>, and the removal of powers to introduce a fee in the Bill.

#### Q10 If the Bill's intended policy outcomes could be delivered through other means such as using existing legislation or in another way

As is set out at paragraph 57 of the Policy Memorandum, one of the intended policy outcomes 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."<sup>53</sup>

A further intended policy outcome, as set out at paragraph 58 of the Policy Memorandum, is to allow 16 and 17 year olds to apply for a GRC. As the evidence requirements for applying for a GRC and the age at which an application can be made are prescribed by the current Gender Recognition Act 2004, changing these requires primary legislation. The Gender Recognition Act 2004 currently operates on a UK-wide basis, but it is devolved to the Scottish Parliament. The Bill therefore inserts specific new sections relating to applying for and obtaining legal gender recognition in Scotland. However, it does not reform any of the effects of obtaining a Gender Recognition Certificate outlined in Section 9 of the current Act, nor the process for applicants without a Scottish Birth Certificate or who are not ordinarily resident in Scotland. This is the only way to achieve the intended policy outcomes of the Bill.

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<sup>52</sup> Gender Recognition Reform (Scotland) Bill Policy Memorandum: <https://www.parlamaid-alba.scot/-/media/files/legislation/bills/s6-bills/gender-recognition-reform-scotland-bill/introduced/policy-memorandum-accessible.pdf>

<sup>53</sup> Ibid

As outlined in our response to Question 8, as it is already an offence to make a false statutory declaration under the Criminal Law (Consolidation) Scotland Act 1995, we do not believe that new section 22A(1), in Section 14 of the Bill, is required. The effect of new section 22A(1) is already in place through existing legislation.

#### Q11 If you have any suggestions for how this Bill could be amended. If so, please provide details

We have outlined in our answers to the preceding questions on the Bill's provisions, and also to the following question on any additional comments we have on the Bill, where we think that improvements to the Bill are necessary to ensure that Scotland has a legal gender recognition process that is truly in line with international best practice in this area.

In summary, we think that the Bill should be amended to:

- Remove the requirement for a person to have been living in their acquired gender for three months, and to state this in their statutory declaration
- Remove the requirement for a three month reflection period, after which an applicant must reaffirm their desire to obtain legal gender recognition
- Remove the duplicate offence of making a false statutory declaration in order to obtain a GRC, since the offence already exists
- Remove the power for the Registrar General to by regulations make provision for or about "information or evidence to be included in an application or a notice 10 under section 8B(3) (in addition to the information and evidence required by this Act)"
- Narrow the scope of who counts as a "person with an interest in a GRC" and ensure that there are robust mechanisms in place to protect trans people from vexatious complaints about them obtaining legal gender recognition
- Ensure that asylum seekers are able to obtain legal gender recognition while their claim is being processed
- Introduce legal recognition of non-binary people
- Introduce a process for under 16s to obtain legal gender recognition, via parental consent, or via a court decision that to do so is in the child's best interest

#### Q12 Any other comments on the Bill

##### Support for improvements to the current process for obtaining legal gender recognition

We would like to reiterate our strong support for the proposals in the Bill that would introduce significant improvements to the process of obtaining legal gender recognition for trans men and trans women. These are the proposals to remove the

requirement for a psychiatric diagnosis and intrusive medical evidence, for a person to have been living in their 'acquired gender' for two years, and for applications to be scrutinised by the GRP, as well as lowering the age at which people can apply to 16.

Obtaining a GRC is the process by which the Scottish Government legally recognises that a trans man or trans woman is living in society as a man or a woman. It is not a process that gives trans men or trans women permission to do so. It puts beyond doubt how a trans man or trans woman is viewed by the state and the law. Trans men and trans women are already able to access partial recognition of their gender without obtaining a GRC, for example by updating the sex marker on other identity documents such as their driving licence or passport. The existing Gender Recognition Act 2004, and this Bill, mandate the requirements for changing the sex marker on a birth certificate.

Trans men, trans women and non-binary people are able to socially transition—taking steps such as changing their names, updating other identity documents (such as a passport, driving licence, and NHS medical records) and coming out to friends, family and at work—before obtaining legal gender recognition. They are also lawfully able to use single-sex services and spaces that correspond with how they are living, regardless of whether or not they have obtained a gender recognition certificate.<sup>54</sup>

For those trans people who want to access trans specific healthcare, and undergo medical interventions as part of their transition, they are also able to do this before obtaining legal gender recognition. The Bill will have no impact on trans people's existing rights to take other social, medical, and legal steps to live in society in accordance with their gender. It will also not create any new rights for people to do so.

