

# **Review of the Gender Recognition Act 2004**

**A Consultation**

**November 2017**



**Scottish Government**  
Riaghaltas na h-Alba  
gov.scot

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## Ministerial foreword



The Gender Recognition Act 2004 allows transgender people to apply to the Gender Recognition Panel to obtain legal recognition of their acquired gender.

At the time, the 2004 Act was seen as ground-breaking. But it is now out of date. The Scottish Government believes the 2004 Act needs to be reformed and simplified. The requirements laid down in the 2004 Act are too intrusive and onerous.

Our proposed reforms include removing requirements for applicants to provide medical evidence and to have lived in their acquired gender for two years before applying.

Some requirements would remain, such as applicants having to provide a statutory declaration to confirm they fully understand the implications of their application and intend to live in their acquired gender for the rest of their lives.

The 2004 Act extends across the United Kingdom. However, gender recognition is a devolved matter. As a result, legislation in this area is within the competence of the Scottish Parliament.

We will though work closely with the UK Government on any potential consequential changes needed to reserved or cross-border legislation. For example, legislation may be needed to ensure mutual acceptance of Gender Recognition Certificates across the UK.

This consultation proposes that the minimum age for applying for legal gender recognition should be reduced from 18 to 16. That is in line with the law in Scotland generally which provides rights for people at age 16 and protections up to age 18.

The consultation also discusses what arrangements should be put in place in relation to applications by, or on behalf of, those aged under 16. And it

seeks views on what recognition should be given to non-binary people, who do not identify as either male or female. In both of these areas, the consultation outlines a number of potential options, and seeks views.

Reform of the 2004 Act is one of the major equality priorities for the Scottish Government. This consultation, with its associated partial Impact Assessments, carefully analyses the issues. I look forward to the responses.

A handwritten signature in black ink, appearing to read 'Angela Constance', written in a cursive style.

**ANGELA CONSTANCE**  
**Cabinet Secretary for Communities, Social Security and Equalities**

## Glossary of terms

“2004 Act” – the Gender Recognition Act 2004.

“acquired gender” – the 2004 Act describes this as the gender (either the “male gender” or the “female gender”) in which an applicant is living and seeking recognition.

“devolved” – a matter devolved to the Scottish Parliament (for example marriage law).

“gender dysphoria” – used to describe when a person experiences discomfort or distress because there is a mismatch between the sex they were assigned at birth and their gender identity.

“gender identity” – a person’s internal sense of self and how they see themselves in terms of being a man or a woman, or being somewhere in between or beyond these categories (see non-binary below).

“GRC” – a gender recognition certificate. Under the 2004 Act, a full GRC provides legal recognition of an applicant’s acquired gender. When a GRC is issued under the 2004 Act, the applicant’s legal sex also changes to male or female.

“Gender Recognition Panel” – deals with applications for legal gender recognition made under the Gender Recognition Act 2004.

“intersex” – a general term used for a variety of physical differences in which a person is born with a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male.

“non-binary” – an umbrella term for people who do not identify as men or women.

“reserved” – a matter reserved to Westminster (for example pensions).

“transgender” or “trans” – umbrella terms used to describe a diverse range of people who find that their gender does not fully correspond with the sex they were assigned at birth. Non-binary people can also be included under the trans umbrella, although some may not consider themselves as trans.

## Part 1. Introduction and how to respond to this consultation

1.01. The 2004 Act allows transgender people aged 18 and over to apply for legal recognition of their acquired gender and to change their legal sex accordingly.

1.02. This consultation seeks views on reforming the 2004 Act. The Scottish Government proposes to streamline the process for obtaining legal recognition and also to allow people aged 16 and over to apply. We are also seeking views about the options for people under 16 and for recognition of non-binary people. This consultation is about the legal process of obtaining legal gender recognition: it is not about the services provided in NHS Scotland to transgender people.

1.03. The Scottish Government has also committed to seeking views about how we should address the issues experienced by intersex people. There is a separate consultation for this purpose, which will be published at <http://consult.scotland.gov.uk/>.

### Why we are consulting

1.04. The Programme for Government 2016-2017<sup>1</sup> and Action 13 of the Fairer Scotland Action Plan<sup>2</sup> set out the Scottish Government's commitment to consult on the reform of the Gender Recognition Act.

1.05. Consultation is an essential part of the policy-making process. We will consider the views expressed in response to this consultation along with other available evidence to help inform the Scottish Government's decisions.

### Responding to this consultation

1.06. We are inviting responses to this consultation by **5pm on 1 March 2018**.

1.07. Please respond to this consultation using the Scottish Government's consultation platform, Citizen Space. You can view and respond to this consultation online at: <https://consult.scotland.gov.uk/family-law/review-of-the-gender-recognition-act-2004>. You can save and return to your responses while the consultation is still open. Please ensure that you submit your consultation response before 5pm on the closing date, 1 March 2018.

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<sup>1</sup> At <http://www.gov.scot/programme2016>.

<sup>2</sup> At <http://www.gov.scot/Publications/2016/10/9964/7>.

1.08. If you are unable to respond online using Citizen Space, please submit your response by post. You must complete and return the Respondent Information Form at Annex A (see “Handling your Response” below) with your response. You can answer the Consultation Questions using Annex B. Send your response and the completed Respondent Information Form to:

Gender Recognition Review  
Room GW-15  
St. Andrew’s House  
Regent Road  
Edinburgh  
EH1 3DG

1.09. We will not accept responses submitted by email.

### **Handling your response**

1.10. Please indicate how you wish your response to be handled and, in particular, whether you are happy for your response to be published.

1.11. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

1.12. If the response comes from an organisation, we will indicate that the organisation has responded to the consultation.

1.13. The Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

### **Next steps in the process**

1.14. Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, or offensive material, we will make responses available to the public at <http://consult.scotland.gov.uk>. If you use Citizen Space to respond, you will receive a copy of your response by email.

1.15. Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so.

## Comments and complaints

1.16. If you have any comments about how this consultation exercise has been conducted, please send them by email to [family.law@gov.scot](mailto:family.law@gov.scot) or by hard copy to the address at paragraph 1.08 above.

## Scottish Government consultation process

1.17. Consultation is an essential part of the policy making process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

1.18. You can find Scottish Government consultations online: <http://consult.scotland.gov.uk>. Each consultation details the issues under consideration, as well as a way for you to give us your views.

1.19. Consultations may involve seeking views in a number of different ways, such as public meetings, focus groups, or other online methods such as Dialogue (<https://www.ideas.gov.scot>).

1.20. Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented.

1.21. While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.



## Part 2. The Gender Recognition Act 2004

2.01. The 2004 Act is UK-wide legislation.

2.02. The process of applying for legal recognition of the gender with which a person identifies is a devolved matter that the Scottish Parliament can legislate for. There are some reserved areas impacting on gender recognition where responsibility is largely with Westminster.

2.03. The Scottish Parliament agreed in 2004, through a Sewel Motion<sup>3</sup>, that Westminster could legislate for Scotland, in respect of the provisions relating to devolved matters in the 2004 Act.

### How gender recognition works under the 2004 Act

2.04. The 2004 Act permits a person aged 18 or over to seek legal recognition in their acquired gender. There are three routes or “tracks” under the 2004 Act by which a person aged 18 and over can seek legal recognition of their acquired gender: the standard, alternative and overseas tracks. The standard track is the one which is used most often.<sup>4</sup>

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<sup>3</sup> These are now known as legislative consent motions. The Gender Recognition Bill Motion can be found at the URL below.

<http://www.gov.scot/About/Government/Sewel/SessionTwo/GenderRecognition>.

<sup>4</sup> In 2016-2017, 338 of the 364 applications received were made using the standard track. Source is <https://www.gov.uk/government/statistics/tribunals-and-gender-recognitions-certificates-statistics-quarterly-january-to-march-2017-and-2016-to-2017>.

2.05. An applicant under the standard track must, in addition to completing and submitting an application form:<sup>5</sup>

- satisfy the Gender Recognition Panel that they have, or have had, gender dysphoria and produce two medical reports detailing this diagnosis;
- satisfy the Gender Recognition Panel that they have lived in the acquired gender throughout a period of two years ending with the date on which the application is made. The Gender Recognition Panel's guidance indicates that evidence demonstrating this such as a passport, driving licence, pay slips, or utility bills, should accompany the application; and
- make a statutory declaration before a person authorised to take oaths that they have lived in their acquired gender throughout the period of two years ending with the date of the application and intend to live in their acquired gender until their death.<sup>6</sup>

2.06. Annex C contains more information about the 2004 Act including the alternative and overseas tracks.

2.07. Applications are considered by the Gender Recognition Panel. The panel has legal and medical members and is supported by an administrative team from HM Courts and Tribunals Service. If the Gender Recognition Panel are satisfied that the application meets the requirements of the 2004 Act then they will issue a full GRC.<sup>7</sup>

2.08. In terms of section 9(1) of the 2004 Act, when a person is issued with a full GRC the effect is that:

“the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).”

2.09. When a person is issued with a full GRC their legal sex changes.

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<sup>5</sup> The standard track application form can be found at the URL below.  
<http://formfinder.hmctsformfinder.justice.gov.uk/t450-eng.pdf>

<sup>6</sup> The wording of the required statutory declarations differ depending on whether the applicant is single, married or in a civil partnership.

<sup>7</sup> Sometimes the Gender Recognition Panel can only issue an interim GRC, which does not give legal recognition. Where an applicant is in a Scottish marriage or a marriage constituted in England and Wales, but their spouse does not consent to the application, then the Gender Recognition Panel can only issue an interim GRC. If only one of the parties to a civil partnership is applying, then the Gender Recognition Panel can only issue an interim certificate.

2.10. If the applicant's birth or adoption<sup>8</sup> was registered in Scotland, the Registrar General for Scotland, who is responsible for the Register of Births, is then advised that a full GRC has been issued to that person. The Registrar General must then make an entry in the Gender Recognition Register (GRR), which was created by the 2004 Act. The GRR is not open to inspection by the public.

2.11. Once the entry in the GRR is complete, the Registrar General must then issue the successful applicant with a new birth certificate that reflects their new legal sex. Their new birth certificate does not disclose that the information is taken from the GRR and otherwise appears to be the same as an extract from the Register of Births.

2.12. If the successful applicant was married in Scotland, the Registrar General can also issue a new marriage certificate that reflects the change in the applicant's legal sex.<sup>9</sup> Similarly, if both the parties in a Scottish civil partnership obtain legal recognition of their acquired gender at the same time, they can obtain a new civil partnership certificate reflecting updated information.<sup>10</sup>

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<sup>8</sup> The 2004 Act, section 10(1) requires that, where there is a 'UK birth register entry' containing 'a record of the person's birth or adoption', a copy of a full GRC must be sent to the appropriate Registrar General holding the record.

<sup>9</sup> If the parties to the marriage register the marriage following legal recognition. See National Records of Scotland guidance at: <https://www.nrscotland.gov.uk/files//registration/registration-of-marriages-and-civil-partnerships-following-gender-recognition-guidance-for-applicants.pdf>.

<sup>10</sup> If the parties to the civil partnership then register the civil partnership following legal recognition. See National Records of Scotland guidance at: <https://www.nrscotland.gov.uk/files//registration/registration-of-marriages-and-civil-partnerships-following-gender-recognition-guidance-for-applicants.pdf>.

### Part 3. Reforming the legal gender recognition system in Scotland

3.01. The Scottish Government knows that concerns have been expressed that the 2004 Act is now in need of reform.

3.02. For instance, the Westminster Women and Equalities Select Committee's Report on Transgender Equality<sup>11</sup> published in 2016 said:

“While we recognise the importance of the Gender Recognition Act as pioneering legislation when it was passed, it is clear that the Act is now dated.”

3.03. The Committee's Report recommended that:

“In place of the present medicalised, quasi-judicial application process, an administrative process must be developed, centred on the wishes of the individual applicant, rather than on intensive analysis by doctors and lawyers”.

3.04. In particular, the Committee heard concerns expressed about the requirement on applicants using the standard or alternative tracks to produce medical evidence and evidence to satisfy the Gender Recognition Panel that they have lived in their acquired gender throughout the period required.<sup>12</sup>

3.05. Under the standard track, an applicant must include two medical reports with their application.<sup>13</sup> One report must be from a practitioner in the field of gender dysphoria who is either a registered medical practitioner or a registered psychologist. This report must include details of the applicant's diagnosis of gender dysphoria. The second report must be provided by a registered medical practitioner who may, but need not, practise in the field of gender dysphoria.

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<sup>11</sup> At <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>.

<sup>12</sup> The period is two years if the applicant is applying using the standard track (2004 Act section 2(1)(b)) or under the alternative track a period of six years before 15 December 2014 (where the applicant is in a Scottish marriage or civil partnership) and has continued to live in the acquired gender until the date the application was made (2004 Act section 3C(4)(a) and (b)).

<sup>13</sup> 2004 Act, sections 3(1) and (2).

3.06. Where an applicant has undergone or is undergoing treatment for the purpose of modifying their sexual characteristics or such treatment has been prescribed or planned for them, then one of the reports must also include details of that treatment. Guidance issued by the Gender Recognition Panel advises that if an applicant has not had surgery that the second report must explain why.<sup>14</sup>

3.07. Since the 2004 Act came into effect, there have been some significant international developments. An increased emphasis is now placed on the rights of transgender people to self-determination, privacy and dignity including the process by which they may obtain legal gender recognition.

3.08. In 2006, the non-binding Yogyakarta Principles were agreed by a wide-ranging group of human rights law experts, representatives of non-governmental organisations and others. They set out existing international human rights law and principles, as the authors believe they should be applied to the treatment of lesbian, gay, bisexual and transgender people.<sup>15</sup> Principle 3 asks countries to:

“take all necessary ... measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex including birth certificates ... reflect the person’s profound self-defined gender identity” and to

“ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned”.

3.09. In 2015, Resolution 2048 of the Parliamentary Assembly of the Council of Europe<sup>16</sup> (Resolution 2048) expressed concerns that requiring someone seeking legal recognition of their acquired gender to have been medically treated or diagnosed is a breach of their right to respect for their private life under Article 8 of the ECHR. The resolution calls on all Member States to:

“develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards ... and other similar documents”.

3.10. The view of the Scottish Government is that the 2004 Act requirements are unnecessarily intrusive and do not reflect the best practice now embodied in the Yogyakarta Principles and Resolution 2048.

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<sup>14</sup> At <http://formfinder.hmctsformfinder.justice.gov.uk/t452-eng.pdf>.

<sup>15</sup> See <http://www.yogyakartaprinciples.org/>.

<sup>16</sup> At <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21736&lang=en>.

3.11. We have identified the systems of legal gender recognition currently being used in 16 other countries or territories and compared those systems with the best practice principles embodied in Yogyakarta and Resolution 2048. Annex D contains further information about these systems.

3.12. There are three broad models in use: the treatment model, the assessment model, and the self-declaration model.

#### Treatment model

3.13. The 'treatment model' requires an applicant to have had hormone treatment or to have been sterilised or had surgery. The 2004 Act did not adopt this model; it is entirely at odds with best practice.

3.14. That the treatment model is also legally unacceptable has been affirmed in a recent decision of the European Court of Human Rights.

3.15. The court confirmed that a requirement to demonstrate the irreversible nature of a change of appearance (such as a requirement for sterilisation or surgery) was a breach of Article 8 of the European Convention of Human Rights.<sup>17</sup>

#### Assessment model

3.16. The arrangements under the 2004 Act are a variation on the 'assessment model'. Under this model an applicant's evidence about their gender identity is supported by third party evidence from a doctor or psychologist and is considered by either a court or an administrative body.

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<sup>17</sup> The case is AP, Garçon and Nicot v France [2017] ECHR 338 (06 April 2017).

