

Gender Recognition Reform (Scotland) Bill

Briefing for the stage 1 debate on 27th October 2022

Scottish Trans and Equality Network
vic@equality-network.org

The Equality Network is a leading Scottish LGBTI equality and human rights charity. Scottish Trans is the project of the Equality Network focusing on the equality, human rights and inclusion of trans people.

Scottish Trans and the Equality Network welcome the Gender Recognition Reform (Scotland) Bill, and we urge MSPs to support the general principles of the bill at stage 1.

We commend to MSPs the Stage 1 report of the Equalities, Human Rights and Civil Justice Committee.

Why is the Bill needed?

“I would feel safer with a GRC but the current process risks re-traumatising me because of harm already inflicted by psychiatrists. When I first told a psychiatrist I was trans as a teenager, they prescribed me electroconvulsive therapy. The harm this did meant I didn’t feel safe to come out again and transition until I was in my 60s. For the sake of my mental health I can never again allow some authority figure who doesn’t know me to decide whether I am who I say I am.” - Russ

“I’m considering legal gender recognition in the future because it would give me a sense of peace. I wanted to medically transition, and so I did, and I’ve come out at school and to my family. For me, the last thing is changing my birth certificate and if I could do that it would give me a sense of closure.” – Jamie, 17

The Gender Recognition Act 2004 (GRA) is the law that sets out the process that trans men and women use to apply for a gender recognition certificate (GRC), which they can use to update the sex recorded on their birth certificate.

Trans people are able to update the sex on their other identity documents – such as driving licences, passports, and medical records – before obtaining a GRC, at the

point at which they start permanently living as a man or woman. Obtaining a GRC brings all their documentation into line and gives them full legal recognition of their gender.

Currently, the core requirement for receiving a GRC is for the applicant to have 'socially' transitioned – that is, to be living permanently as a man or woman with the intention to do so for the rest of their life. They must provide a statutory declaration that this is the case. There is no requirement to have 'medically' transitioned (i.e. undergone gender affirming surgery or taken hormones). **None of this will change with the proposed reforms.**

The current process is complex and intrusive. The key problems with it are:

1. Even though being trans is no longer classified as a mental illness, you must provide a **psychiatric diagnosis** of 'gender dysphoria' as supporting evidence for your application. This inappropriately requires the approval and evidence of a psychiatrist to access gender recognition.
2. You have to provide **intrusive medical reports** of choices you have made about medical transition, like hormones or surgery, despite the fact that no medical treatments are required to obtain a GRC.
3. Because of waiting times of more than four years to see an NHS gender identity service, the only way to obtain the above documentation in a reasonable time is to pay **expensive private medical fees**.
4. You cannot apply for a GRC until you have been permanently living as a man or woman for **two years**. This means a period of your life where you have contradictory documents, increasing the likelihood of experiencing harassment or discrimination.
5. You must provide **evidence that you have been living in your gender** for two years with your application. This can cause problems for people who are unable to afford to update their other ID, or who are unable to produce evidence due to their life circumstances – like experiencing homelessness, domestic abuse, or fleeing a country of origin where it is not safe to be trans.
6. Applications must be made to the **Gender Recognition Panel**, a tribunal of doctors and judges who never meet the applicant.
7. **Only people over the age of 18** can apply for a GRC, even though the legal age of capacity in Scotland is 16, and many people start work or further or higher education before 18. They are likely to be outed as trans because their documentation is inconsistent.
8. **Only trans men and trans women are eligible to apply**. This means non-binary people (people who don't identify wholly as men or women) have no way to access legal gender recognition.

These problems mean that some trans people who have permanently socially transitioned are unable to apply, while many others are deterred from applying.

This can cause significant problems because of inconsistency between their identity documents, including:

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

What would the Bill change?

The provisions of the bill would make significant improvements to the current process for obtaining a GRC by:

1. Demedicalising the process

The Bill would demedicalise the process in two key ways:

- a. By removing the requirement to submit a psychiatric diagnosis of 'gender dysphoria'
- b. By removing the requirement to submit intrusive medical reports, which include detailing the personal choices you have made about your own medical treatments.

Being trans is often misunderstood as being a medical issue – either a mental health issue, or all about the choices someone might make to have medical interventions that help their body align with their sense of who they are.

But while many trans people do experience distress due to a mismatch between how they understand themselves and their body versus how that is perceived by others, the most fundamental part of being trans is your personal sense of identity. For those who do medically transition, this is vital to their ability to live a happy and healthy life.

Demedicalising the process is an important way of ensuring that legal gender recognition is not based on these misunderstandings.

2. Reducing the time delay before you can apply

The Bill would reduce the time required before you can obtain a GRC from two years to six months. This would be split into two periods:

- a. A trans man or women would be able to apply for a GRC after three months of living permanently in the their gender.
- b. There would then be a three month 'reflection period', after which the applicant must reconfirm they wished to obtain a GRC.

3. Making the process more administrative

The Bill would remove the need for applicants to submit evidence to the Gender Recognition Panel. Instead, they would apply to a newly established team at National Records of Scotland.