That legal gender recognition is about recognising how someone is already living in society, rather than granting them permission to do so, is clear from the requirements that exist in the current process. It is also clear from the original ruling of the European Court of Human Rights that required the UK to implement a legal gender recognition process for trans men and trans women, which stated: "the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost."<sup>55</sup>

A process of legally recognising trans men and trans women has existed in Scotland since 2005, following the passing of the Gender Recognition Act 2004 on a UK-wide basis. We welcome that the Gender Recognition Reform (Scotland) Bill will reform

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<sup>54</sup> See the Services, public functions and associations Statutory Code of Practice guidance on trans people and single-sex services, pages 197–199:

[https://www.equalityhumanrights.com/sites/default/files/servicescode\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf)

<sup>55</sup> European Court of Human Rights "Case of Christine Goodwin v. United Kingdom" accessed at [http://hudoc.echr.coe.int/eng#{"fulltext":\["\"CASE OF CHRISTINE GOODWIN v. THE UNITED KINGDOM\""\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-60596"\]}](http://hudoc.echr.coe.int/eng#{)

the process by which this recognition is possible, and acknowledge and agree with the statement in the Policy Memorandum at paragraph 59 that: “it does not change the effects of a GRC and the rights and responsibilities which a person has on obtaining legal gender recognition.”<sup>56</sup>

A “person who has an interest”

New Section 8S, in Section 9 of the Bill, which covers revocations of a GRC after applications to the sheriff states:

“(1) A person who has an interest in a gender recognition certificate may apply to the sheriff for the revocation of the certificate on the ground that—

- (a) the Registrar General for Scotland issued the wrong type of gender recognition certificate under section 8E,
- (b) the application for the certificate was fraudulent, or
- (c) the person to whom the certificate was issued was incapable of—
  - (i) understanding the effect of obtaining the certificate, or
  - (ii) validly making the application for the certificate.

(2) A person who has an interest in a confirmatory gender recognition certificate may apply to the sheriff for the revocation of the certificate on the ground that the application for the certificate was fraudulent.”

Similarly, new section 8P, which covers instances where a court needs to reach a decision about overseas gender recognition, includes:

“(2) A court may make an order determining the question mentioned in subsection (1)—

- (a) where the question arises in the course of civil proceedings before the court, or
- (b) on an application being made to the court by a person who has an interest in the question.”

The Bill’s Explanatory Notes state that examples of a “person who has an interest” include a “spouse, civil partner or child of a person who has obtained a GRC”. It is unclear which other family members, for example parents or siblings, would also be included.

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<sup>56</sup> Gender Recognition Reform (Scotland) Bill Policy Memorandum: <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-recognition-reform-scotland-bill/introduced/policy-memorandum-accessible.pdf>

This is different from the rule under the existing Gender Recognition Act (section 8) which provides that only the spouse / civil partner, and the Secretary of State, can apply for revocation of a GRC<sup>57</sup>.

We agree that it should be possible for the court to revoke a GRC, and that the grounds outlined in section 8S would all be fair and reasonable ones on which to do so. We also agree that there may be limited circumstances in which a court needs to come to a decision about whether overseas legal gender recognition should be recognised in Scotland.

However, it is important that new section 8S cannot be used by individuals to make frivolous or vexatious applications to the sheriff to revoke a trans person's GRC. Such a process might be used by an unsupportive family member, or an ex-spouse, to cause greater difficulty and distress for a trans person whom they would prefer had not obtained legal gender recognition. It is important that any process by which an individual could apply to have another person's GRC revoked is sensible and limited in who would be considered "a person who has an interest in a gender recognition certificate".

Although social attitudes are improving, there is still a significant minority of people who hold negative attitudes about trans people. For example in the Scottish Social Attitudes Survey 2015, 32% of people said they would be unhappy or very unhappy if a close family member married or had a long term relationship with a person who had undergone gender reassignment surgery<sup>58</sup>. Polling by YouGov in 2021 found that 12% of Britons would not be supportive if their child, sibling or close family member came out as trans or non-binary.<sup>59</sup> It is therefore crucial that new section 8S cannot be used by people who object to someone having obtained legal gender recognition, simply because they disagree with the person's choice, to force that person to go to Court to prove that their application was not fraudulent.

There are campaign organisations that disagree with this bill, and in some cases, with the concept of gender recognition itself, and we are concerned that an organisation might seek out, and possibly fund, cases where a family member is willing to take a trans family member to court to challenge their GRC.

In the World Professional Association for Transgender Health's 2017 statement on identity recognition, they note that "court and judicial hearings can produce psychological, as well as financial and logistical barriers to legal gender change, and may also violate personal privacy rights or needs".<sup>60</sup> The effects on the mental and

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<sup>57</sup> Gender Recognition Act 2004 Section 8:

<https://www.legislation.gov.uk/ukpga/2004/7/section/8>

<sup>58</sup> Scottish Social Attitudes 2015: attitudes to discrimination and positive action:

<https://www.gov.scot/publications/scottish-social-attitudes-2015-attitudes-discrimination-positive-action/pages/4/>

<sup>59</sup> International Survey: how accepting would Britons be of a family member coming out? Eir Nolsoe, 31<sup>st</sup> August 2021: <https://yougov.co.uk/topics/international/articles-reports/2021/08/31/international-survey-how-supportive-would-britons->

<sup>60</sup> World Professional Association for Transgender Health's statement on identity recognition (2017):

physical health of a trans person must be considered as part of any investigation, hearing, or review of their application for a GRC if its legitimacy is questioned by another party.