3.17. An example of a territory using an assessment model different from the 2004 Act arrangements – and where a medical diagnosis is not required – is the Canadian province of British Columbia. From 2014, British Columbia allowed a person whose birth was registered there to submit an application to the Vital Statistics Agency. The applicant can request a change in their birth certificate from female to male or male to female. The applicant must submit:

- an application form<sup>18</sup> containing a personal statement that they have assumed, identify with and intend to maintain the gender identity corresponding with their requested change; and
- a statement from a doctor or psychologist confirming the applicant's gender identity.

3.18. Another example of a variation on the assessment model is the legal gender recognition process adopted in France in 2017. This is court based. The applicant must provide supporting evidence such as evidence that they appear publicly to belong to the sex in which they want to be legally recognised.

3.19. These assessment models may not require applicants to demonstrate a medical diagnosis, but access to legal recognition in British Columbia and France does require applicants to demonstrate that their gender identity conforms to the sex in which they wish to appear in their birth records.

#### Self-declaration model

3.20. Under the 'self-declaration model' the decision on whether an applicant can be recognised is entirely based on a declaration or statement of the applicant, sometimes with a period of reflection before full recognition is given and/or limitations on the number of occasions on which recognition can be obtained.

3.21. Countries that have adopted the self-declaration model include Norway, Denmark, Malta, Colombia, Argentina, and the Republic of Ireland.

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<sup>18</sup> The forms can be seen at <http://www2.gov.bc.ca/gov/content/life-events/births-adoptions/births/birth-certificates/change-of-gender-designation-on-birth-certificates>.

3.22. The Republic of Ireland implemented its self-declaration system in 2015. A person whose birth or adoption was registered there, or who is ordinarily resident there, can have their preferred gender as a man or woman recognised and consequently change their legal sex.<sup>19</sup> They must submit an application form incorporating a statutory declaration<sup>20</sup> to the Department of Social Protection. The applicant must declare that they:

- have a settled and solemn intention of living in the preferred gender for the rest of their life;
- understand the consequences of the application; and
- make the application of their own free will.

3.23. In the Republic of Ireland, the applicant's acquired gender is known as their "preferred gender".

3.24. The statutory declaration must be witnessed a person authorised to take statutory declarations in the Republic of Ireland, such as a notary public or commissioner for oaths.

3.25. Denmark has a slight variation on this arrangement. A Danish transgender person may change their sex as recorded in the Danish Central Persons' Register on the basis of their written statement of 'a sense of belonging to the other sex'. This statement does not require any additional witnessing or other authentication. However, their new legal sex is not recognised until they have re-confirmed their application after a reflection period of six months.

#### Initial view of the Scottish Government

3.26. The Scottish Government considers that, subject to views expressed during this consultation, Scotland should adopt a self-declaration system for legal gender recognition. This would mean that applicants under a Scottish system would not have to demonstrate a diagnosis of gender dysphoria or that they had lived for a period in their acquired gender. This would align Scotland with the best international practice demonstrated in countries who have already successfully adopted self-declaration systems. We would be ensuring our compliance with Resolution 2048. And the arrangements would be less intrusive and onerous from the perspective of applicants.

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<sup>19</sup> The effect of recognition of their gender is to change their legal sex, per the Gender Recognition Act 2015, section 18(1).

<sup>20</sup> The statutory application form used in the Republic of Ireland can be seen at <http://www.welfare.ie/en/pdf/GRC1.pdf>.



3.27. In one aspect, we think that Scotland could build on the existing arrangements in the 2004 Act. All applications made under the 2004 Act must be accompanied by a statutory declaration,<sup>21</sup> witnessed by a person authorised to administer oaths and which includes a statement that the applicant intends to live in their acquired gender until death. In Scotland, oaths may be administered by a notary public or a justice of the peace. Paragraphs 3.30 to 3.34 discuss retaining the requirement for a statutory declaration under the proposed self-declaration system.

3.28. Streamlining the existing processes would also allow for applications to be considered by an administrative body, rather than by a tribunal such as the Gender Recognition Panel. The proposed self-declaration system could be administered by officials based in the Scottish Government or by officials at National Records of Scotland. The Registrar General for Scotland (the Registrar General) who heads National Records of Scotland is responsible for the Register of Births and the Gender Recognition Register under the 2004 Act.

3.29. Powers could be taken so that the Scottish Government or National Records of Scotland could charge fees for applications. There would be full and careful consultation before any such fees were introduced and on the level of any such fees.

### Question 1

The initial view of Scottish Government is that applicants for legal gender recognition should no longer need to produce medical evidence or evidence that they have lived in their acquired gender for a defined period. The Scottish Government proposes to bring forward legislation to introduce a self-declaratory system for legal gender recognition instead.

Do you agree or disagree with this proposal?

Agree

Disagree

Don't know

If you want, you can give reasons for your answer, or make comments.

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<sup>21</sup> The required statutory declarations under the 2004 Act arrangements take different forms are in depending on whether an applicant is married, in a civil partnership or is single. They can be seen within the guidance at the URL below.  
<https://www.gov.uk/apply-gender-recognition-certificate/documents-you-must-provide>.

## Statutory declaration

3.30. Choosing to apply for legal recognition of your acquired gender is an important life decision. This needs to be reflected in any new self-declaration system for obtaining legal gender recognition.

3.31. A requirement to submit a statutory declaration would demonstrate that applicants intend to permanently live in their acquired gender. Therefore, the Scottish Government considers that applicants under the proposed system of legal gender recognition should have to provide a statutory declaration stating that they:

- are applying of their own free will;
- understand the consequences of obtaining legal gender recognition; and
- intend to live in their acquired gender until death.

3.32. The Scottish Government's research into countries using self-declaration systems of legal gender recognition has not identified evidence of false or frivolous statements being made by applicants. However, under the proposed self-declaration system for legal gender recognition, if an applicant were to make a statement in a statutory declaration that is false in a material particular, this would be an offence.<sup>22</sup>

3.33. Another option would be a period of reflection, as used in Denmark and Belgium. Under this applicants would apply under a self-declaration system but would also be required to confirm their application again after a defined period of time. A full GRC would then be granted.

3.34. In Denmark, although a false statement is also a criminal offence, their reflection period is 6 months. In Belgium, the applicant must re-confirm their application after a minimum of three months. In both countries, an applicant is provided with information about the consequences of legal gender recognition during the reflection period. The purpose of a reflection period appears to be to reduce the risk that an applicant might change their mind after getting legal recognition in their acquired gender.

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<sup>22</sup> Criminal Law (Consolidation) (Scotland) Act 1995, section 44(2) at: <http://www.legislation.gov.uk/ukpga/1995/39/section/44>.

## Question 2

Should applicants to the proposed gender recognition system in Scotland have to provide a statutory declaration confirming they know what they are doing and intend to live in their acquired gender until death?

Yes   
No   
Don't know

If you want, you can give reasons for your answer or make comments.

### Number of times a person can seek legal recognition

3.35. The 2004 Act does not restrict the number of times that a person can apply for legal recognition of their acquired gender.

3.36. Countries with self-declaration systems for legal gender recognition have different approaches to limiting the number of times that a person can seek to change their legal sex. Annex D contains further information about these arrangements.

3.37. Colombia permits a person to change their sex in the Civil Registry of Birth on a total of two occasions, and their requests to do so must be more than 10 years apart. In Malta, subsequent requests to amend the Civil Registry of Birth must be considered by a court, unless on the prior application the applicant was a minor.

3.38. It is possible to change your name in Scotland without changing the content of the Register of Births. However, if you wish your birth certificate to reflect your name change, you can only do so on a limited number of occasions. A person aged 16 or over is permitted to record a change of forename on one occasion and their surname on three occasions in the Register of Births. In respect of a surname change, five years must elapse after one change is recorded before another may be recorded.<sup>23</sup> There are different rules for people under 16.

3.39. Notwithstanding the proposed requirement for applicants to submit a statutory declaration, there may be concerns that applications might be submitted frivolously. Limiting the number of times that a person may apply for recognition of their acquired gender may reduce that risk.

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<sup>23</sup> Registration of Births, Deaths and Marriages (Scotland) 1965, section 43(5) at <http://www.legislation.gov.uk/ukpga/1965/49/section/43>.

### Question 3

Should there be a limit on the number of times a person can get legal gender recognition?

Yes

No

Don't know

If you want, you can give reasons for your answer or make comments.

### Requirements in relation to an applicant's place of birth or residence

3.40. In general, applicants need not have been born in the UK or be ordinarily resident in the UK to use the standard or overseas tracks. However, only people ordinarily resident in Scotland, England and Wales can use the alternative track to apply for legal recognition under the 2004 Act<sup>24</sup>. The Scottish Government's intention is that under the proposed new self-declaration system, there would just be one way of applying, although, as discussed elsewhere in this consultation, distinct arrangements may be needed in respect of people under 16.

3.41. The question arises whether the proposed self-declaration system should:

- be open only to people whose birth or adoption was registered in Scotland and to people who are resident in Scotland; or
- be open to anybody in the world.

3.42. A key benefit of a full GRC for an applicant whose birth was registered in the United Kingdom is that they will be issued with a new birth certificate. If their birth was registered elsewhere, whether they can obtain a new birth certificate upon issue of a full GRC will depend on the laws of that country or territory.

3.43. Other countries restrict who may apply for recognition under their systems. In the Republic of Ireland, an applicant's birth or adoption must have been registered there<sup>25</sup> or they must be ordinarily resident there.<sup>26</sup>

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<sup>24</sup> 2004 Act, section 3A(6).

<sup>25</sup> Including a person whose birth is recorded either in a foreign births entry book or the foreign births register provided under the Irish Nationality and Citizenship Act 1956.

3.44. In Denmark, legal recognition is obtained by an applicant applying for an amendment to their sex shown in the Danish Central Person's Register. Only people legally resident in Denmark can have an entry in the Central Person's Register.<sup>27</sup>

3.45. One option for the proposed self-declaration system would be to limit access to people whose birth or adoption was registered here as well as to people who are resident in Scotland at the time of their application. However, this could exclude some people who might wish their acquired gender to be recognised here. An example might be someone who plans to move to Scotland.

3.46. At the moment, a person who has obtained legal gender recognition in another country or territory outwith the UK can apply to the UK Gender Recognition Panel for a UK GRC. The applicant must have obtained this legal gender recognition in an "approved country or territory". This means a country or territory prescribed by order made by the Secretary of State after consulting the Scottish Ministers and the Department of Finance and Personnel in Northern Ireland.<sup>28</sup> In 2016-2017, the Gender Recognition Panel received 25 applications submitted using the overseas track out of a total of 364 applications using all tracks.<sup>29</sup>

3.47. In future, the Scottish Government would intend that automatic recognition should be granted in Scotland where a person has been recognised in their acquired gender in another country or elsewhere in the UK. Paragraphs 6.29 and 6.30 consider this in more detail. On that basis, the Scottish Government's initial view is that, subject to the views expressed during this consultation, applications to the Scottish self-declaration system should be restricted to those whose birth or adoption was registered in Scotland and to people who are resident here.

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<sup>26</sup> The Gender Recognition Act 2015, section 2, defines ordinarily resident as ordinarily resident throughout the period of one year ending on the date that the person applies for a GRC.

<sup>27</sup> To have an entry in the Central Persons Register, your stay in Denmark must be for more than three months, you must reside in Denmark and be legally permitted to do so (e.g. have a residence permit if you are not a Danish citizen).

<sup>28</sup> See The Gender Recognition (Approved Countries and Territories) Order 2011 at <http://www.legislation.gov.uk/uksi/2011/1630/contents/made>.

<sup>29</sup> Source is Table 2 at <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2017-and-2016-to-2017>.

#### Question 4

If the Scottish Government takes forward legislation to adopt a self-declaration system for legal gender recognition, should this arrangement be open:

(A) only to people whose birth or adoption was registered in Scotland, or who are resident in Scotland?

or

(B) to everyone?

or

(C) Don't know

If you want, you can give reasons for your answer or make comments.

## Part 4. Age of applicants

4.01. The minimum age at which a person may make an application at the moment under the 2004 Act is 18.

4.02. There is no consistent approach amongst countries with self-declaration systems of legal gender recognition in relation to people under 18.

4.03. When considering the options in this area, the Scottish Government has had regard to the United Nations Convention on the Rights of the Child (UNCRC).<sup>30</sup> We have included a partial Child Rights and Wellbeing Impact Assessment (CRWIA) at Annex M.

### 16 and 17 year olds

4.04. The Scottish Government considers that people aged 16 or older should be able to apply for legal recognition of their acquired gender using the proposed self-declaration process.

4.05. There is clear evidence that people aged 16 do live full time in their acquired gender and want this to be legally recognised. For example, the Women and Equalities Select Committee heard evidence from LGBT Youth Scotland to this effect. In the Republic of Ireland, 8 people aged 16 and 17 have received a GRC<sup>31</sup> after obtaining a court order permitting them to apply under their self-declaration system. The court in the Republic of Ireland is required to consider evidence about the young person's transition to their acquired gender.

4.06. This proposed change would also be consistent with the age at which young people can exercise other rights under the law in Scotland. 16 and 17 year olds are able to make a number of important life decisions without parental involvement or consent. These include:

- getting married or entering a civil partnership;
- recording a change of name; and
- voting in Scottish elections.

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<sup>30</sup> The Scottish Ministers are also under a duty to keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements in terms of section 1 of the Children and Young People (Scotland) Act 2014.

<sup>31</sup> Source is the Department of Social Protection.

4.07. Annex E contains further information about the ages at which young people get rights and when they are presumed to be old and mature enough to act.

#### Question 5

(This question relates to the reduction of the minimum age of applicants for legal gender recognition to those aged 16 and over from the current age of 18. Question 6 will ask your views on the options for people younger than 16.)

The Scottish Government proposes that people aged 16 and 17 should be able to apply for and obtain legal recognition of their acquired gender. Do you agree or disagree?

Agree   
Disagree   
Don't know

If you want, you can give reasons for your answer or add comments.

#### People aged under 16

4.08. The Scottish Government's view is that there is a careful balance to be struck in relation to people under 16. On the one hand, we should treat children with dignity and respect, giving weight to their views and wishes in line with their individual capacity. On the other hand, we should ensure that children have the right protection and care.

4.09. People who are under 16 years of age can act on their own behalf in relation to a range of matters. Annex E contains further information about this. The CRWIA at Annex M refers to research evidence about children who identify as transgender.

4.10. The Scottish Government considers that there are five broad options in relation to people under 16 being able to apply for legal gender recognition.



## Under 16s - option 1 - nothing for those under 16

4.11. Under this option, applicants would have to be at least 16 to apply for legal recognition of their acquired gender. This would be straightforward, but would stop those under 16 with a clear view of their gender identity from obtaining legal gender recognition.

## Under 16s - option 2 - court process

4.12. Option 2 would be for Scotland to adopt a court based process.

4.13. The courts in Scotland deal regularly with decisions involving children. In keeping with Article 3 of the UNCRC, court decisions in Scotland relating to matters such as parental responsibilities and rights (PRRs) are child-centred. In reaching a decision, the court must regard the welfare of the child concerns as its paramount consideration.<sup>32</sup> Further information about PRRs is in Annex F.

4.14. Any court based process, whether instigated by a child's parents or by the child themselves, would focus on the assessment of the child's welfare. We would also consider specifying the matters the court would have to have regard to in determining what was in the child's best interests.

4.15. Under this option, a court action could be raised by the child if they had sufficient capacity to do so, or if they did not, by a person or persons who had PRRs for them acting on their behalf.<sup>33</sup>

4.16. In civil matters, such as applying for a court order in relation to PRRs, a person under 16 has legal capacity to instruct a solicitor where the person has a general understanding of what it means to do so. A person of 12 and over is presumed to be of sufficient age and maturity to be capable of instructing a solicitor on their own behalf.<sup>34</sup>

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<sup>32</sup> Children (Scotland) Act 1995, section 11(7).