The improvements listed above would see Scotland move to a system of legal gender recognition known internationally as '**self-declaration**'. This means a system that is administrative and does not require medical or other evidence. The core of the gender recognition process remains a statutory declaration of living full time and permanently in the other gender. Making a deliberately false declaration is a criminal offence.

'Self-declaration' is considered by human rights bodies to be the system of legal recognition that best upholds trans people's human rights, including the human right to recognition before the law. This position has been stated by, amongst others, the Council of Europe, who call for 'quick, transparent and accessible' processes, and the UN Independent Expert on Protection Against Violence and Discrimination on the Basis of Sexual Orientation and Gender Identity, who calls for a simple and administrative process without 'abusive requirements' like medical evidence.

'Self-declaration' is in place in more than 30 jurisdictions around the world. The first country to pass such a law was Argentina in 2012, and the most recent was Switzerland in 2020. Parliaments in Cyprus, Germany and Spain are also currently considering self-declaration legislation.

During evidence to the Equalities, Human Rights and Civil Justice Committee, the Chair of the Scottish Human Rights Commission, said:

"Having analysed concerns through a human rights lens we remain strongly of the view that the changes that are set out in the Bill will bring Scotland closer to satisfying international legal standards and will not jeopardise the rights of others."

4. Lowering the age you can apply to 16

The Bill would allow 16 and 17 year olds to apply for a GRC. This would be in line with the Age of Legal Capacity (Scotland) Act 1991. It would also prevent 16 and 17 year olds from encountering the current difficulties they experience due to having a two year period in which they by necessity have mismatched identity documents.

During Stage One evidence to the Equalities, Human Rights and Civil Justice Committee, the Children and Young People's Commissioner said:

“We support the move to lower the age to 16. Protection and participation rights are not mutually exclusive, and we are looking for a process that recognises not only the growing autonomy of young people but the need to support and protect them.”

What the Bill does *not* do

The bill does not change the effect of the (reserved) Equality Act 2010, either in the way it protects trans people or in the way it protects women.

The bill does not affect whether or not a trans person can use a single-sex service matching the gender they live in. Giving evidence to the EHRCJ Committee, the Equality and Human Rights Commission explained that whether a trans person has a GRC does not affect this – the law says that in all cases trans people can be excluded from single-sex services if to do so is a proportionate means to a legitimate aim. Most services such as Women's Aid and Rape Crisis Centres in Scotland have been inclusive of trans women for many years regardless of their GRC status.

The bill does not give any entitlement to trans prisoners to move to the accommodation for their transitioned gender. Giving evidence to the EHRCJ Committee, the Scottish Prison Service said that such transfer requests are assessed on the basis of potential risk, and are not based on whether the prisoner has a GRC.

The bill does not affect medical treatment pathways that some trans people use. Giving evidence to the EHRCJ Committee, the clinical lead for the National Gender Identity Clinical Network Scotland confirmed that having a GRC does not make a significant difference to a trans person's ability to receive treatment.

The bill will not affect the quality of statistical data. The proportion of trans people is very small (about 0.5%). Where data is needed on biological sex characteristics, such as for medical screening, that can be requested, and in other cases, such as the Census, sex data is based on self-declaration and trans people are advised that they can state their transitioned gender whether or not they have a GRC.

How could the bill be improved?

We strongly support the general principles of the Bill. It would significantly improve the current process for trans men and women applying for a Gender Recognition Certificate. It would move Scotland from having a system that is long, complex, highly medicalised and that requires the evidence of others to recognise trans people, to one that is much quicker, simpler, de-medicalised and based on self-declaration.

The Bill will mean that trans people who at present do not have full recognition of their transitioned gender will have the reassurance and peace of mind of that recognition, and will know that Scotland respects their identity. By having consistent documentation, their privacy will be better protected and they will be at less risk of harassment and discrimination.

However, some key areas that could still be strengthened in the Bill include:

- New section 8S, in section 9 of the bill, allows a 'person with an interest' to apply to the Sheriff Court to revoke a GRC on the grounds that it was obtained fraudulently. Those able to make an application are defined much more widely than in the current GRA, which only allows a spouse / civil partner and the Secretary of State to apply. We have serious concerns that section 8S will result in vexatious applications to the Court, simply where a family member objects to a person receiving a GRC .
- The three month 'reflection period' is an unusual requirement in a self-declaration system: only two jurisdictions have one. We think this should be removed, or at the very least, should be able to be waived where a person is making an application at the end of their life, and would like to obtain a GRC before their death.
- The Bill includes no recognition for non-binary trans people, who make up a significant portion of the trans community. If this is not possible at this time, the Bill should include a commitment to make significant progress on non-binary legal recognition in the near future.
- The Bill requires that a person be 'ordinarily resident' in Scotland to apply for a GRC. We are concerned that this may make it impossible for those seeking asylum to apply, while they are living in Scotland and waiting to learn if they have been successful in their claim. Some refugees will be fleeing transphobic persecution, or will have been unable to update their documents in their country of origin. They should be able to apply for a GRC when living in Scotland.