We are particularly concerned that in order to defend themselves from a claim of having made a fraudulent application, that trans men and women may be forced to provide evidence to a Court demonstrating that they have not done so over and above the requirements for obtaining a GRC set out in the Bill. This might include evidence required under the current law, such as a psychiatric diagnosis, or medical reports detailing any medical interventions they have had as part of their transition. This would fundamentally undermine the purpose and provisions of the Bill.

We also note that the person whose GRC is being challenged may incur very substantial costs defending it in court, and may be unable to afford the defence. This is in addition to the likely high emotional cost.

Finally we note that new section 8S as it stands may tend to encourage people in families where there is a difference of opinion about a family member being trans, to take their trans family member to court, and this is contrary to the generally accepted approach of encouraging settlement of family disputes outwith court.

We therefore think that the right to apply to court to revoke a person's GRC should be limited to the Registrar General and the spouse / civil partner of the person, as in the existing legislation, and that new section 8S in section 9 of the bill should be amended accordingly.

#### The requirement that applicants for a GRC must be 'ordinarily resident' in Scotland

New Section 8A(2)(b) in Section 2 of the Bill requires that a person be "ordinarily resident" in Scotland if they are not the subject of a birth register entry. Asylum seekers are not considered to be legally resident in Scotland when awaiting a decision on their application for refugee status or for some other form of leave to remain. This is likely to mean that they would not pass the threshold of being considered 'ordinarily resident' in Scotland.

We think that a specific provision is needed in the Bill to ensure that trans asylum seekers, refugees, and other people awaiting a decision for some form of leave to remain can apply for legal gender recognition.

Many trans asylum seekers have left a country of origin where they were unable to access any legal gender recognition process<sup>61</sup>, and indeed may have suffered persecution on account of their gender identity. Trans asylum seekers may be housed in asylum support accommodation or detention centres that don't match their gender identity, due to arriving in Scotland with identity documents from their country

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<https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH%20Identity%20Recognition%20Statement%2011.15.17.pdf>

<sup>61</sup> TGEU "Legal Recognition Toolkit" <https://tgeu.org/wp-content/uploads/2017/02/Toolkit16LR.pdf>

of origin that reflect their assigned sex at birth.<sup>62</sup> They may have been unable to change their documents due to a process not existing in their country of origin, or because they would have faced discrimination and harassment for doing so. They may have status as an asylum seeker for several years in Scotland, while they are awaiting a decision about their right to remain.

It is therefore vital that asylum seekers in Scotland are able to access the legal gender recognition process, as this may assist them in being housed correctly and in obtaining documents in Scotland that reflect their lived identity and not the information on their documents from their country of origin.

As many trans asylum seekers will be in Scotland as a result of experiencing transphobic persecution in their country of origin, it is crucial that these experiences are not exacerbated by being unable to access the process of legal gender recognition upon arrival. Staff working with asylum seekers should be provided with information on the new process in order to be able to support trans asylum seekers to make an application where appropriate.

Of course, it should never be a requirement that a trans asylum seeker has legal gender recognition to be housed in a facility that corresponds with their gender identity. Many trans asylum seekers will arrive without legal gender recognition from their country of origin, and it may take weeks for them to access a legal gender recognition process, during which time they may face discrimination and violence in asylum support accommodation or detention centres.<sup>63</sup> However, the policy on the housing of trans asylum seekers is outside of the scope of this consultation.

Despite the fact that we would strongly oppose legal gender recognition being a requirement for trans asylum seekers arriving in Scotland, we think it is important that the Scottish Government considers how the use of a requirement that people be 'ordinarily resident' in Scotland if they do not have a Scottish birth or adoption certificate may exclude certain groups from being able to apply for legal gender recognition.

An example of this sort of provision in existing legal gender recognition legislation around the world is in section 8 of the Maltese Gender Identity, Gender Expression and Sex Characteristic Act 2015: "(8) A person who was granted international protection in terms of the Refugees Act, and in terms of any other subsidiary legislation issued under the Refugees Act, and who wants to change the recorded gender and first name, if the person so wishes to change the first name, shall make a declaration confirmed on oath before the Commissioner for Refugees declaring the person's self-determined gender and first name. The Commissioner for Refugees shall record such amendment in their asylum application form and protection certificate within fifteen days."<sup>64</sup>

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<sup>62</sup> UKLGIG and Stonewall "No Safe Refuge" [https://uklgig.org.uk/wp-content/uploads/2017/03/no\\_safe\\_refuge.pdf](https://uklgig.org.uk/wp-content/uploads/2017/03/no_safe_refuge.pdf)

<sup>63</sup> Ibid

<sup>64</sup> Maltese Gender Identity, Gender Expression and Sex Characteristics Act 2015: [https://tgeu.org/wp-content/uploads/2015/04/Malta\\_GIGESC\\_trans\\_law\\_2015.pdf](https://tgeu.org/wp-content/uploads/2015/04/Malta_GIGESC_trans_law_2015.pdf)

Although legal gender recognition in Malta is generally only open to citizens, this provision was included to ensure that refugees and asylum seekers could access it as well. We urge the Committee to explore with relevant expert organisations who specialise in the law in this area in what way a provision could be added to the Bill to ensure that refugees and asylum seekers in Scotland have access to legal gender recognition.