<sup>33</sup> Where a child has capacity, they can choose to allow their parents to act on their behalf.

<sup>34</sup> Age of Legal Capacity (Scotland) Act 1991, section 2(4A).

4.17. Where the action was raised by a person with PRRs for the child, the child's views would require to be considered. Under the current law, where a court has been asked to make an order in relation to PRRs, the court must, taking into account the child's age and maturity, and so far as practicable:

- give the child an opportunity to indicate whether they wish to express a view;
- If the child does so wish, give the child an opportunity to express them; and
- have regard to such views as the child may express.

4.18. At age 12 and over, a child is presumed to be old and mature enough to form such a view.<sup>35</sup>

4.19. Malta has a court based process of legal gender recognition for those under 18. Those with parental authority for a child may file an application in the court. The court must consider the best interests of the child and give due weight to the views of the child depending on their age and maturity.

4.20. In the Republic of Ireland, applications cannot be made by those aged under 16. However, applications by 16 and 17 year olds require to be accompanied by a court order permitting the application to be made. The court may only grant the order if the child's parents, surviving parent or guardian consents. Two medical certificates must also be produced to the court. The medical certificates must confirm that:

- the child has a sufficient degree of maturity to decide to apply for gender recognition;
- the child is aware of, has considered and fully understands, the consequences of that decision;
- the child's decision is freely and independently made; and
- the child has transitioned, or is transitioning to, their preferred gender.

4.21. Under option 2, a child who may not have reached puberty might apply to the court or a person with PRRs for such a child might apply.

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<sup>35</sup> Children (Scotland) Act 1995, section 11(10).

## Under 16s – option 3 – parental application

4.22. Option 3 would be to permit an application to be made on behalf of a person under 16 by someone with PRRs for them. Typically, this would be the child's parents. Further information about PRRs, when parents get them and who else may have PRRs is in Annex F.

4.23. Usually, where more than one person has parental rights in relation to a child, each can exercise their rights without the consent of the other or any of the others.<sup>36</sup>

4.24. Where a person with PRRs is reaching a major decision regarding the fulfilling or exercise of PRRs, the person is under a duty to have regard to any views the child expresses, taking account of the child's age and maturity. The person making the decision must also have regard to any views expressed by any other person with PRRs for the child concerned.<sup>37</sup> The Scottish Government considers that seeking legal recognition in an acquired gender is an example of a major decision.

4.25. One possibility under this option would be to require the application to be made by all parents with PRRs for a child. This would mean that a person who had PRRs for the child but was not their parent would not require to be involved. However, we would still expect the person(s) applying on the child's behalf to have regard to the views of such a person.

4.26. Another possibility under this option would be to require all people with PRRs to apply, not just a parent or parents with PRRs. This may mean that a local authority that had PRRs for a child would need to be involved in the application process.

4.27. If all the people who required to be involved in the application did not agree<sup>38</sup>, then a court order could be sought under existing arrangements. Section 11(1) of the Children (Scotland) Act 1995 allows the Sheriff Court or the Court of Session to make an order in relation to PRRs. The court could then make a decision based on the child's welfare.

4.28. There are some children for whom no one has PRRs. One option might be for a person who has an interest to obtain PRRs from the court and then apply for legal gender recognition on behalf of the child.

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<sup>36</sup> Children (Scotland) Act 1995, section 2(2).

<sup>37</sup> Children (Scotland) Act 1995, section 6

<sup>38</sup> Or where they could not be found

4.29. Other matters will require careful consideration:

- how best to ensure the child's views have been sought and considered before an application is made;
- if those with PRRs require to make a statutory declaration, the wording of that declaration;
- whether a person who has limited PRRs should be involved in the process or whether the person must have all PRRs for the child; and
- how the process would work if a local authority had PRRs for the child.

4.30. In summary, therefore, under this option all parents with PRRs (or, perhaps, everybody with PRRs) would have to apply, having had regard to the child's views. If there is a dispute amongst those with PRRs, an application could be made to the court to resolve the matter. There may be restrictions on the role of a person with limited PRRs.

4.31. Under this option, applications could be made on behalf of very young children, including both those who lack legal capacity and who have not reached puberty.

#### Under 16s - option 4 - minimum age of 12

4.32. Option 4 would permit children aged 12 and above to apply in the same way as those aged 16 or above.

4.33. This option would offer a clear test of who could apply for legal gender recognition.

4.34. However, this option would take no account of a child's capacity to take decisions nor their physical maturity.

4.35. In addition, this option would also allow a child or young person aged 12 to 15 to take an important life decision without any assistance or support from their family or others. People aged 12 to 15 should be adequately supported to make a decision about this aspect of their life.

4.36. The Scottish Government does not favour this option as it would allow a child to apply irrespective of their capacity to understand the nature and consequences of their decision.

## Under 16s – option 5 – application by capable child

4.37. Option 5 would permit a person under 16 to apply in the same manner as an adult, provided they had capacity to understand the consequences of recognition in their acquired gender.

4.38. Under this option, someone would have to test the child's capacity. This could potentially be done, for example, by a registered medical practitioner, or by a practising solicitor.

4.39. A person under 16 is considered to have the capacity to consent to any surgical, medical or dental procedure or treatment if, in the opinion of a qualified medical practitioner attending them, they are capable of understanding the nature and possible consequences of the procedure or treatment.<sup>39</sup>

4.40. A person under 16 has legal capacity to instruct a solicitor, in connection with any civil matter, where the person has a general understanding of what it means to do so. Someone aged 12 or more is presumed to be old and mature enough to have such understanding.<sup>40</sup>

4.41. Arrangements based on individual capacity would allow a sufficiently old and mature child to apply, even if their parents or other people with PRRs did not support their decision. This option would allow children who have sufficient legal capacity, but who may not have reached puberty, to apply.

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<sup>39</sup> Age of Legal Capacity (Scotland) Act 1991, section 2(4).

<sup>40</sup> Age of Legal Capacity (Scotland) Act 1991, section 2(4A).

### Question 6

Which of the identified options for children under 16 do you most favour? Please select only one answer.

Option 1 - do nothing for children under 16

Option 2 - court process

Option 3 - parental application

Option 4 - minimum age of 12

Option 5 - applications by capable children

None of these options

If you want, you can give reasons for your answer, add comments, or describe your preferred option if none of the options given reflects your views.

## Part 5. Marriage and Civil Partnership

### Scottish marriage

5.01. The Gender Recognition Panel can only issue a full Gender Recognition Certificate (a GRC, which gives legal recognition) to a married applicant if their spouse has confirmed that they are content to stay in the marriage.

5.02. If evidence of the non-applying spouse's consent is not submitted with the application for recognition, the Gender Recognition Panel may only issue an interim GRC.

5.03. Where the marriage is a Scottish marriage (that is, a marriage solemnised in Scotland) the party who is seeking recognition may then apply to the sheriff court for a full GRC.<sup>41</sup>

5.04. If an interim GRC has been issued, either of the parties to a marriage may also seek a divorce on that basis.<sup>42</sup>

5.05. The Scottish Government is aware of concerns about the requirement for the consent of a spouse in relation to an application for legal gender recognition under the 2004 Act. In particular, the requirement may give a transgender person's spouse inappropriate power to determine the transgender person's access to their legal rights.

5.06. The requirement for consent may, however, be seen by others as a reasonable balance between the rights of the transgender person to seek recognition of their acquired gender and those of their spouse to decide whether they want to stay in the marriage. Ultimately, under the 2004 Act arrangements, the spouse of a transgender person in a Scottish marriage cannot prevent them obtaining recognition. However, lack of consent may add time and cost to the process, since the transgender person will need either to apply for a full GRC from the sheriff court or to raise an action of divorce.

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<sup>41</sup> 2004 Act, section 4E.

<sup>42</sup> Divorce (Scotland) Act 1976, section 1(1)(b).

5.07. The Scottish Government is unaware of any applications to the sheriff court to issue a full GRC after an interim GRC has been issued by the Gender Recognition Panel. Between 2010 and 2016, there were seven divorces in Scotland on the ground that an interim GRC had been issued to one of the parties to the marriage.<sup>43</sup>

5.08. Other countries with self-declaration systems, such as the Republic of Ireland and Denmark, do not require a married transgender person to obtain the consent of their spouse to their application for recognition of their acquired gender.

#### Question 7

Should it be possible to apply for and obtain legal gender recognition without any need for spousal consent?

Yes   
No   
Don't know

If you want, you can give reasons for your answer or add comments.

5.09. If the requirement for consent were to be removed under the proposed self-declaration system, consideration would need to be given as to whether the spouse of a transgender person should be informed by the Scottish Government or National Records of Scotland of the transgender person's successful application to change their legal sex. This could only be done when the spouse can be found.

#### Scottish civil partnerships

5.10. Where one of the partners in a civil partnership registered in Scotland wants to be issued with a full GRC, the couple have two options. They may either:

- choose to change their civil partnership to a marriage; or
- end the civil partnership.

5.11. The couple cannot continue as civil partners because Scotland does not recognise mixed sex civil partnerships.

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<sup>43</sup> At <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/supptab1516>. Table 2 gives divorces granted by ground.



5.12. Civil partners can change their partnership to a marriage as a result of changes made by the Marriage and Civil Partnership (Scotland) Act 2014.<sup>44</sup>

5.13. If an applicant for legal gender recognition is still in a civil partnership when their application for legal gender recognition is made, the Gender Recognition Panel will issue an interim GRC.<sup>45</sup>

5.14. Where an interim GRC is issued to one of the parties in a civil partnership, this is a ground for dissolution of the partnership by either of the parties.<sup>46</sup> Between 2010 and 2016, there were no dissolutions of civil partnership on this basis.<sup>47</sup>

5.15. In 2016, 60 civil partnerships were registered in Scotland.<sup>48</sup>

5.16. In 2015, the Scottish Government published a consultation on civil partnership as part of our review of the Civil Partnership Act 2004.<sup>49</sup> We will announce our decision about the future of civil partnership shortly.

#### Question 8

Civil partnership is only available to same sex couples. This means that the civil partners cannot remain in their civil partnership if one of them wishes to obtain a full Gender Recognition Certificate.

Should they instead be allowed to remain in their civil partnership? This would mean that a woman and a man would be in the civil partnership.

Yes   
No   
Don't know

If you want, you can give reasons for your answer or add comments.

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<sup>44</sup> National Records of Scotland have published guidance on changing a civil partnership to a marriage at <https://www.nrscotland.gov.uk/registration/i-want-to-change-my-civil-partnership-into-a-marriage-how-do-i-go-about-it>.

<sup>45</sup> A full GRC can be issued to a partner in a civil partnership provided the other partner is also being issued with a GRC.

<sup>46</sup> Civil Partnership Act 2004, section 117(2).

<sup>47</sup> At <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/supptab1516>. Table 3 gives dissolutions by ground.

<sup>48</sup> At <https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/marriages-and-civil-partnerships/marriages-time-series-data>.

<sup>49</sup> The consultation is at <http://www.gov.scot/Topics/Justice/law/17867/cpreview>.

5.17. At the moment, it is a ground of divorce of a marriage and dissolution of a civil partnership for either party if an interim GRC has been issued by the Gender Recognition Panel.

5.18. Interim GRCs may no longer be needed under the proposed self-declaration system of gender recognition. At the moment, interim GRCs are issued by the Gender Recognition Panel:

- where the applicant is a party to a marriage and their spouse has not consented to the application for gender recognition; or
- if one of the partners in a civil partnership is applying but the other is not.

5.19. At paragraphs 5.01 to 5.08, we discuss whether the need for a married applicant seeking legal recognition of their acquired gender to obtain consent from their spouse should be removed. At paragraphs 5.10 to 5.15, we discuss whether mixed sex civil partnership should be recognised for the purpose of allowing one partner to apply for legal gender recognition without the partnership being changed to marriage or dissolved. Clearly, if interim GRCs are no longer used under a new system of gender recognition, then the existing arrangements require to be amended.

5.20. The other ground for divorce or dissolution of a civil partnership is that the marriage or civil partnership has broken down irretrievably.<sup>50</sup> This can be demonstrated by living apart for one year and both parties consenting to the divorce or dissolution; living apart for two years; unreasonable behaviour or, in relation to marriage, adultery.

5.21. The Scottish Government's initial view is that there is no specific need for gender recognition to be a ground of divorce or dissolution. It appears to the Scottish government that the ground that the marriage or civil partnership has broken down irretrievably would be sufficient.

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<sup>50</sup> Divorce (Scotland) Act 1976, section 1(1)(a) and Civil Partnership Act 2004, section 117(2)(a).

Question 9

Should legal gender recognition stop being a ground of divorce or dissolution?

- Yes
- No
- Don't know

If you want, you can give reasons for your answer or add comments.

## Part 6. Other aspects of the 2004 Act

### Privacy issues

6.01. Section 22 of the 2004 Act is intended to protect the privacy of people who have applied for or who have obtained a GRC.

6.02. The provision makes it an offence for a person who has acquired “protected information” in an official capacity to disclose that information. Protected information is information about a person’s application for recognition in their acquired gender under the 2004 Act or about a successful applicant’s gender before it became the acquired gender.

6.03. There are exceptions, for example where disclosure of protected information is made for the purposes of crime prevention or detection, the social security system or pensions, or for the purpose of instituting court proceedings or otherwise for the purposes of court proceedings.

6.04. Scottish Ministers have made an order under section 22 for additional exceptions in relation to devolved matters.<sup>51</sup> The Gender Recognition (Disclosure of Information) (Scotland) Order 2005<sup>52</sup> provides that disclosure is not an offence where it is:

- for the purpose of obtaining legal advice;
- for the purpose of enabling a person to decide on the admission or appointment of the subject as a minister of religion;
- made to any one of a specified group of health professionals for medical purposes;
- made by or on behalf of a credit reference agency and is of information contained in an order of a court or tribunal; or
- made in relation to one of a specified group of bankruptcy or insolvency officeholders in order for them to perform their functions.

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<sup>51</sup> 2004 Act, section 22(5), (6) and (7).

<sup>52</sup> 2005, SSI 125 at <http://www.legislation.gov.uk/ssi/2005/125/contents/made>.

6.05. When the UK Parliament's Women and Equality Committee took evidence on transgender equality, it was argued that the exemption for protected information to be disclosed in court proceedings was being misused<sup>53</sup> and that exemptions in secondary legislation allowing disclosure to certain medical professionals required extension to psychologists too.<sup>54</sup>

6.06. Data protection is reserved, so changes in the effect of section 22 are matters that the Scottish Government may need to discuss with the UK Government.

#### Question 10

Are any changes to section 22 (prohibition on disclosure of information) necessary?

Yes   
No   
Don't know

If you answered Yes, describe the changes you consider are needed.

#### Equality Act 2010

6.07. The Equality Act 2010 (the 2010 Act) makes it unlawful to discriminate against persons who have certain "protected characteristics". One of these protected characteristics is "gender reassignment". The 2010 Act also makes other provision to promote and safeguard equality. It contains a number of exceptions. The 2010 Act is largely reserved. Annex G sets out the Scottish Parliament's legislative powers in respect of equal opportunities.

6.08. Increased recognition of non-binary people, discussed in Part 7 of this consultation, might require the Scottish Government to discuss with the UK Government whether any amendments are required to the 2010 Act.

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<sup>53</sup> Women and Equalities Select Committee Report on Transgender Equality at paragraph 76 onwards: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2015/transgender-equality/>.

<sup>54</sup> See evidence from the British Psychological Society and the British Association of Gender Identity Specialists at the links below.  
<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Women%20and%20Equalities/Transgender%20Equality/written/19471.html>  
<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Women%20and%20Equalities/Transgender%20Equality/written/19532.html>

6.09. In addition, the changes proposed to the 2004 Act to make it more straightforward to obtain legal recognition of an acquired gender are likely to mean that the Scottish Government will need to ask the UK Government to make changes to reserved legislation, including the 2010 Act, and to legislation applying elsewhere in the UK.

6.10. This can be done by way of an Order under section 104 of the Scotland Act, which allows UK Ministers to make consequential provision following an Act of the Scottish Parliament.

6.11. Potential changes to reserved legislation as a result of the changes proposed to the 2004 Act to make it more straightforward to obtain legal recognition of an acquired gender are:

- the recognition of a Scottish GRC both for the purpose of reserved areas of law and elsewhere in the UK (paragraphs 6.15 to 6.19 below give more details);
- provision so that a person who holds a Scottish GRC but who was born elsewhere in the UK can obtain an updated birth certificate from the relevant part of the UK;
- the continued recognition of GRCs issued under the 2004 Act;
- technical amendments required as a result of the 2004 Act ceasing to apply in Scotland either entirely or in large part.

6.12. There is existing provision in the 2010 Act<sup>55</sup> which provides that it is not unlawful for an approved celebrant to refuse to marry or register a civil partnership for a person the approved celebrant reasonably believes holds a full GRC under the 2004 Act.

6.13. The Scottish Government is not seeking a change to the substance of this provision, but it may need to be amended to add a reference to the new proposed Scottish legislation on obtaining legal gender recognition.

6.14. The Scottish Government is also not seeking to amend the 2010 Act to change the existing exception which allows for religious bodies to impose restrictions on the categories of people they wish to employ in a limited range of roles, for example, as a minister of religion.<sup>56</sup>

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<sup>55</sup> Equality Act 2010, paragraph 25 of Schedule 3.

<sup>56</sup> Equality Act 2010, paragraph 2 of Schedule 9. For example, this enables an employer in limited circumstances and where employment is for the purposes of organised religion, to require that an applicant must be of a particular sex and also not be a person with the protected characteristic of gender reassignment.

## Recognition elsewhere in the UK of Scottish GRCs

6.15. The 2004 Act is UK-wide legislation.

6.16. Under the proposed self-declaration system for legal gender recognition, the Scottish Government wants the rights and responsibilities of those obtaining recognition of their acquired gender to remain the same as they are now under the 2004 Act.

6.17. The Scottish Government will discuss with the UK Government the effect of a Scottish GRC in respect of the rights in matters reserved to the Westminster Parliament, and under the law in other parts of the UK. We will also seek to consult with the Northern Ireland Executive about the recognition of people with a Scottish GRC there.

6.18. As indicated above, UK Ministers have the power to make an order under section 104 of the Scotland Act 1998. This allows UK consequential provisions to be made following an Act of the Scottish Parliament.

6.19. The Minister for Women and Equalities has confirmed that the UK Government will proceed with a review of the operation of the 2004 Act<sup>57</sup> and consulting on reform.

## Recognition outwith the UK of Scottish GRCs

6.20. Recognition abroad of Scottish GRCs is a matter for other countries rather than for Scotland.

6.21. Scotland cannot require other countries to recognise the acquired gender of a person who has been recognised here. Nor can we require another country to recognise a gender status which that country does not confer to its own citizens.

6.22. If we do adopt a self-declaration system of legal gender recognition, the Scottish Ministers would intend to work with other countries to encourage them to recognise Scottish GRCs.

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<sup>57</sup> At <https://www.gov.uk/government/news/new-action-to-promote-lgbt-equality>.

## Recognition in Scotland of a person whose acquired gender has been recognised under foreign law

6.23. If legislation is taken forward following this consultation, there are a number of options for the approach that Scotland could take on recognition of a person who has acquired a gender under the law of a country outside the UK.

6.24. In the Republic of Ireland, the Gender Recognition Act 2015 makes provision for people whose birth or adoption was registered in the Republic or who are ordinarily resident there, but who have been recognised in their acquired gender under the law of another jurisdiction, to apply for an Irish GRC.

6.25. The legislation in Malta provides that a final decision about a person's gender identity determined by a competent foreign court or authority shall be recognised in Malta.<sup>58</sup> No further process is required.

6.26. Where a national of another country within the European Economic Area has been granted recognition of their acquired gender under the law of that country, they do not need to make an application under the 2004 Act in order to be recognised in the UK in that gender.<sup>59</sup>

6.27. Under the 2004 Act, a person who has obtained recognition in a specified country or territory outside the UK may apply using the overseas track, explained in Annex C. The specified countries and territories are set out in the Gender Recognition (Approved Countries and Territories) Order 2011.<sup>60</sup>

6.28. The Scottish Government's position is that Scotland ought to recognise GRCs issued by the UK Gender Recognition Panel and people who have been recognised in their acquired gender in a country or territory outside the UK.

6.29. As indicated in paragraph 3.47, the Scottish Government would intend that, in future, automatic recognition should be granted in Scotland where a person's acquired gender has been legally recognised in another country, including elsewhere in the UK.

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<sup>58</sup> Gender Identity, Gender Expression and Sex Characteristics Act 2015, article 9 at <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>.

<sup>59</sup> 2004 Act, section 21(6). The European Economic Area includes all 28 EU member states together with Iceland, Lichtenstein and Norway.

<sup>60</sup> At <http://www.legislation.gov.uk/ukSI/2011/1630/contents/made>.



6.30. This could be subject to a public policy exception. Under this, it would be possible to refuse recognition here when a person has acquired a gender in another jurisdiction, but only if there were serious concerns either about the process by which the person obtained legal gender recognition or in relation to a specific case. If there should be a dispute about a refusal in Scotland to recognise the legal acquisition of a gender in another jurisdiction, an application could be made to the Scottish courts to determine the matter.

6.31. Recognition of a person's non-binary gender identity from another jurisdiction will depend on the decision about the recognition of non-binary people in Scotland.

#### Question 11

Should a person who has been recognised in their acquired gender under the law of another jurisdiction be automatically recognised in Scotland without having to make an application?

Yes   
No   
Don't know

If you want, you can give reasons for your answer or add comments.

6.32. The Scottish Government may need to discuss this proposed approach with the UK Government, given the potential implications for reserved matters, and with the UK Government and the Northern Ireland administration, given that a person with legal recognition in Scotland may travel or move to other parts of the UK.

#### Rules of Court

6.33. There is provision in the Rules of Court in relation to the 2004 Act. For example, provision is made in relation to a case referred by the Secretary of State to quash a decision of the Gender Recognition Panel to grant an application under section 8(5) of the 2004 Act.<sup>61</sup>

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<sup>61</sup> See <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap91.pdf?sfvrsn=14>.

6.34. Consequential changes may be needed to this and other affected Rules of Court to reflect changes proposed in this consultation. Accordingly, and in line with usual practice, the Scottish Government will prepare a policy paper for the Family Law Committee of the Scottish Civil Justice Council on proposed changes to the Rules of Court.<sup>62</sup>

#### Further information on proposed self-declaration system

6.35. Annex H contains further information on how the proposed self-declaration system for legal gender recognition could operate in Scotland.

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<sup>62</sup> Information on the Family Law Committee of the Scottish Civil Justice Council is available at the URL below.  
<http://www.scottishciviljusticecouncil.gov.uk/committees/family-law-committee>.

## Part 7. Non-binary people

7.01. A non-binary person's gender identity is not that of a man or woman.

7.02. The Equality and Human Rights Commission Note on Measuring Gender Identity<sup>63</sup> reported that 0.4% of people who answered a question about their gender identity reported that they identified in another way from a man or woman.

7.03. Principle 3 of the Yogyakarta Principles emphasises that:

“Each person's self-defined ..... gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.”

7.04. A survey of non-binary people has indicated that they believe that because their gender identities have no legal recognition, they are refused services and that their lack of inclusion and visibility has adverse impacts, for example on their self-esteem and mental health.<sup>64</sup> Taking action to ensure that non-binary people are not excluded could increase their acceptance and reduce the levels of discrimination experienced.

7.05. We are aware that increasingly employers and service providers<sup>65</sup> are recognising that their employees and customers may not identify as men or women.

7.06. Some countries recognise non-binary people to varying degrees, or offer alternatives to identifying as either a man or woman (or as male or female) for the purposes of official records. Annex D contains further information about some of these arrangements.

7.07. The Scottish Government has identified six broad options to advance the recognition of non-binary people. It may be possible to pursue more than one of these options. Provisions to recognise non-binary people are radical and require careful thought.

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<sup>63</sup> At [https://www.equalityhumanrights.com/sites/default/files/technical\\_note\\_final.pdf](https://www.equalityhumanrights.com/sites/default/files/technical_note_final.pdf).

<sup>64</sup> Source is a survey of 895 non-binary people in 2015, available at the URL below. <http://www.scottishtrans.org/non-binary/>.

<sup>65</sup> See our Partial Business and Regulatory Impact Assessment at Annex L for information about the policies of organisations interviewed.

## Option 1 – changes to administrative forms

7.08. Under this option, the Scottish Government and Scottish public bodies would be required to review all administrative forms, to identify:

- which requests for information about sex or gender are unnecessary and should be removed;
- which requests for information about sex or gender are justifiable, for instance, for equality monitoring purposes, or where particular medical services are targeted at men rather than women or vice versa; and
- which requests for information about gender could include an option, or options, inclusive of non-binary people.

7.09. The Australian Government has issued Guidelines on the Recognition of Sex and Gender<sup>66</sup> for all Australian Government departments and agencies to follow. These Guidelines relate to the collection of data about sex and gender, and the correction or amendment of that data. For example, the Guidelines indicate that where sex and/or gender information is collected and recorded in a personal record, individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified). The Guidelines confirm that the X category can refer to any person with a non-binary gender identity.

## Option 2 – the Book of Non-Binary Identity

7.10. Under Option 2, a Book of Non-Binary Identity could be established by National Records of Scotland, separately from the Register of Births.

7.11. Under this option, a non-binary person could apply to enter their name and their gender identity in the Book. A fee would be charged to cover the administration costs. Whilst a formal acknowledgement would be issued to the applicant, entry in the Book would have no legal effect on the gender in which the person was legally recognised in Scotland. The Scottish Government does not favour this option, since it does not advance the recognition of non-binary people.

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<sup>66</sup> Available at:

<https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF>.

### Option 3 – limited identity document and record changes

7.12. A further option would be for the Scottish Government to seek changes to identity documents, such as passports or driving licences.

7.13. Under existing Civil Aviation Organisation Standards, a passport cannot be issued without the holder's sex being recorded in it.<sup>67</sup> Under those standards, a holder's sex can be recorded as 'M' for male, 'F' for female or 'X' for 'unspecified'. The current format of the UK passport allows for the holder only to be recorded as either 'M' or 'F'.

7.14. New Zealand is a country that permits its citizens to apply for their passport to disclose their sex as 'X' provided that they submit a statutory declaration indicating:

- the sex or gender identity (M, F or X) in which they wish to be disclosed in their passport; and
- how long they have maintained their current sex/gender identity.<sup>68</sup>

7.15. Australia also allows a passport holder to apply for their sex to be shown in their passport as 'X'. The Australian Passport Office website states that a passport holder who requested that their sex be shown as 'X' must submit confirmation from a registered medical practitioner or psychologist that the holder is of 'indeterminate sex or is intersex'.<sup>69</sup> The Scottish Government understands this process is intended to cover non-binary people as is required under the Australian Government's Guidelines on the Recognition of Sex and Gender.<sup>70</sup>

7.16. Denmark and Canada<sup>71</sup> also permit their citizens to request that their passport disclose their sex as 'X'.

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<sup>67</sup> See ICAO Document 9303 available at <https://www.icao.int/Security/FAL/TRIP/Pages/Publications.aspx>.

<sup>68</sup> For adults aged 18 and over. See <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/>. Those under 18 require a statutory declaration from a parent and also from a registered counsellor or medical professional supporting the change.

<sup>69</sup> At the URL below.  
<https://www.passports.gov.au/passportsexplained/theapplicationprocess/eligibilityoverview/Pages/changeofsexdoborpob.aspx>

<sup>70</sup> At the URL below.  
<https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF>.

<sup>71</sup> See <http://www.cic.gc.ca/english/passport/apply/new/change-sex.asp>.

7.17. A UK driving licence records the holder's sex as part of a unique identifier consisting of letters and numbers: one of the digits will either be 0 or 1 for a male, or 5 or 6 for a female.

7.18. Both the UK passport and driving licence are reserved matters and the Scottish Government would have to discuss this with the UK Government. The Women and Equalities Select Committee Report on Transgender Equality recommended that:

“The UK must follow Australia's lead in introducing an option to record gender as “X” on a passport.”

7.19. The UK Government indicated in its response that it:

“maintained the need to gather information about gender at the point of application and include this on the passport chip.”<sup>72</sup>

7.20. The response did not indicate whether the UK Government was minded to permit the holder's gender to be recorded as 'X' on the face of the passport.

7.21. Some Scottish records also contain information about a person's sex, such as the Community Health Index number (CHI number). A CHI number is allocated to every patient in NHS Scotland. The number can currently be changed to reflect the gender identity of trans men and women. But it cannot currently be changed to record the gender identity of a non-binary patient.

7.22. There would be costs in updating IT systems to accommodate changes. For example, if a non-binary people's gender was to be reflected in their Community Health Index record maintained by NHS Boards of all patients in Scotland there might be costs including to update breast and cancer screening IT systems that use CHI numbers.

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<sup>72</sup> Page 23 of the Government Response to the Women and Equalities Committee Report on Transgender Equality at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/535764/Government\\_Response\\_to\\_the\\_Women\\_and\\_Equalities\\_Committee\\_Report\\_on\\_Transgender\\_Equality.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/535764/Government_Response_to_the_Women_and_Equalities_Committee_Report_on_Transgender_Equality.pdf).

#### Option 4 - recognition using proposed self-declaration system

7.23. Under this option, a person born in Scotland or resident in Scotland would be able to apply to the proposed Scottish self-declaration system for recognition of their non-binary gender identity. Where they were born in Scotland they would then be able to access an updated birth certificate reflecting their gender identity.

7.24. Under the existing 2004 Act arrangements, the effect of recognition is that the applicant is recognised as being of the opposite sex to the recorded sex in their entry in the Register of Births.

7.25. Recognition of a new legal sex in Scotland for people whose gender identity is non-binary would be a significant legal step.

7.26. There would be consequential changes require to other areas of devolved law in Scotland including:

- parentage law would need to clearly include non-binary people;
- marriage law would need a new category of marriage to include a marriage involving a non-binary person;
- registration law would require amendment to ensure that non-binary people were included;<sup>73</sup>
- criminal law may require amendment to ensure that any remaining gender specific offences can be committed by people of all legal sexes.<sup>74</sup>

7.27. Further information about these examples and others is set out in Annex J.

7.28. There could also be implications for other reserved areas that are gender specific such as maternity pay and leave. The protected characteristics of “sex” and “sexual orientation” in the Equality Act 2010 recognise only two sexes. We would need to ensure that we had identified all reserved impacts and agree any consequential changes required in these areas with the UK Government.

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<sup>73</sup> There would also be accompanying costs to carry out the necessary alterations to the related IT systems of the National Records of Scotland.

<sup>74</sup> Section 20 of the 2004 Act provides that the fact that a person’s acquired gender has been legally recognised does not prevent a gender specific offence being committed or attempted, whether the offence may be committed only by a person of a specific gender or on a person of a specific gender.

7.29. If Scotland chose to move alone to recognise non-binary people in the same way that we recognise people who identify as men and women, this could affect the rights of non-binary people who leave Scotland. The other jurisdictions of the UK and other countries might choose not to recognise a non-binary person's gender. Scotland cannot require another country to recognise a gender status which that country does not confer to its own citizens, whether this is the gender identity of a non-binary person or the acquired gender of a person recognised under the existing 2004 Act.