#### Recognition of gender recognition obtained outwith the United Kingdom

We also largely support new section 8N (that would be inserted by section 8 of the Bill) to automatically recognise legal gender recognition obtained overseas, unless this is “manifestly contrary to public policy”. At the moment, only those who have obtained legal gender recognition from a place listed on the “Approved Countries or Territories” list are able to have their legal gender recognition automatically recognised here, otherwise they have to apply via the overseas track.<sup>65</sup> This section would make it significantly fairer and simpler for trans men and trans women who had obtained gender recognition overseas to have certainty about being legally recognised in Scotland.

However, new Section 8N(3)(a) at Section 8 of the Bill states that: “‘overseas gender recognition’ means gender recognition obtained in a country or territory outwith the United Kingdom which resulted in a person’s gender under the law of that country or territory becoming male instead of female, or female instead of male.”

In other areas of law, “manifestly contrary to public policy” doesn’t necessarily mean that Scots Law does not recognise any types of legal status acquired outwith Scotland that would not have been granted here. For example, Scots Law recognises overseas polygamous marriages as marriages for some purposes.

New Section 8N(3)(a) at Section 8 of the Bill would mean that a non-binary person, who had obtained legal recognition of their gender identity in another jurisdiction, would not be able to have their gender identity recognised in Scotland. Where a non-binary person was arriving in Scotland having already obtained legal gender recognition of their identity, and perhaps only with identity documents recording and recognising them as non-binary, this could present challenges for an individual in terms of clarity about their legal rights and treatment in Scotland. We are often contacted by trans people around the world who are planning to move to Scotland, with requests for information about their ability to be legally recognised when they are living here. It would be useful to understand how a non-binary person arriving in Scotland who had already obtained legal gender recognition would be treated for legal purposes, and ensure that accurate and accessible information was available to people intending to move here.

Similarly, there are a number of jurisdictions that recognise trans children and young people who are under 16. It would be useful to understand whether recognising such children and young people would be considered “manifestly contrary to public

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<sup>65</sup> The Gender Recognition (Approved Countries and Territories) Order 2011  
<https://www.legislation.gov.uk/ukdsi/2011/9780111510810>

policy". Whilst the mechanism for making such decisions by a Court is outlined in new section 8P of Section 8 of the Bill, many families would benefit greatly from understanding whether or not their trans child would be recognised if they were to move to Scotland having already obtained legal gender recognition overseas.

### Accessibility

Along with the proposed reforms, we would welcome a platform for individuals to apply for a GRC online. This would also require a parallel paper application for those unable to apply digitally, and provisions for applicants to provide both digital and physical evidence for those without access to printers or scanners.

A simple digital and paper application process would allow trans people to apply for a GRC with the relative ease, and make it less likely for them to run into issues with incongruent identity documents.

This should also be accompanied by accessible information about how to fill in an application available in multiple formats and languages, including community languages, braille, Easy Read, BSL, etc. These are essential to ensuring that disabled trans people also have access to legal gender recognition.

Similarly, there should also be provisions for individuals struggling with their application to request support, and these should be especially sensitive to those under 18 who may be applying without the support of their parent or guardian.

Simple explainers in a range of formats on the application process, what a GRC means, and how it could be used would also be helpful in ensuring that applicants fully understand the process, know what to expect, and can communicate it to others.

### Legal recognition for non-binary people

Unlike for trans men and trans women, there is currently no process for non-binary people to apply to have their gender legally recognised. This means that non-binary people are unable to get their birth certificates changed to reflect their gender identities. It also means that in the eyes of the law they are either a man or a woman – despite them knowing that this is not an accurate reflection of the way they feel about their own identity.

We are very disappointed that the Bill does not include reform of the Gender Recognition Act 2004 in a way that would result in the legal recognition of non-binary people. The reasons given for this by the Bill's EQIA are: "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."

The process to obtain legal gender recognition currently available to trans men and trans women was introduced in the UK as a consequence of a ruling by the

European Court of Human Rights. This ruling stated that not being able to have your gender legally recognised is a breach of your Article 8 right to a private life.<sup>66</sup>

In making that decision, part of the court's ruling was: "The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance... No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost."<sup>67</sup>

In the twenty one years since that ruling was made, huge progress has been made in the way that trans people are treated, understood, and provided with legal protections, in Scotland and beyond. However, a continued lack of recognition of non-binary people leaves them in the exact position that trans men and trans women were in before this ruling and the subsequent introduction of the Gender Recognition Act 2004, with no way to be legally recognised as who they are. Although extending legal gender recognition to non-binary people will undoubtedly have consequences for other areas of legislation, this reflects the situation when the case of Goodwin vs UK was taken to the European Court of Human Rights. We feel that similarly to the ECtHR decision in that case, the right to be recognised and 'live in dignity and worth' outweighs these other considerations.