#### Option 5 - an incremental approach towards legal recognition

7.30. Under Option 5, the Scottish Government would commit to increasing recognition of non-binary people gradually. We think that this approach would involve:

- the adoption of options 1, 2 and 3 discussed above;
- our commissioning detailed research into the impact the lack of recognition has for non-binary people, the discrimination they experience and the implications of full recognition of non-binary people;
- a duty on the Scottish Ministers to consider whether further action is appropriate to further increase recognition of non-binary people; and
- Scotland moving towards full recognition including the possibility of amending birth certificates of those born in Scotland.

#### Option 6 - seek amendment of the Equality Act 2010

7.31. We have already noted the evidence that non-binary people experience discrimination.

7.32. The 2010 Act makes provision for the protection of individuals from unfair treatment and the promotion of a more equal society. The 2010 Act defines a number of protected characteristics. It provides that subject to some exceptions, it is unlawful to discriminate, harass or victimise another person because they have, are perceived to have, or associate with someone who has, a protected characteristic.



7.33. One protected characteristic is gender reassignment. As a consequence, it is usually unlawful to discriminate against a person because they propose to undergo, are undergoing or have undergone a process or part of a process to reassign their sex by changing their physiological or other characteristics of sex.<sup>75</sup> This process need not include medical treatment.<sup>76</sup>

7.34. The Equality and Human Rights Commission have said that the gender reassignment protected characteristic must be broadened to include all people who face ill treatment as a result of their gender identity.<sup>77</sup>

7.35. The Scottish Parliament has some powers to legislate in respect of equal opportunities. Further details about these powers are in Annex G. However, the Scottish Parliament cannot legislate to alter the existing protected characteristics.

7.36. This means that the Scottish Government would need to work with the UK Government on any amendments to the protected characteristic of gender reassignment.

7.37. Increasing the protections against discrimination on the basis of a person's gender identity may have impacts for the provision of services.

7.38. The Scottish Government are not aware of any demand from non-binary people for provision of services specifically designed for them. Instead, we understand that non-binary people would like the right to choose, or to be consulted about, whether a service provided for men or for women would best meet their needs.

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<sup>75</sup> Equality Act 2010, section 7 defines the protected characteristic of gender reassignment.

<sup>76</sup> See Equality Act 2010 Explanatory Notes at paragraphs 41 to 43:

<http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/1/4>.

<sup>77</sup> Evidence of the Equality and Human Rights Commission to the Women and Equalities Select Committee at:

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19337.pdf>.

7.39. Nonetheless, there may be concerns that recognition of non-binary people would have financial implications for businesses and service providers, including the public sector. For example:

- NHS Scotland currently aims to accommodate all patients in hospital in single-sex wards;
- toilets or changing facilities in publicly accessible building are often designated for the use of either men or women;
- the Scottish Prison Service has estimated that the cost of a new small prison unit for 20-30 people might be between £8.7 million and £10.7 million.

7.40. The Partial Business and Regulatory Impact Assessment in Annex L indicates that it is not currently possible to accurately identify the costs involved in the recognition of non-binary people, as much depends on exactly which option(s) are chosen. However, interviewees did indicate that many IT systems would need to be upgraded. For example, interviewees noted that Her Majesty's Revenue and Customs require them to provide information about whether employees are male or female. One interviewee noted that they are considering making the option of gender neutral toilets available to staff.

7.41. We would need to consider whether a scheme for full recognition of non-binary people should limit any requirement to adapt existing services or facilities for non-binary people only to what is reasonable in the particular circumstances. For instance, a disabled person's employer is under a duty to make reasonable adjustments to enable the disabled worker to access what they need to do and keep their job. Under those arrangements, what is reasonable for an organisation will depend, in part, on the size and nature of the organisation. Any limitation of this nature might require amendments to the 2010 Act, which, as indicated above, is generally reserved.

#### Option 7 - no change

7.42. The final option is to do nothing. This is clear, but fails to address concerns about the lack of inclusion and recognition in society of non-binary people.

### Question 12

Should Scotland take action to recognise non-binary people?

- Yes
- No
- Don't know

If you answered No, and if you want, you can give reasons for your answer.

### Question 13

**If you answered Yes to Question 12**, which of the identified options to give recognition to non-binary people do you support? You can select more than one option.

- Option 1: Changes to administrative forms
- Option 2: Book of Non-binary Identity
- Option 3: Limited document changes
- Option 4: Full recognition using proposed self-declaration system
- Option 5: Incremental approach
- Option 6: Amendment of the Equality Act 2010
- None of the above options

If you want, you can give reasons for your answer, add comments or, if you think none of Options 1 to 6 is suitable, describe your preferred option.

### Question 14

At paragraph 7.26. and in Annex J we have identified the consequential legal impacts if non-binary people could obtain legal gender recognition using the proposed self-declaration system.

Are you aware of other impacts we have not identified?

- Yes
- No
- Don't know

If you answered Yes, describe the impacts you have identified.

## Part 8. Conclusion

### Impact Assessments

8.01. In accordance with usual practice, the Scottish Government has prepared a number of impact assessments in relation to the development of policy in this area.

8.02. The Scottish Government considers that the changes proposed or considered in this consultation (and the related consultation on issues for people with intersex conditions) have minimal impact on the environment. Accordingly, the Scottish Government has sent a pre-screening exemption from Strategic Environmental Assessment (SEA) to the usual SEA consultation authorities.<sup>78</sup>

8.03. A partial Business and Regulatory Impact Assessment (BRIA) is attached at Annex L. The change to a self-declaration system for legal gender recognition would have minimal cost implications for employers as the possibility of legal recognition already exists and the estimated number of applicants per year is low. It is not currently possible to identify the costs of the different options for recognising non-binary people.

8.04. A partial Child Rights and Wellbeing Impact Assessment (CRWIA) is attached at Annex M. This considers which Articles of the UNCRC are engaged by the proposals and policy options identified for people under 18. The CRWIA also sets out the evidence that the Scottish Government has identified so far as relevant to the assessment of these options.

8.05. The changes proposed to the law would have impacts in relation to equalities. A partial Equality Impact Assessment (EQIA) is attached at Annex N.

8.06. A partial Privacy Impact Assessment (PIA) has also been undertaken and is attached at Annex O. The partial PIA suggests that the proposed self-declaration system for legal gender recognition would not have adverse implications for the privacy of applicants.

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<sup>78</sup> The SEA consultation authorities are: the Scottish Environment Protection Agency, Scottish National Heritage, and Historic Environment Scotland.

### Question 15

Do you have any comments about, or evidence relevant to:

- (a) the partial Business and Regulatory Impact Assessment;
- (b) the partial Equality Impact Assessment;
- (c) the partial Child Rights and Wellbeing Impact Assessment; or
- (d) the partial Privacy Impact Assessment?

Yes

No

If you answered Yes, add your comments or evidence.

8.07. The Scottish Government recognises that in order to develop well-informed policy and legislation, it is important that we receive responses reflecting the range of views held on this subject. Consultees are welcome to make any other comments relating to this consultation and the review of the 2004 Act.

### Question 16

Do you have any further comments about the review of the Gender Recognition Act 2004?

Yes

No

If you answered Yes, add your comments.

## ANNEX A: RESPONDENT INFORMATION FORM

**Please Note** this form **must** be completed and returned with your response.

Are you responding as an individual or an organisation?

- Individual  
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

Where are you resident? (please select one of the options below)

Scotland       Rest of the UK       Rest of the World

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name  
 Publish response only (without name)  
 Do not publish response

### **Information for organisations:**

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes
- No

If you are responding as an organisation and want to tell us more about your organisation's purpose and its aims and objectives, you can do so here.

## ANNEX B: CONSULTATION QUESTIONS

### Question 1 (Paragraphs 3.01 - 3.29)

The initial view of Scottish Government is that applicants for legal gender recognition should no longer need to produce medical evidence or evidence that they have lived in their acquired gender for a defined period. The Scottish Government proposes to bring forward legislation to introduce a self-declaration system for legal gender recognition instead.

Do you agree or disagree with this proposal?

Agree

Disagree

Don't know

If you want, you can give reasons for your answer or add comments.

Q1



Question 2 (Paragraphs 3.30 - 3.34)

Should applicants to the proposed gender recognition system in Scotland have to provide a statutory declaration confirming they know what they are doing and intend to live in their acquired gender until death?

Yes

No

Don't know

If you want, you can give reasons for your answer or make comments.

Q2

Question 3 (Paragraphs 3.35 - 3.39)

Should there be a limit on the number of times a person can get legal gender recognition?

Yes

No

Don't know

If you want, you can give reasons for your answer or make comments.

Q3

Question 4 (Paragraphs 3.40 - 3.47)

If the Scottish Government takes forward legislation to adopt a self-declaration system for legal gender recognition, should this arrangement be open:

(A) only to people whose birth or adoption was registered in Scotland, or who are resident in Scotland?

or

(B) to everyone?

or

(C) Don't know

If you want, you can give reasons for your answer or make comments.

Q4

Question 5 (Paragraphs 4.04 - 4.07)

(This question relates to the reduction of the minimum age of applicants for legal gender recognition to those aged 16 and over from the current age of 18. Question 6 will ask your views on the options for people younger than 16).

The Scottish Government proposes that people aged 16 and 17 should be able to apply and obtain legal recognition of their acquired gender. Do you agree or disagree?

- Agree   
Disagree   
Don't know

If you want, you can give reasons for your answer or add comments.

Q5

Question 6 (Paragraphs 4.08 - 4.41)

Which of the identified options for children under 16 do you most favour?  
(Please select only one answer).

- Option 1 - do nothing for children under 16
- Option 2 - court process
- Option 3 - parental application
- Option 4 - minimum age of 12
- Option 5 - applications by capable children
- None of these options

Q6

Question 7 (Paragraphs 5.01 - 5.08)

Should it be possible to apply for and obtain legal gender recognition without any need for spousal consent?

Yes

No

Don't know

If you want, you can give reasons for your answer or add comments.

Q7

Question 8 (Paragraphs 5.10 - 5.16)

Civil partnership is only available to same sex couples. This means that civil partners cannot remain in their civil partnership if one of them wishes to obtain a full Gender Recognition Certificate.

Should they instead be allowed to remain in their civil partnership? This would mean that a woman and a man would be in the civil partnership.

Yes

No

Don't know

If you want, you can give reasons for your answer or add comments.

Q8

Question 9 (Paragraphs 5.17 - 5.21)

Should legal gender recognition stop being a ground of divorce or dissolution?

Yes

No

Don't know

If you want, you can give reasons for your answer or add comments.

Q9

Question 10 (Paragraphs 6.01 - 6.06)

Are any changes to section 22 (prohibition on disclosure of information) necessary?

- Yes
- No
- Don't know

If you answered Yes, describe the changes you consider are needed.

Q10



Question 11 (Paragraphs 6.23 - 6.31)

Should a person who has been recognised in their acquired gender under the law of another jurisdiction be automatically recognised in Scotland without having to make an application?

Yes

No

Don't know

If you want, you can give reasons for your answer or add comments.

Q11

Question 12 (Paragraphs 7.01. - 7.06.)

Should Scotland take action to recognise non-binary people?

Yes

No

Don't know

If you answered No, and if you want, you can give reasons for your answer.

Q12

Question 13 (Paragraphs 7.08. - 7.41.)

If you answered Yes to Question 12, which of the identified options to give recognition to non-binary people do you support? (You can select more than one option).

- Option 1: Changes to administrative forms
- Option 2: Book of Non-binary Identity
- Option 3: Limited document changes
- Option 4: Full recognition using proposed self-declaration system
- Option 5: Incremental approach
- Option 6: Amendment of the Equality Act 2010
- None of the above options

If you want, you can give reasons for your answer, add comments or, if you think none of Options 1 to 5 is suitable, describe your preferred option.

Q13

Question 14

At paragraph 7.26. and in Annex J we have identified the consequential legal impacts if non-binary people could obtain legal gender recognition using the proposed self-declaration system.

Are you aware of other impacts we have not identified?

Yes

No

Don't know

If you answered Yes, describe the impacts you have identified.

Q14

Question 15 (Paragraphs 8.01. - 8.06.)

Do you have any comments about, or evidence relevant to:

- (a) the partial Business and Regulatory Impact Assessment;
- (b) the partial Equality Impact Assessment;
- (c) partial Child Rights and Wellbeing Impact Assessment; or
- (d) the partial Privacy Impact Assessment?

Yes

No

If you answered Yes, add your comments or evidence.

Q15

Question 16

Do you have any further comments about the review of the Gender Recognition Act 2004?

Yes

No

If you answered Yes, add your comments.

Q16

## ANNEX C – GENDER RECOGNITION ACT 2004 – ADDITIONAL INFORMATION

### Alternative track

1. The alternative track was introduced for Scotland by the Marriage and Civil Partnership (Scotland) Act 2014. There are similar arrangements for England and Wales under their equivalent legislation, but the alternative track is not available to people resident in Northern Ireland. Under the alternative track, the applicant must:

- be married or in a civil partnership;
- have been living in the acquired gender for six years before 16 December 2014, continued to live in that gender until the application and intend to continue to live in the acquired gender until death;
- have had gender dysphoria or have undergone surgical treatment or other treatment as prescribed by Scottish Ministers<sup>79</sup> by Order for the purpose of modifying their sexual characteristics and produce a medical or psychological report to this effect;
- be resident in Scotland or England and Wales; and
- provide a statutory declaration.

### Overseas track

2. Under the overseas track, an applicant has to show that they have been recognised in their acquired gender in an approved jurisdiction. The approved jurisdictions are listed in the Gender Recognition (Approved Countries and Territories) Order 2011.<sup>80</sup> They must provide a statutory declaration. No medical or psychological report is required.

### Fee for applications

3. There is a statutory fee for an application which is currently £140, but the fee can be remitted to either £30 or £0 depending on the income of the applicant.<sup>81</sup>

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<sup>79</sup> An order setting out the prescribed treatment has not been made as yet.

<sup>80</sup> The Order can be seen at <http://www.legislation.gov.uk/ukSI/2011/1630/contents/made>.

<sup>81</sup> See The Gender Recognition (Application Fees) Order 2006 (SI 758) at <http://www.legislation.gov.uk/ukSI/2006/758/contents/made>. The 2006 order was amended by The Gender Recognition (Application Fees) (Amendment) Order 2012 at <http://www.legislation.gov.uk/ukSI/2012/920/contents/made>.

## Number of applications

4. Between 1 April 2016 and 31 March 2017, the Gender Recognition Panel received 364 applications for recognition,<sup>82</sup> issued 318 full GRCs and refused 15 applications. In the same period, 93% of the applications processed were submitted using the standard track.<sup>83</sup>

5. The table below shows the numbers of applicants whose birth was registered in Scotland who have received a full GRC.

Year	Number of updated Scottish birth certificates
2005	47
2006	44
2007	30
2008	16
2009	18
2010	18
2011	24
2012	13
2013	16
2014	16
2015	25
2016	20

Source: National Records of Scotland

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<sup>82</sup> Source is HM Courts and Tribunals Service quarterly statistics for tribunals which can be found at <https://www.gov.uk/government/collections/tribunals-statistics>.

<sup>83</sup> Source is HM Courts and Tribunals Service quarterly statistics for tribunals which can be found at <https://www.gov.uk/government/collections/tribunals-statistics>.

## ANNEX D – SCOTTISH GOVERNMENT’S UNDERSTANDING OF THE POSITION IN OTHER COUNTRIES

1. The table below summarises the key features of the legal gender recognition arrangements in other countries and territories. Further details are provided in Parts 2-4 of this Annex.

Country	Self-declaration model	Assessment model- administrative system-	Assessment model- Court-based process	Treatment model- treatment or surgery required
Argentina	Yes			
Australian Capital Territory		Yes		
Austria				Yes
Belgium	Yes			
Canada - British Columbia		Yes		
Colombia	Yes			
Czech Republic				Yes
Denmark	Yes			
Finland				Yes
France			Yes	
Iceland				Yes
Ireland	Yes			
Malta	Yes			
New Zealand			Yes	
Norway	Yes			
Spain				Yes



## 2. Countries with self-declaration systems

### Argentina

2.1. The law in Argentina was adopted in 2012 and provides that a person wishing to change their recorded sex aged 18 or over must make a request to the National Register of Persons stating that they are covered by this law and seeking an amended birth certificate and a new identity card.

2.2. Where the trans person is under 18, the request is made by their legal representatives and with the trans person's agreement, taking into account their evolving capacities and best interests. If the person's legal representatives do not wish to make the application or it is otherwise impossible to obtain approval, a court process can be used.

2.3. The Scottish Government understands that recognition of non-binary people is given under this process.

### Belgium

2.4. Belgium adopted a new law in May 2017 which removed the requirement to undergo sterilisation. Applicants aged 18 and over must make a declaration stating that they are convinced that the sex shown in their act of birth does not correspond with their gender identity. Applicants aged 16 and 17 must be supported by their parent or legal representative and have consulted a psychiatrist.

2.5. The applicant then receives an information pack and the King's Prosecutor is advised of the application and has a period of three months during which they may refuse the application in exceptional cases. At the end of this three month period and before six months have passed in total, the applicant must reconfirm their application before the process is completed.

### Colombia

2.6. The law in Colombia was adopted in 2015 and provides that a person is permitted to correct the information about their sex in the Civil Registry of Birth by filing a petition with a notary public.

2.7. The petition must be accompanied by a sworn declaration indicating their willingness for the Civil Registry of Birth to be corrected and containing information about the applicant's understanding of their sexual identity.

2.8. The notary is required to issue a public deed correcting the entry within 5 business days of receipt of petition and necessary documents.

2.9. Correction of the Civil Registry of Birth may consist of either male to female or female to male.

2.10. The sex shown for a person in the Civil Registry of Birth may be corrected up to twice and requests must be 10 years apart.

### Denmark

2.11. From 1 September 2014, Danish residents aged 18 or over may apply to change their personal number in the Central Persons Register by application to the Minister of the Interior and Social Security stating they belong to the other sex and then completing a six-month “reflection” period. If a false statement is made this is punishable under the Danish penal code.

2.12. An average of 289 people per year have changed their legal sex using this process.

2.13. The Scottish Government understands that a Danish citizen can apply for their passport to show their sex as ‘X’ for “undetermined, unspecified, intersex”, but that the Central Persons’ Register only allows the binary options of male and female.

### Republic of Ireland

2.14. Under the Irish legislation, which came into force in 2015,<sup>84</sup> a person who was born, or is ordinarily resident in the Republic of Ireland, and is aged 18 or over, may apply to the Department of Social Protection to change their legal sex from male to female or vice versa by submitting an application form incorporating a statutory declaration. The statutory declaration states that they intend to live in their acquired gender for the remainder of their life. It is an offence for a person knowingly or recklessly to provide false or misleading information in a material respect in an application.

2.15. Applications by 16 and 17 year olds must be accompanied by a court order permitting their application to proceed. The court order is granted if there is parental consent and medical evidence about the young person’s capacity and transition to their acquired gender.

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<sup>84</sup> At <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html>. The Irish application form can be found at <http://www.welfare.ie/en/pdf/GRC1.pdf>.

2.16. A person who has obtained recognition of their acquired gender in another jurisdiction can apply for recognition in the Republic of Ireland. In 2016, the Department of Social Protection issued GRCs to 109 people.

2.17. If an applicant later changes their mind, they must request revocation of the GRC. The Minister for Social Protection decides whether to grant this request.

### Malta

2.18. The law in Malta<sup>85</sup> was adopted in 2015. It provides that all Maltese citizens may request the Director for Public Registry to change their “recorded gender and first name” by way of a declaratory public deed drawn up by a notary public. This deed must contain “a clear, unequivocal and informed declaration by the applicant that one’s gender identity does not correspond to the assigned sex” and a specification of the gender particulars.

2.19. Where a person is under 16, persons exercising parental authority may file an application in court, with the court required to ensure the best interests of the child are taken into account and to give due weight to the views of the child, having regard to the child’s age and maturity.

2.20. Amendments made to an adult applicant’s Act of Birth as a result of legal recognition can only be modified again by a court order.

2.21. Malta recognises non-binary gender identities.

### Norway

2.22. The law in Norway provides that a Norwegian resident aged 16 and over may apply for a change in the gender in which they are registered in the National Register to the Tax Office. If they are aged between 6 and 16 they must apply along with the person or persons who have parental responsibility for them.

2.23. If in respect of a child between 6 and 16 only one parent consents, the application must be made then to the County Governor of Oslo and Akershus and will be granted if this is best for the child.

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<sup>85</sup> At <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>.

2.24. In the first nine months of operation, 706 people had their acquired gender recognised.

2.25. These arrangements do not include recognition of non-binary people.

### **3. Countries using an administrative assessment model – third party evidence of gender identity is required**

#### Australian Capital Territory

3.1. A person seeking to change their sex on a birth certificate issued in the Australian Capital Territory can apply to Access Canberra enclosing an application form and a statement by a doctor.<sup>86</sup> They can apply to be registered as Female, Male, Unspecified, Indeterminate or Intersex.

3.2. The statement from the doctor or psychologist requires to confirm either that that applicant has had ‘appropriate clinical treatment’ for the alteration of their sex or that the applicant is an intersex person.

#### Canadian province of British Columbia

3.3. A person seeking to change their sex on a birth certificate issued in British Columbia may apply to change this from female to male or vice versa by applying to the British Columbia Vital Statistics Agency.<sup>87</sup> The application form states that they “have assumed, identify with and intend to maintain the gender identity that corresponds with the requested change”. In addition, they must provide a statement in the prescribed form from a physician or psychologist confirming that the applicant’s gender identity does not align with the “Sex” designation on the identification issued to the applicant by the provincial government.

3.4. A person under 18 may also apply provided they have the consent of all their parents or legal guardians, and are able to provide a required statement from a physician or psychologist.

3.5. A similar arrangement is also used in the Canadian province of Manitoba.<sup>88</sup>

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<sup>86</sup> Further information including the forms to be used can be found at [https://www.accesscanberra.act.gov.au/app/answers/detail/a\\_id/1691](https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/1691).

<sup>87</sup> Information on the process is at <http://www2.gov.bc.ca/gov/content/life-events/births-adoptions/births/birth-certificates/change-of-gender-designation-on-birth-certificates>.

<sup>88</sup> See [https://vitalstats.gov.mb.ca/change\\_of\\_sex\\_designation.html#q3](https://vitalstats.gov.mb.ca/change_of_sex_designation.html#q3).

## 4. Countries using a court based assessment model

### France

4.1. The law in France was altered with effect from 1 January 2017. Any adult or emancipated minor can apply to the court to have their gender corrected in the civil registry, declaring their free and informed consent to the change of documents with supporting evidence. They require to demonstrate sufficient facts in support of this such as: that they appear publicly to belong to the affirmed sex; that they are known in that sex to their family, friends and colleagues; or that they have changed their forename to one of the affirmed sex.

### New Zealand

4.2. People aged 18 and over (or a person under 18 who is or has been married, in a civil union or a de facto relationship)<sup>89</sup> and whose birth was registered in New Zealand<sup>90</sup> may apply. Applications are made to the Family Court for a declaration that the birth certificate issued to them should contain their nominated sex and not the sex assigned to them in the birth register.<sup>91</sup> Typically, there must be expert medical evidence that the applicant:

- has assumed or has always had the gender identity of a person of the nominated sex;
- has undergone medical treatment usually regarded by medical experts as desirable to enable persons of the applicant's genetic and physical conformation at birth to acquire a conformation that accords with the gender identity of a person with the nominated sex; and
- will as a result maintain a gender identity of a person of the nominated sex.

4.3. Each case is assessed taking into account the medical evidence and what is medically recommended for that person.

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<sup>89</sup> At the two URLs below.

[http://www.legislation.govt.nz/act/public/1995/0016/latest/versions.aspx?search=ts\\_act%40bill%40regulation%40deemedreg\\_births+deaths+marriages+and+relationships+act+1995\\_resel\\_25\\_a&p=1](http://www.legislation.govt.nz/act/public/1995/0016/latest/versions.aspx?search=ts_act%40bill%40regulation%40deemedreg_births+deaths+marriages+and+relationships+act+1995_resel_25_a&p=1)

<http://www.youthlaw.co.nz/information/relationships/marriage-civil-unions-de-facto-2/>  
<sup>90</sup> A New Zealand citizen or person who is permanently resident in New Zealand may also apply.

<sup>91</sup> Births, Deaths, and Marriages and Relationships Act 1995, section 28 and guidance at [https://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Services-Births-Deaths-and-Marriages-Information-for-Transgender-Applicants?OpenDocument](https://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Births-Deaths-and-Marriages-Information-for-Transgender-Applicants?OpenDocument).

4.4. Although it is possible to record a person's sex in the birth register as 'indeterminate' in New Zealand, it is not possible for a person whose sex was correctly recorded as male or female to change this to 'indeterminate', according to the guidance published by the New Zealand Department of Internal Affairs.<sup>92</sup>

4.5. A New Zealand passport can be issued showing the holder as M (male), F (female) or X (indeterminate/unspecified) provided an applicant provides a statutory declaration stating how long they have maintained their current sex or gender identity. Applicants under 18 must submit statutory declarations from a parent or legal guardian and a registered counsellor or medical professional.<sup>93</sup>

## **5. Countries using a treatment model where medical treatment or surgery is required**

### Czech Republic

5.1. The law in the Czech Republic<sup>94</sup> permits a person to change their legally recognised gender including a change in their personal identification number, provided they have had genital surgery and been sterilised.

### Finland

5.2. A Finnish national, or person resident in Finland must:<sup>95</sup>

- submit a medical statement confirming that they have been sterilised or are otherwise infertile and that they feel they belong permanently to the opposite gender from their assigned gender; and
- evidence of the consent of their spouse or partner where they are married or in a recognised partnership.

### Iceland

5.3. In 2012 Iceland adopted legislation permitting a person who has received a diagnosis and treatment from University Hospital Iceland to request confirmation from an expert committee that they belong to the opposite sex.

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<sup>92</sup> At [https://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Services-Births-Deaths-and-Marriages-Information-for-Transgender-Applicants?OpenDocument](https://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Births-Deaths-and-Marriages-Information-for-Transgender-Applicants?OpenDocument).

<sup>93</sup> At <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/>.

<sup>94</sup> At <http://www.czechlegislation.com/en/89-2012-sb>.

<sup>95</sup> At <http://www.finlex.fi/fi/laki/kaannokset/2002/en20020563.pdf>.

## Spain

5.4. A Spanish national of 18 and over may request rectification of the information in the Civil Registry about their sex. Unless they have already undergone gender reassignment surgery, they must demonstrate through a medical report or reports that:

- they have been diagnosed with gender dysphoria; and
- they have, where age and health permit, undergone medical treatment for at least 2 years to alter their physical characteristics.

## ANNEX E – RIGHTS OF PEOPLE AGED 18 AND UNDER

1. The following is not intended to be an exhaustive list of the rights acquired by children and young people.

2. At age 12 you can:

- consent to your own adoption;
- make a will; and
- apply for child maintenance for yourself.

3. At age 12 you are presumed to be mature and old enough to:

- express views about a major decision about you by your parents or others caring for you;
- express a view about matters a court has to decide (such as who you should live with or spend time with);
- instruct a lawyer in a civil matter;
- request access to your personal records; and
- make a freedom of information request from a public authority.

4. Before 16 you may:

- Consent to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending you are capable of understanding the nature and possible consequences of the procedure or treatment; and
- instruct a solicitor, in connection with any civil matter, where you have a general understanding of what it means to do so.

5. At age 16 you can:

- leave home without your parent or guardian's consent;
- get a full-time job and pay National Insurance;
- enter into a legally binding contract;
- consent to surgical, medical, or dental procedures and treatments;
- marry or register a civil partnership;
- consent to lawful sexual activity;
- apply for a UK passport on your own behalf;
- vote in elections to the Scottish Parliament and Scottish local authorities;
- get a skin piercing; and
- record a change of name officially.



6. At age 18 you can:

- buy alcohol or tobacco;
- place a bet;
- serve as a juror in both civil and criminal cases; and
- vote in UK elections.

## ANNEX F – PARENTAL RESPONSIBILITIES AND RIGHTS (PRRs)

1. Part 1 of The Children (Scotland) Act 1995 sets out:

If you have parental responsibilities for a child, you are expected to fulfill certain legal duties in respect of looking after them. You are required to:

- safeguard their health, development and welfare;
- give them direction and guidance in line with their stage of development;
- maintain personal relations and direct contact with the child on a regular basis, where they are not living with you; and
- act as their legal representative.

2. Parental rights enable you to fulfill these duties. If you have parental rights then you are entitled to:

- have a child live with you or otherwise regulate their residence;
- control, direct or guide their upbringing, in a manner appropriate to their stage of development, for example, deciding how the child should be educated;
- maintain personal relations and direct contact with them on a regular basis if they are not living with you; and
- act as the child's legal representative.

3. A child's mother automatically has PRRs in relation to their child.

4. A father will have PRRs if:

- when the child was conceived the father was married to the child's mother or subsequently marries them;
- the mother and father jointly register the child's birth (this applies to births registered on or after 4 May 2006);
- the mother and father complete and register a Parental Responsibilities and Rights Agreement; or
- a court so orders.

5. Others can ask the court for PRRs to be given to them.

6. One example is a parental order made by a court under section 54 of the Human Fertilisation and Embryology Act 2008. In this case, the intended parent or parents in a surrogacy arrangement seek to take over PRRs from the child's legal parent(s).

7. The surrogate mother is automatically considered as the legal parent of a child even where she is not genetically related to them. The surrogate mother's husband is also automatically considered to be the legal parent of a surrogate baby where he was married to the surrogate mother at the time of her artificial insemination or when the embryo or sperm and eggs were placed in her. When a parental order is granted to the intending parents, (those who commissioned the surrogacy arrangement), the surrogate mother and father stop having PRRs for the child. A parental order made by a Scottish court is registered in the Parental Order Register maintained by the Registrar General for Scotland.

## ANNEX G – EQUAL OPPORTUNITIES – SCOTTISH PARLIAMENT’S DEVOLVED POWERS

1. The power to legislate to prevent, eliminate or regulate discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions, is reserved to Westminster. This is in terms of section 30 and Schedule 5 Part II, Head L2 of the Scotland Act 1998.

2. Schedule 5 Head L2 also sets out certain exceptions to this reservation. The Scottish Parliament may legislate:

To impose duties on–

(a) any office-holder in the Scottish Administration, or any Scottish public authority with mixed functions or no reserved functions, to make arrangements with a view to securing that the functions of the office-holder or authority are carried out with due regard to the need to meet the equal opportunity requirements, or

(b) any cross-border public authority to make arrangements with a view to securing that its Scottish functions are carried out with due regard to the need to meet the equal opportunity requirements.

In relation to

- Equal opportunities so far as relating to the inclusion of persons with protected characteristics in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions.
- Equal opportunities in relation to the Scottish functions of any Scottish public authority or cross-border public authority, other than any function that relates to the inclusion of persons in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions. The provision falling within this exception does not include any modification of the Equality Act 2010, or of any subordinate legislation made under that Act, but does include–
  - (a) provision that supplements or is otherwise additional to provision made by that Act;
  - (b) in particular, provision imposing a requirement to take action that that Act does not prohibit;
  - (c) provision that reproduces or applies an enactment contained in that Act, with or without modification, without affecting the enactment as it applies for the purposes of that Act.