The Yogyakarta Principles 2006 assert how crucial a right to gender identity is for all individuals: "Everyone has *the right to recognition everywhere as a person before the law*... Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom."<sup>68</sup> (emphasis added)

The Council of Europe's Parliamentary Assembly Resolution 2048 also calls on member states to "consider including a third gender option in identity documents for those who seek it" in the Resolution's section on legal gender recognition.<sup>69</sup>

Furthermore, the World Professional Association for Transgender Health updated its statement on legal gender recognition in 2017, where it called for numerous best

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<sup>66</sup> European Court of Human Rights "Case of Christine Goodwin v. United Kingdom" accessed at [http://hudoc.echr.coe.int/eng#{"fulltext":\["CASE OF CHRISTINE GOODWIN v. THE UNITED KINGDOM"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-60596"\]}](http://hudoc.echr.coe.int/eng#{)

<sup>67</sup> Ibid

<sup>68</sup> The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity

<sup>69</sup> 'Council of Europe Parliamentary Assembly Resolution 2048 on discrimination against transgender people in Europe', 2015:

<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736>

practice approaches to be taken, including recognising non-binary people: “WPATH recognizes that there is a spectrum of gender identities, and that choices of identity limited to Male or Female may be inadequate to reflect all gender identities. An option of X, NB (non-binary), or Other (as examples) should be available for individuals who so choose.”<sup>70</sup>

In 2018, the UN Independent Expert on protection against violence and discrimination on the basis of sexual orientation and gender identity recommended that legal gender recognition procedures should: “Acknowledge and recognize non-binary identities, such as gender identities that are neither “man” nor “woman””.<sup>71</sup>

By only allowing people to be recognised as a man or a woman, current legislation implies that other gender identities – non-binary identities – are less valid and less valued than these. It also means that non-binary people do not have the same access to their right to be recognised as who they are as all other people in Scotland, and in keeping with human rights principles.

Argentina, Iceland, Malta, Colombia, Alberta, British Columbia, Newfoundland and Labrador, Northwest Territories, Nova Scotia (Canada), California, Nevada, New Jersey, New York City, Oregon, Washington State (USA), New Zealand, Tasmania (Australia) and Uruguay all allow non-binary people to be recognised legally on their birth certificates. By excluding non-binary people from this Bill, the proposed legislation will be far from world-leading.

The Scottish Government has indicated that it accepts that non-binary people are living in Scotland, and that they may face particular issues and inequalities – this can be seen by the Scottish Government establishing a working group on non-binary people’s equality, which made recommendations to Scottish Ministers about how to improve non-binary people’s equality and inclusion in Scotland in March 2022.<sup>72</sup> We understand that the publication of those recommendations, alongside the Scottish Government’s response, is imminent.

Similarly, other political parties in Scotland have indicated their understanding that non-binary people are a part of the trans community, and that they face discrimination and barriers – with the Scottish Greens, Scottish Labour and Scottish

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<sup>70</sup> World Professional Association for Transgender Health’s statement on identity recognition (2017):

<https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH%20Identity%20Recognition%20Statement%2011.15.17.pdf>

<sup>71</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity A/73/152 (2018):

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/220/41/PDF/N1822041.pdf?OpenElement>

<sup>72</sup> Scottish Government Working Group on Non-Binary People’s Equality:

<https://www.gov.scot/groups/non-binary-working-group/>

Liberal Democrats having included manifesto commitments for the 2021 Holyrood Election to legally recognise non-binary people.<sup>73</sup>

In paragraphs 113 – 117 of the Policy Memorandum, the Scottish Government elaborates on its decision not to extend legal gender recognition to non-binary people at the current time through this Bill<sup>74</sup>. We agree that to do so would likely result in the things outlined, e.g. an increased cost to NRS, and the need for consequential amendments to devolved and reserved legislation. Whilst we agree with the assessment laid out in these paragraphs around the consequences of legally recognising non-binary people, the current situation means many of these complexities are already present for non-binary people themselves. Non-binary people have to navigate a society, legal system, services and workplaces, and use identity documents that almost exclusively require them to be seen and treated as male or female, when they are neither of these things.

The Scottish Government has indicated through the introduction of this Bill and the provisions included within it that it has reached a position where it believes that trans men and trans women should be able to have their gender identity recognised legally by a self-declaratory system, underpinned by human rights principles. We feel that in using these principles, it should and must follow that a system of legal gender recognition that truly delivers for all trans people in Scotland must include legal gender recognition of non-binary people as well. All of the difficulties that can be encountered by trans men and women due to not having a birth certificate that reflects how they live their lives, and all of the human rights arguments in favour of allowing trans men and women to be recognised legally on the principle of self-determination, apply equally to non-binary people.

We would therefore like the Committee to explore the possibility of an amendment to the Bill that would require Scottish Ministers to fully scope how we can move forward from the current impasse.

The previous Scottish Government announced their intention not to provide legal gender recognition to non-binary people in June 2019<sup>75</sup>. Whilst the Working Group on Non-Binary People's Equality has subsequently completed their work and made recommendations, this was within the context of that announcement, and on the understanding that Scottish Ministers would reject a recommendation to introduce non-binary legal gender recognition. Whilst we understand that those

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<sup>73</sup> Equality Network webpage "Holyrood manifestoes 2021-2026 – what the parties are saying on LGBTI equality issues": <https://www.equality-network.org/holyrood-manifestos-2021-26-what-the-parties-are-saying-on-lgbti-equality-issues/>

<sup>74</sup> Gender Recognition Reform (Scotland) Bill Policy Memorandum: <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-recognition-reform-scotland-bill/introduced/policy-memorandum-accessible.pdf>

<sup>75</sup> Statement by Cabinet Secretary for Social Security and Older People Shirley-Anne Somerville to the Scottish Parliament: <https://www.gov.scot/publications/statement-gender-recognition/>

recommendations are likely to shape the commitment to developing a non-binary action plan by 2023<sup>76</sup>, we are concerned that there will be an ongoing situation where consequences of providing non-binary people with legal recognition are raised as a barrier to doing so, without adequate attention and resource paid to how to remove those barriers.

We consider that this could be done by inserting provisions in the Bill requiring Scottish Ministers to undertake this work, and for this to be commenced within two years of the Bill coming into effect. Across Europe, a range of methods have been taken to better understand how to move forward in this area. For example in Ireland, the Irish Gender Recognition Act 2015 required ministers to commence a review into the operation of the Act no later than two years after it came into operation, with this review going on to focus on whether non-binary people should also be included<sup>77</sup><sup>78</sup>. In Belgium, the Government commissioned an expert report in this area<sup>79</sup>.

### Applicants under the age of 16

There are no provisions in the Bill to allow trans children and young people under the age of 16 to have their gender legally recognised. While we strongly support the provisions in the Bill to allow applicants who are 16 and 17 to apply for legal gender recognition, we would also welcome an amendment to the Bill which would allow those under 16 to also apply with parental consent.

We think it is vital that people under 16 have access to the legal gender recognition process. An Amnesty International report into legal gender recognition processes across Europe states that “Absolute denial of legal gender recognition to individuals under a given age is not consistent with existing international standards regarding the rights of children.”<sup>80</sup>

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<sup>76</sup> Scottish Government and Scottish Green Party Draft Shared Policy Programme: <https://www.gov.scot/binaries/content/documents/govscot/publications/agreement/2021/08/scottish-government-and-scottish-green-party-shared-policy-programme/documents/scottish-government-and-scottish-green-party-draft-shared-policy-programme/scottish-government-and-scottish-green-party-draft-shared-policy-programme/govscot%3Adocument/SG%2BSGP%2BTalks%2B-%2BDraft%2BPolicy%2BProgramme%2B-%2Bversion%2B7%2B-%2BFINAL%2B-%2BBOFFSEN.pdf?forceDownload=true>

<sup>77</sup> Irish Gender Recognition Act 2015 Section 7:

<https://www.irishstatutebook.ie/eli/2015/act/25/section/7/enacted/en/html#sec7>

<sup>78</sup> Irish Government Department of Social Protection Review (under section 7) of the Gender Recognition Act 2015: <https://www.gov.ie/en/consultation/001721-review-of-the-gender-recognition-act-2015/>

<sup>79</sup> See e.g. Emmanuelle BRIBOSIA, Isabelle RORIVE and Hania OUHNAOUI, *Rapport au sujet de l'arrêt n° 099-2019 de la Cour constitutionnelle du 19 juin 2019 annulant partiellement la loi du 25 juin 2017 réformant des régimes relatifs aux personnes transgenres, et de ses conséquences en droit belge à la lumière du droit compare* (Institut pour l'Égalité entre les Femmes et les Hommes, 2019).

<sup>80</sup> *The state decides who am: Lack of legal gender recognition for transgender people in Europe* (2014) Amnesty International, London

In 2018, the UN Independent Expert on protection against violence and discrimination on the basis of sexual orientation and gender identity recommended that legal gender recognition procedures should: “Ensure that minors have access to recognition of their gender identity” and said that “Many States assume that children are not able to consent to gender recognition procedures. Children are thus often de jure and de facto excluded from gender recognition with the corresponding heightened risk of persecution, abuse, violence and discrimination.”<sup>81</sup>

Extending the right to obtain legal gender recognition to those under 16 would also be in keeping with many of the principles of the United Nations Convention on the Rights of the Child, including articles 2, 3, 6, 8, 12, 14, 16, and 28.