## **ANNEX H – A SELF-DECLARATION SYSTEM FOR LEGAL GENDER RECOGNITION IN SCOTLAND**

### **The application process**

1. The process set out below is intended to apply to applicants aged 16 and over.
2. A person seeking recognition in their acquired gender would complete and submit an application consisting of:
  - information about the applicant and their contact details;
  - a statutory declaration by the applicant of statements of fact before a person authorised to administer an oath;
  - confirmation from the person witnessing the statutory declaration of evidence used to verify the applicant's identity; and
  - if spousal consent is required under the new system (see also Part 5 of the consultation), details of the marriage and a statutory declaration by the applicant's spouse.
3. The content of the statutory declaration by the applicant would include statements of fact, such as:
  - the applicant's age;
  - their personal capacity to make the application;
  - that the decision is of their own free will;
  - the gender in which they wished to be legally recognised; and
  - their intention to remain in that gender for the rest of their life.
4. The application would be submitted by post to be processed by a team based within either the Scottish Government or National Records of Scotland. The possibility of electronic submission of applications in a secure manner should not be excluded.

### **Examination of applications**

5. On receiving a correctly completed application, the administrative body dealing with such applications would be under a duty to issue a GRC.

6. Only incomplete applications, or those which contain a material error, would be refused. Examples of applications which would be refused include:

- where the applicant has failed to sign the application form;
- where the applicant has not included a completed statutory declaration; or
- where the witness to a statutory declaration is not appropriately authorised to administer oaths in Scotland.<sup>96</sup>

7. Refused applications would be returned to the applicant with information confirming why the application had been refused.

8. No additional evidence could be requested.

### **General effect of recognition**

9. The Scottish Government's intention is that the general effect of a GRC would be the same as it is now under section 9 of the 2004 Act. Scottish applicants would have legal recognition of their acquired gender from the date of the issue of the certificate.

### **Updating the Register of Births and other registers**

10. Following the issue of a Scottish GRC to an applicant whose birth or adoption was registered in Scotland, the administrative body processing the application would advise the Registrar General for Scotland (the Registrar General). The Registrar General would be required to issue a new birth certificate to the applicant to reflect their legally recognised gender, as is currently the case.

11. It is assumed for the purpose of this Annex that the existing Gender Recognition Register held by the Registrar General would continue to be used in the proposed self-declaration system.

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<sup>96</sup> A notary public is authorised to administer an oath in Scotland, as is a justice of the peace. Most solicitors in Scotland are notaries public, though not all.

12 When an applicant's birth or adoption was registered in Scotland, the Registrar General would be required to enter prescribed particulars in an entry in the Gender Recognition Register as they do now.<sup>97</sup> This entry enables the Registrar General to issue a new birth certificate showing the successful applicant in their new legal sex. As is the case now, the new birth certificate would not disclose that it had been issued following recognition of an acquired gender. For marriages solemnised in Scotland, the successful applicant would also be able to obtain an updated marriage certificate on request.

13. Currently, National Records of Scotland staff provide details to be disclosed on the updated birth certificate to a successful applicant. They will also provide advice, if necessary, regarding obtaining an updated marriage certificate and cancelling any previously recorded change of name which might inadvertently disclose the applicant's transgender status. This process should continue under a new system.

### **Correction, appeals and revocation**

14. Provision for the correction of administrative errors contained in a Scottish GRC already issued will be required.

15. The Scottish Government considers that adopting a self-declaration process for legal gender recognition would reduce the potential for applications to be refused. However, an applicant would be able to request that the authority review a decision to refuse their application. If the applicant remained dissatisfied after the review process was completed, an appeal could be made to the sheriff court.

16. The 2004 Act provides for a decision to issue a GRC to be quashed where a court determines, following an application by

- an applicant's spouse; or
- or their civil partner; or
- by the Secretary of State,

that the application for recognition has been secured by fraud.<sup>98</sup>

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<sup>97</sup> The prescribed particulars to be registered are set out in the Gender Recognition (Prescription of Particulars to be Registered) (Scotland) Regulations 2005.

<sup>98</sup> 2004 Act, sections 8(5), 8(5A), 8(5B), 8(5C) and 8(6).

17. It appears to the Scottish Government that, if spousal consent is no longer required under the proposed self-declaration system of legal gender recognition, then a spouse would not need to be able to seek revocation of a GRC. Similarly, there may be no need for a civil partner to be able to seek revocation of a GRC.

18. However, the Scottish Government considers that it would be appropriate to retain a power for the Scottish Ministers to apply to a court to have a Scottish GRC quashed on the basis that it has been secured by fraud.

#### Impact of new system for other matters

19. The table in Annex I summarises the provisions of the 2004 Act and the Scottish Government's view on whether the legal position in Scotland should continue under the proposed self-declaration system of legal gender recognition. It also highlights those areas of law which are reserved and so do not fall within the Scottish Parliament's legislative competence.



**ANNEX I - Provisions of the 2004 Act**

2004 Act	Effect	Retain/amend	Devolved or reserved	Comments
s.1 (and Schedule 1)	Sets out who may apply and that the Gender Recognition Panel determines applications.	Amendment required under proposed self-declaration system.	Devolved	See Parts 2, 3 and 4.
s.2	Sets out how applications are determined.	Significant amendment required under proposed self-declaration system.	Devolved	See Annex H.
s.3 to 3F	Makes provisions for evidence required with applications.	Significant amendment required under proposed self-declaration system. For example, to remove all medical requirements and requirement to have lived in acquired gender prior to application.	Devolved	See Parts 2 to 6.

2004 Act	Effect	Retain/amend	Devolved or reserved	Comments
s.4 to 5D	<p>(1) GRP to issue a full GRC in some cases or an interim GRC in others.</p> <p>(2) Form of GRC can be specified in subordinate legislation.</p> <p>(3) Provision for Gender Recognition Panel to issue full GRCs to people with interim GRCs in certain circumstances.</p> <p>(4) In Scotland, a married person with interim GRC can apply to sheriff within 6 months of issue for a full GRC (s.4E).</p>	Significant amendment required under proposed system, (including if interim GRC not needed under new arrangements).	Devolved	See Part 5 and Annex H.
s.6	Application may be made to correct errors in a GRC or an error in the type of GRC issued.	Similar provision required with minimal amendment.	Devolved	See Annex H.

2004 Act	Effect	Retain/amend	Devolved or reserved	Comments
s.7	An application must be made in form and manner specified.	Significant amendments in the form and manner of application will be necessary under proposed self-declaration system.	Devolved	See Annex H.
s.8	Provision for appeal against rejection of application, applications to a court to quash a decision to grant an application if allege grant of GRC secured by fraud.	Similar provisions required.	Devolved	See Annex H.

2004 Act	Effect	Retain/amend	Devolved or reserved	Comments
s.9	Effect of full GRC is that person's sex is aligned with their acquired gender. This does not affect things done or events occurring before then but their acquired gender does operate for the interpretation of legislation, instruments and other documents made before and after the issue of the GRC.	Retain effect.	Devolved	
s.10	When Gender Recognition Panel issues full GRC to person with an entry in UK birth register, they must send a copy to the appropriate Registrar General. See below for further information about Schedule 3 which s.10 also gives effect to.	Retain effect.	Devolved	See Part 2 and Annex H.

2004 Act	Effect	Retain/amend	Devolved or reserved	Comments
s.11 (and Schedule 4)	To make consequential provision to ensure gender change does not alter intended operation of prohibited degrees of marriage.	Retain effect.	Devolved	See Part 5.
s.11A- 11D	Provisions ensure the continuity of (1) marriage on recognition of acquired gender; or (2) of a civil partnership where both parties recognised in their acquired gender.	Retain effect. Amendment may be required if Scottish civil partnership can continue if one party issued with GRC.	Devolved	See Part 5.
s.12	Parenthood - responsibilities and rights not lost on recognition of acquired gender.	Retain effect.	Devolved	See Annex H

2004 Act	Effect	Retain/amend	Devolved or reserved	Comments
s.13 (and Schedule 5)	<p>Social security benefits and state pension paid based on recipient's acquired gender.</p> <p>Accordingly they may cease to be entitled following gender recognition to certain social security benefits or pension which are gender specific or if a person of the same gender and age would not be so entitled.</p>	Retain effect.	Reserved (though some benefits are devolved).	State pension age will equalise for men and women in late 2018. Few people remain eligible for gender-specific benefits.
s.14 (and Schedule 6)	<p>Repealed and replaced for Scotland, England and Wales by Equality Act 2010.</p> <p>(Provisions concerned operation of gender recognition and sex discrimination legislation.)</p>	Retain effect.	Equal opportunities generally reserved.	See Annex G.

2004 Act	Effect	Retain/amend	Devolved or reserved	Comments
s.15	Succession - recognition does not affect who inherits under a will made before 4 April 2005.	Retain effect.	Devolved	
s.16	Peerages - descent of any peerage, dignity or title of honour will take place as if a person recognised in the acquired gender were still of the sex assigned at birth.	Retain effect.	Reserved	
s.17	Protection for trustees and other representatives unaware of person having been recognised in their acquired gender where this affected true entitlements.	Retain effect.	Devolved	

2004 Act	Effect	Retain/amend	Devolved or reserved	Comments
s.18	A person who will not inherit as a result of gender recognition may apply for a court order against the person who benefits.	Retain effect.	Devolved	
s.19	<p>Repealed and replaced for Scotland (and England and Wales) by Equality Act 2010.</p> <p>(Provision related to the regulation of participation in gender affected sports.)</p>	Retain effect.	Equal opportunities generally reserved.	See Annex G.



2004 Act	Effect	Retain/amend	Devolved or reserved	Comments
s.20	Gender specific offences – recognition of an acquired gender does not affect whether the person recognised can be held to have committed gender-specific offences.	Retain effect.	Devolved	Most sexual offences are now gender-neutral, but some sex-specific offences may remain.
s.21	Recognition of acquired gender outwith the UK does not result in automatic UK recognition unless granted in an EU or EEA country.	Amend effect.	Devolved (international relations are reserved).	See Part 6.
s.22	Makes it an offence for an official to disclose protected information, for example that a person’s acquired gender has been recognized. There are some exceptions.	Retain effect, but changes may be required depending on outcome of this consultation.	Data protection reserved, but Scottish Ministers currently can exercise powers to add exceptions that	See Part 6.

2004 Act	Effect	Retain/amend	Devolved or reserved	Comments
			are within legislative competence.	
s.23	Secretary of State or the Scottish Ministers (if provision within legislative competence of Scottish Parliament) may make order modifying operation of any Act or subordinate legislation in relation to people who have been recognised in their acquired gender under the 2004 Act.	Retain effect for legislation within devolved competence.	-	

2004 Act	Effect	Retain/amend	Devolved or reserved	Comments
s.24	How orders may be made by those with powers under the 2004 Act.	Similar provision required if power to make secondary legislation taken in any Bill to implement the proposed self-declaration system.	Devolved	
s.24 to s.26,	How secondary legislation may be made.  Provides for interpretation and commencement of 2004 Act.	Similar provisions required under proposed self-declaration system.	Devolved	
s.27	Different process for applications made within two years of commencement.  No longer possible to apply though similar to the alternative track.	Not required under proposed self-declaration system.	Devolved	See Annex C for the alternative track.

2004 Act	Effect	Retain/amend	Devolved or reserved	Comments
s.28	Extent of provisions of the Act to the different constituent parts of the UK.	Proposed self-declaration process for legal gender recognition would affect law in Scotland only.		See Part 7 for section 104 Orders.
Schedule 1	(1) Constitution of Gender Recognition Panel; (2) appointment of President and Deputy President; (3) Panel Membership; (4) Panel procedures; (5) Staff and facilities; and (6) related matters.	Provisions not required.  Proposed self-declaration system would not involve a Gender Recognition Panel.	Devolved	See Annex H.
Schedule 2	Issuing of interim GRC when applicant married.  Only Part 2 applies to Scottish marriages.	Effect of Part 2 will require amendment if interim GRC no longer a ground of divorce.	Devolved	See Part 5.

2004 Act	Effect	Retain/amend	Devolved or reserved	Comments
Schedule 3	<p>Part 2 applies to Scotland.</p> <p>Provides for the Gender Recognition Register, entries in that register and correction of those entries.</p> <p>Also provides for secondary legislation to allow marriages and civil partnerships to be registered after gender recognition.</p>	<p>Retain effect.</p> <p>Amendments may be required to reflect decisions made in relation to recognition of mixed sex civil partnership for a limited purpose.</p>	Devolved	See Part 5.
Schedule 4	<p>Part 2 applies to Scotland. See s.11 above for further information</p>	Retain effect.	Devolved	
Schedule 5	<p>See s.13 above for further information.</p> <p>Whether and how entitlements to pensions and benefits are affected by person recognised in their acquired gender.</p>	Retain effect.	Reserved (some benefits are devolved).	

2004 Act	Effect	Retain/amend	Devolved or reserved	Comments
Schedule 6	<p>Provisions repealed and replaced for Scotland, England and Wales by Equality Act 2010.</p> <p>(Provisions concerned the operation of gender recognition and sex discrimination legislation.)</p>	Retain effect.	Equal opportunities are generally reserved.	See Annex G.

## **ANNEX J – Non-binary people – consequential legal impacts of Option 4**

1. The following are examples of consequential changes required to existing devolved areas of law to take account of the recognition of a third legal sex under Option 4 discussed in Part 7.

### Family law

2. Changes may be required to family law including in areas such as:

- parentage law;
- references which may be gender specific family terms such as “husband” and “wife”;
- references which assume that there are only two sexes; or
- PRRs and who obtains PRRs.

3. Annex F contains further information about PRRs and who may have them.

### Marriage law

4. Marriage legislation currently reflects that marriage can be between a man and a woman or between two people of the same sex. This would require to be extended to include a third category of marriage, covering where one or both of the parties is non-binary. Provisions would be needed to reflect that some religious bodies and celebrants would not wish to marry non-binary people.

5. The Civil Partnership Act 2004 requires that a civil partnership must be between two people of the same sex. Provision might be required to ensure that this could be interpreted correctly where a civil partnership would involve two recognised non-binary people.

### Registration law

6. The law on the birth register and other registers may need to be amended to reflect the potential legal recognition of non-binary people.

## Crime- Gender-specific offences

7. Section 20 of the 2004 Act makes provision to ensure that a gender specific sexual offence can be committed or attempted by or against a person who has been issued with a full GRC. Although many criminal offences have been made gender neutral, there may be some remaining gender specific criminal offences and a similar provision will continue to be required. This will need to take account of an additional legal sex category.

## Victims of crime

8. Certain victims of crime currently have the right to specify the gender of their police interviewer in terms of section 8 of the Victims and Witnesses (Scotland) Act 2014. This provision is subject to an exception where complying with the request would not be reasonably practicable. In due course the victim of a crime will also have the right to request a particular gender of forensic medical examiner under section 9 of the 2014 Act where the crime alleged is of a specified type. Amendment may be needed to ensure that we address any issues which may arise on recognition of a third legal sex.



## **ANNEX K – LIST OF ORGANISATIONS SENT THIS CONSULTATION**

Any organisation or individual with an interest in this consultation is encouraged to submit their views using Citizen Space or by post.