Countries operate a range of different models for allowing under 16s to obtain gender recognition: some with parental consent, some through a court process, some through a capacity model, and some through selecting a designated person to apply on the child’s behalf. Jurisdictions that have some mechanism of recognising under 16s include: Argentina, Australia (Tasmania), Belgium, Canada (Alberta, British Columbia, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Yukon), Iceland, Luxembourg, Malta, New Zealand, Spain (Andalucia), Switzerland, United States (California, Montana, New Jersey, New York State, Nevada, Oregon, Washington State) and Uruguay.

Allowing trans young people under the age of 16 to have their gender legally recognised is not about access to medical treatments. Decisions about the medical treatment of young trans people would continue to be made by medical professionals, and would not be affected. Instead, providing a mechanism for under 16s is about enabling consistency in people’s legal documentation, and allowing them the same recognition of their identity as everyone else, and not denying them access to their legal right to recognition of their identity exclusively on the basis of their age.

In Scotland, children and young people under 16 cannot access any irreversible treatments as part of a medical transition, such as cross sex hormones. Children and young people under 18 cannot access surgical interventions. Furthermore, healthcare providers are not obliged to provide people with medical interventions as a result of them having obtained legal gender recognition. Amending the Bill to provide a mechanism for under 16s to have their gender legally recognised would have no impact on how decisions are taken about individual trans patients’ medical transitions.

Whilst it is undoubtedly true that under 16s would require support to be able to apply for legally recognition, it is important to stress that under 16s are not necessarily uncertain of their gender identity. A small number of trans children and young people, living in Scotland, are very confident and certain of their gender - they have

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<sup>81</sup> Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity A/73/152 (2018): <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/220/41/PDF/N1822041.pdf?OpenElement>

fully socially transitioned with the support of their family, peers and school, and will be living confidently and permanently in their gender identity. These young people should have access to legal gender recognition.

We would not think it was appropriate for anyone, regardless of their age, to obtain legal gender recognition if they were uncertain of their gender identity. A person should only apply for legal recognition when they are confident and settled in their gender, and when they feel sure that they will be living permanently as a man, woman or non-binary person. However, we think that the requirement that someone must sign a statutory declaration in front of a notary public, which declares your intention to live in your gender until death – is a proportionate and suitable way of ensuring that anyone who is experiencing uncertainty will not apply.

A small but increasing number of trans young people in Scotland are able to be open about their gender identity and live happy, healthy lives with the support of their parents, families and peers. At the moment, even those young people who have been living for many years as themselves, who are accepted by their families, and who go along to school expressing themselves in the way that they feel most comfortable, are unable to have their gender identity legally recognised on their birth certificate. With their parent's consent they can already change their gender on their medical records and passport, but their birth certificate remains stuck in their old gender which causes them significant distress and inequality.

Children and young people are less likely to have other forms of ID, so may be more reliant on showing and using a birth certificate to demonstrate who they are. Because they are unable to update their birth certificates, this may mean having to use it despite it conflicting with their gender identity, their other identity documents and the reality of their daily life. This can mean that trans children and young people have little privacy around their trans status, and are rarely able to decide for themselves if they share this with organisations or services.

Similarly, there may be uncertainty about how they should be treated in some situations, due to a discrepancy between how they are living and the sex recorded on their birth certificate. For example, some decisions about eligibility for welfare payments may be dependent on whether a child is recorded as male or female on their birth certificate. Because trans young people are able to socially transition, and update all other records and documents, their inability to gain legal gender recognition can leave them in an unacceptable legal limbo for years.

We think that requiring applicants under 16 to have parental consent will bring the process of legal gender recognition in line with many of the other administrative changes that trans young people can make at that age, such as changing their passport, medical records, and name. This would mean that the process for under 16s would mirror the process for adults introduced by the provisions in this Bill; that legal gender recognition becomes a decision subject to the same processes as those for updating your other identity documents. In the case of trans adults this would mean being able to do so simply by self-declaration, and in the case of trans young people and children under 16 this would mean being able to do so with parental consent. If a trans person under 16 did not have a parent with parental

rights and responsibilities, then somebody else with parental rights and responsibilities should be able to make the application.

We think that a parental application should require the person making the application to sign a statutory declaration which includes that they have a solemn and true belief that the young person has an intention to live in their gender identity. We would want the application to be made with the best interests and wishes of the child having been taken into account, and the wording of the statutory declaration should make this clear.

However, we do think that there should also be a process in place for those young people who wish to obtain legal gender recognition where there is some kind of dispute about whether or not there is parental consent. This will ensure that they are able to have their gender legally recognised if this is in their best interests. It is our understanding that at the moment, if a young person under 16 did not have parental consent for their application, they could apply to the Sheriff Court for the need for parental consent to be dispensed with, under the provisions of Section 11 of the Children (Scotland) Act 1995.<sup>82</sup>

### What the Bill doesn't do

The ongoing policy and public discussions about Gender Recognition Act reform, which have been underway in Scotland since late 2017, have often included discussion of issues related to how trans people are treated by services and participate in public life over and above what is related to legal gender recognition.

Whilst not exhaustive, below is some discussion of the most frequently raised areas of discussion.

#### 1. How trans people can access single or separate- sex services

The law that allows for the provision of single or separate- sex services is the Equality Act 2010. There are exceptions in the Equality Act 2010 that allow services to be provided separately to men and women, or only to either men or women, if they meet certain criteria<sup>83</sup>. Without these exceptions, providing single or separate- sex services would be unlawful (because it would be treating either men or women less favourably on the basis of their sex, which is prohibited).

There is an additional exception in the Equality Act 2010 that allow single- or separate sex service providers to treat trans people less favourably if it is a proportionate means of achieving a legitimate aim<sup>84</sup>. No single or separate- sex service is required to use this exception, and many such services have been operating in a trans inclusive way, with trans men accessing men's services and

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<sup>82</sup> Children (Scotland) Act 1995 Section 11

<http://www.legislation.gov.uk/ukpga/1995/36/section/11>

<sup>83</sup> Equality Act 2010 Schedule 3 Part 7 Sections 26 and 27:

<https://www.legislation.gov.uk/ukpga/2010/15/schedule/3/part/7>

<sup>84</sup> Equality Act 2010 Schedule 3 Part 7 Section 28:

<https://www.legislation.gov.uk/ukpga/2010/15/schedule/3/part/7>

trans women accessing women's services, successfully for a significant number of years in Scotland.

In the Equality Act 2010, a trans person is a person with the protected characteristic of "gender reassignment". The protected characteristic is held by anyone who is:

"proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex."<sup>85</sup>

The law says that anyone who has the protected characteristic is a 'transsexual'. The definition makes it clear that in order to have the protected characteristic, a person does not need to have undergone any gender reassignment medical treatments, or to be under medical supervision. Social and legal aspects of changing your sex count as well (in the definition, called 'other attributes of sex').

It also makes it clear that a person has the protected characteristic from the point that they are proposing to make these changes – not only at the point that those changes are occurring or have occurred.

This means that everyone who qualifies for a GRC under the existing GRA, and everyone who would qualify for one under the GRA as amended by this bill, would already have the protected characteristic of gender reassignment before they can apply for their GRC, and they would continue to have the protected characteristic after the GRC is granted. In other words, having a GRC or not makes no difference to whether a person has the gender reassignment protected characteristic. Changing the arrangements for obtaining a GRC will not change who has the gender reassignment protected characteristic, and so will not change who is protected, or the extent to which they are protected, under the Equality Act 2010. It will not change the operation of the exceptions that allow single-sex services to treat trans people less favourably where that is a proportionate means to a legitimate aim, and it will not change who those exceptions apply to.

## 2. Prisons

The Scottish Prison Service's gender identity and gender reassignment policy<sup>86</sup> outlines how they will treat trans people in custody. Individual decision-making, based on risk assessment, is used to decide whether a trans person is held in the male or female estate, with the safety of the trans person and other people in custody central to that decision-making process.

Having a Gender Recognition Certificate does not guarantee any individual trans person in custody the right to be held on the estate corresponding to their acquired

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<sup>85</sup> Equality Act 2010 Section 7:

<https://www.legislation.gov.uk/ukpga/2010/15/section/7>

<sup>86</sup> Scottish Prison Service "Gender Identity and Gender Reassignment Policy for those in our Custody 2014) can be downloaded here:

<https://www.sps.gov.uk/Corporate/Publications/Publication-2561.aspx>

gender. A trans woman with a Gender Recognition Certificate, and female on her birth certificate, is not guaranteed the right to be held on the female estate. A trans man with a Gender Recognition Certificate, and male on his birth certificate, is not guaranteed the right to be held on the male estate. Changing the process by which someone can obtain a GRC therefore will not impact decision-making about how individual trans people in custody are held in the prison estate.

### 3. Sport

Since the Gender Recognition Act 2004 was passed, there have been specific provisions, originally in the GRA<sup>87</sup>, and subsequently in the Equality Act 2010<sup>88</sup>, allowing trans people to be treated differently in gender-affected activity (activities where the average differences between men and women would lead to disadvantage in competition) if this is necessary to guarantee fairness or safety.

The provisions in the Equality Act 2010 relating to how trans people can be treated in sports relate to all people with the protected characteristic of gender reassignment – which will include all trans people who have obtained a Gender Recognition Certificate, as well as many trans people without a GRC. Changing the process by which someone can obtain a GRC therefore will not impact how individual trans people are able to participate in sporting competition.

### 4. Access to medical treatments

Decisions about accessing medical transition treatments are clinical decisions, made between individual trans people and their healthcare providers. Having a Gender Recognition Certificate does not enable a trans person to override a clinical decision made about their care, or guarantee them access to particular medical interventions. Changing the process by which someone can obtain a GRC therefore will not impact on individual trans people's access to medical treatments.

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<sup>87</sup> Gender Recognition Act 2004 Section 19:

<https://www.legislation.gov.uk/ukpga/2004/7/section/19>

<sup>88</sup> Equality Act 2010 Section 195(2):

<https://www.legislation.gov.uk/ukpga/2010/15/section/195>