Action of Churches Together Scotland  
Affirmation Scotland  
Al-Jannah  
Apostolic Church  
Assemblies of God  
Associated Presbyterian Churches of Scotland  
Association of Pension Lawyers  
Association of Registrars of Scotland

Baha'i Council for Scotland  
Baptist Union of Scotland  
Barnardo's  
BiScotland

Centre for Research on Families and Relationships  
Children 1<sup>st</sup>  
Children and Young People's Commissioner Scotland  
Children in Scotland  
Church of Christ  
Church of Jesus Christ of Latter-Day Saints (Mormon Church)  
Church of Scotland  
Church of the Nazarene  
Christian Brethren  
Christian Institute  
Confederation of British Industry Scotland  
Congregational Federation  
Convention of Scottish Local Authorities  
Edinburgh Inter Faith Association  
Engender  
Elim Pentecostal Church  
Equality and Human Rights Commission Scotland  
Equality Network  
Evangelical Alliance

Faculty of Advocates  
Families Need Fathers  
Family Law Association  
Federation of Small Businesses in Scotland  
Fife Buddhist Group  
Forum of Private Business  
Free Church of Scotland

Free Church of Scotland (Continuing)  
Free Presbyterian Church of Scotland

Galva 108  
Gay and Lesbian Humanist Association  
Glasgow Jewish Educational Forum

Hindu Temple of Scotland  
Humanist Fellowship of Scotland  
Humanist Society Scotland

Imaan  
Information Commissioner  
Institute of Directors Scotland

Jehovah's Witnesses  
Jewish Gay and Lesbian Group

Law Society of Scotland  
LEAP Sports Scotland  
Lesbian and Gay Christian Movement  
LGBT Centre for Health and Wellbeing  
LGBT National Youth Council  
LGBT Network  
LGBT Youth Scotland  
All Local Authority Chief Executives in Scotland

Members of the European Parliament representing Scotland  
Mermaids  
Methodist Church in Scotland  
Metropolitan Community Church  
Muslim Council of Scotland

NHS National Services Scotland - National Gender Identity Clinical Network  
Scotland  
National Records of Scotland  
NUS Scotland

OneKirk  
One Spirit Interfaith Seminary  
Open Episcopal Church in Scotland

Pagan Federation of Scotland  
Pensions Advisory Service  
Pensions Regulator  
Plymouth Brethren

Quaker Gender and Sexual Diversity Community

Rape Crisis Scotland  
Reformed Presbyterian Church of Scotland  
Relationships Scotland  
Religious Society of Friends (Quakers)  
River of Life Church  
Roman Catholic Church

Salvation Army  
Scottish Chambers of Commerce  
Scottish Christian Party  
Scottish Churches Parliamentary Office  
Scottish Conservative and Unionist Party  
Scottish Council of Jewish Communities  
Scottish Council for Voluntary Organisations  
Scottish Courts and Tribunals Service  
Scottish Episcopal Church  
Scottish Green Party  
Scottish Human Rights Commission  
Scottish Inter Faith Council  
Scottish Labour Party  
Scottish Law Commission  
Scottish Legal Aid Board  
Scottish Liberal Democrats  
Scottish Local Government Partnership  
Scottish National Party  
Scottish Prison Service  
Scottish Public Pensions Agency  
Scottish Retail Consortium  
Scottish Trades Union Congress  
Scottish Trans Alliance  
Scottish Unitarian Association  
Scottish Women's Aid  
Scottish Youth Parliament  
Seventh-Day Adventists  
Sheriffs' Association  
Sikhs in Scotland  
The Spark  
Spiritualists' National Union  
Stonewall Scotland

TransparentSees

United Free Church of Scotland  
United Reformed Church  
White Ribbon Scotland

## **ANNEX L: PARTIAL BUSINESS AND REGULATORY IMPACT ASSESSMENT (BRIA)**

### **Title of Proposal**

Review of Gender Recognition Act 2004 (the 2004 Act)

### **1. Purpose and intended effect**

- **Background**

1.1 Currently, a transgender person who has transitioned and is living as the gender opposite to that of the sex which they were assigned at birth, can have their acquired gender legally recognised in accordance with the provisions of the 2004 Act.

1.2 There are three tracks or routes to recognition under the 2004 Act: the standard track, which was used in 2016-2017 by 93% of applicants; the alternative track; and the overseas track. Under the standard track, applicants must:

- Satisfy the Gender Recognition Panel (a UK-wide tribunal) that they have or have had gender dysphoria (a condition where they experience discomfort or distress because there is a mismatch between their biological sex and their internal sense of their gender identity). They must produce two medical reports detailing this diagnosis.
- Satisfy the Gender Recognition Panel that they have lived in their acquired gender throughout the period of two years ending with the date of their application. Evidence demonstrating this, such as their passport, driving licence, payslips, or utility bills must accompany the application.
- Make a statutory declaration before a person authorised to take oaths that they have lived in their acquired gender through the period of two years ending with the date of the application and intend to live in their acquired gender until their death.

1.3 Action 13 of the Fairer Scotland Action Plan states that the Scottish Government:

“will review and reform gender recognition law so it is line with international best practice for transgender or intersex people”.

- **Objective**

1.4 The objective is to consider streamlining and simplifying the existing legal gender recognition arrangements under the 2004 Act to make these less intrusive for applicants and more in line with international developments such as in other countries which have recently adopted new systems of legal gender recognition.

1.5 The Scottish Government proposes, subject to the outcomes of the consultation, to replace the existing arrangements with a ‘self-declaration’ system for legal gender recognition, similar to that adopted in countries such as the Republic of Ireland. Under the proposed self-declaration system there would be no requirement for

medical evidence or evidence of having lived in their acquired gender for a defined period. Decisions would no longer be made by a tribunal like the existing Gender Recognition Panel.

1.6 Additionally, the Scottish Government proposes that applications for legal gender recognition could be made by people aged 16 and over.

1.7 The views of respondents are also sought on:

- a range of identified options for children under 16; and
- about the options for legal recognition of people who do not identify as men or women, but whose gender identity lies somewhere between or beyond those categories, or who do not have a gender (non-binary people).

1.8 A separate consultation will be published seeking views on next steps for intersex people/people with variations of sex development.

- **Rationale for Government intervention**

1.9 Adopting a new system for legal gender recognition in Scotland would require an Act of the Scottish Parliament.

## **2. Consultation**

- **Within Government**

2.1 In preparing the consultation, the Scottish Government's Family and Property Law team have worked with:

- the Equality Unit;
- Communities Analytical services;
- Scottish Government Human Resources;
- National Records of Scotland;
- The Scottish Public Pensions Agency (regarding any impacts in relation to public service pensions);
- NHS National Services Scotland (regarding impacts for the National Health Service Central Register and the Community Health Index number);

- **Public Consultation**

2.2 This partial BRIA forms part of a public consultation which will run for 16 weeks.

- **Business**

2.3 We conducted interviews with representatives from the following organisations to prepare for this BRIA:

The University of Glasgow

Pinsent Masons LLP

Tesco Stores Limited

A technology company in the global payments industry (the technology company)

A UK-wide association of pension schemes and pension professionals (the pension association)

### **3. Options**

3.1 Option 1: no change

3.2 Option 2: introduce a new self-declaration system for legal gender recognition for people aged 16 and over. Under our proposals, to obtain legal recognition of their acquired gender, an applicant would complete an application form and submit this with a statutory declaration<sup>1</sup> indicating that:

- they are applying of their own free will;
- they understand the consequences of obtaining legal gender recognition and
- they intend to live in their acquired gender until their death.

3.3 Option 3: introduce a new self-declaration system for legal gender recognition and, depending on the outcomes of the consultation, allow under 16s to apply for legal gender recognition.

3.4 Option 4: introduce a new self-declaration system for legal gender recognition and, depending on the outcomes of the consultation, take action to give legal recognition to the gender identities of non-binary people.

#### **Sectors and groups affected**

3.5 We consider that the following groups or sectors are affected:

- Transgender people who want to be legally recognised in the gender with which they identify and in which they live;
- National Records of Scotland - who currently deal with updating the Gender Recognition Register and issue updated birth certificates to successful applicants for legal gender recognition under the 2004 Act who were born or adopted in Scotland;
- Employers and business - who may engage with a transgender employee or customer who is seeking to transition to an acquired gender or is living in their acquired gender and who may obtain legal gender recognition; and
- Pension providers (including businesses with their own employee pension schemes), and which schemes may have members who have changed their legal gender.

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<sup>1</sup> This is a declaration made under the Statutory Declarations Act 1835.

## **Benefits and costs**

### Option 1: no change

#### 3.6 Option 1- Benefits

Legal gender recognition would still be available using the 2004 Act process. This may have the benefit of stability and there would be no need for further legislation.

#### 3.7 Option 1- Costs

3.7.1 No set up costs or running costs would be incurred. Transgender people would still (in the majority of cases) have to provide medical evidence and evidence of their having lived in their acquired gender for a defined period ending with the date of their application. People aged under 18 could not apply for legal gender recognition. Non-binary people cannot use the legal gender recognition arrangements under the 2004 Act to be recognised in their gender identity.

### Option 2: self-declaration system for those aged 16 and above

#### 3.8 Option 2- Benefits

3.8.1 This would streamline the existing legal gender recognition process under the 2004 Act and allow people aged 16 and over to apply. Applicants would experience a less intrusive application process

#### 3.9 Option 2- Costs

3.9.1 Option 2 would lead to costs. However, the Scottish Government does not consider that there would be significant costs in adopting a self-declaration system for legal gender recognition in Scotland. The possibility of legal gender recognition is already provided in the 2004 Act. The majority of associated costs have been incurred with the introduction of the 2004 Act.

3.9.2 For certain legal purposes, for example state and occupational pensions, and social security benefits, a transgender person whose acquired gender has not been legally recognised is treated as being of the sex shown on their birth certificate regardless of their gender identity. In practice, businesses and the third sector must recognise and respect transgender people who are living in, or transitioning to, their acquired gender (either as employees or customers) before they obtain legal gender recognition under the 2004 Act. This is because, subject to limited exceptions, it is unlawful to discriminate against a person on the grounds that they intend to undergo, are undergoing or have undergone gender reassignment.

3.9.3 In practice, transgender people seeking legal recognition under either the standard or alternative track<sup>2</sup> provided by the 2004 Act have lived in their acquired gender for a substantial period of time.

3.9.4 Overall, the organisations interviewed in preparation for this BRIA (for which see Part 4 of this BRIA) took the view that there would be minimal costs for them if Scotland adopted a self-declaration system for legal gender recognition. It was noted by two of those interviewed that smaller organisations might not have formulated a policy in relation to gender diverse employees and service users and that an increase in the numbers of people obtaining legal gender recognition would increase the likelihood that a business would encounter a transitioned or transitioning employee or customer. This may require such organisations to formulate policies longer term and incur costs in doing so. However, these costs would not be the direct result of the adoption of Option 2.

3.9.5 There would be costs relating to the operation of legal gender recognition process to replace the Gender Recognition Panel. (When the 2004 Act came into effect, the UK Government indicated that the cost of establishing the Gender Recognition Panel would be £0.7 million<sup>3</sup>. No contribution has been sought from Scotland towards the running of the Gender Recognition Panel.). The consultation suggests that, if applications for legal gender recognition were made under a self-declaration system, either a team at Scottish Government or National Records of Scotland could then process the applications. There would be one-off costs associated with IT systems, application forms and for training and familiarisation events for staff dealing with applications. We currently estimate these set-up costs to be in the range of £250,000 to £300,000.

3.9.6 This estimate is based on the assumption that the existing Gender Recognition Register constituted by the 2004 Act would continue to be used as part of the self-declaration system for legal gender recognition. (Staff at the National Records of Scotland make an entry in the Gender Recognition Register for a person born or adopted in Scotland who obtains a full Gender Recognition Certificate and having done so can then use that record to provide a successful applicant with a new birth certificate reflected their sex as aligning with their acquired gender.)

3.9.7 Running costs will primarily depend on the numbers of applicants. Other countries that have adopted self-declaration systems for legal gender recognition to replace existing arrangements have seen an increase in the number of applicants. The evidence from other countries which have adopted self-declaration systems leads us to believe that the proposal to adopt a similar system in Scotland, if implemented, is likely to lead to an overall increase in the number of successful applications for legal gender recognition.

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<sup>2</sup> 93.1% of applicants in 2016-2017 applied using these one of these two tracks. The remaining applicants sought recognition under the overseas track indicating that they already had legal recognition in another jurisdiction.

<sup>3</sup> As set out in the Legislative Consent motion for the Gender Recognition Bill 2004 at <http://www.gov.scot/About/Government/Sewel/SessionTwo/GenderRecognition>.



3.9.8 Denmark has a similar size population to Scotland<sup>4</sup> and has implemented a self-declaration system for legal gender recognition. In 2014, it received an average of 279 applications per year in the first two years of operation. The Republic of Ireland has a slightly smaller population than Scotland<sup>5</sup>. Between September 2015 (when their new arrangements started) and May 2017, a total of 230 people had been recognised in their acquired gender in the Republic of Ireland. Norway, which has a population of 5.23 million has experienced a significantly higher uptake than Denmark or the Republic of Ireland. In the first eight months of operation<sup>6</sup> there, 706 applications were received. We consider it reasonable to estimate that the numbers of applications from people either born or adopted in Scotland or resident in Scotland, would be in the range of 250 to 400 applications per year. Currently, an average of 25 people per year obtain legal recognition of their acquired gender under the 2004 Act who were born or adopted in Scotland.

3.9.9 Based on the assumption that the number of applications will not exceed 400 per year, we estimate that the running costs of a self-declaration system would be £100,000 per year. Running costs could potentially be offset if a fee were charged for making an application for legal gender recognition. The consultation suggests that if the proposed self-declaration system is adopted, then powers could be taken so that the Scottish Government or National Records of Scotland could charge a fee, subject to a full and careful separate consultation including about the level of any such fees.

3.9.10 Pension policy is a reserved matter to the UK Government, although there are some executively devolved powers of pension policy in terms of certain public service schemes in Scotland<sup>7</sup>. A change of legal gender had the potential to affect pension rights. However, we consider that the impacts of the adoption of Option 2 from the perspective of a successful applicant's pension rights or of their survivor's pension rights are now minimal.

3.9.11 In particular, in late 2018 the state pension age will equalise for men and women. Consequently, all people regardless of their legal sex will be entitled to the state pension at the same age. A change of legal gender will cease to have the potential to affect whether a person who is legally recognised in their acquired gender becomes entitled to the state pension at an earlier stage or later stage. (The Scottish Government has committed to implementing new arrangements for legal gender recognition by 2020.)

3.9.12 However, a change of legal gender can affect rights to occupational pensions. Historically men and women have been treated differently for pension purposes, as have widowers, surviving civil partners and same-sex spouses in respect of survivor

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<sup>4</sup> Denmark's population in 2016 was estimated to be 5,748,769 per <https://countryeconomy.com/demography/population/denmark>. . Scotland's population in 2015 was estimated to be 5,373,000 per <https://www.nrscotland.gov.uk/news/2016/scotlands-population-at-its-highest-ever>.

<sup>5</sup> About half a million fewer than Scotland- see <http://countrysometers.info/en/Ireland/>

<sup>6</sup> From 1 July 2016 to 20 March 2017.

<sup>7</sup> Information on these public sector schemes is available at the Scottish Public Pension Agency's website: <http://www.sppa.gov.uk/>.

rights in pensions. For private sector defined benefit schemes, there is a legal obligation to ensure gender equality from 17 May 1990<sup>8</sup> onwards; in public service schemes, generally only service from 6 April 1988 onwards counts towards accrual of a widower's same sex surviving spouse or surviving civil partner pension<sup>9</sup>. (In some cases, where a member changes their gender from male to female, there are protections for their surviving female spouse to ensure that they do not lose entitlement as a result of their spouse's decision to change their legal gender<sup>10</sup>.)

3.9.13 The UK Government has published information about the potential costs of equalisation of survivor benefits<sup>11</sup>. Further information can be found in the UK Government report "Review of Survivor Benefits in Occupational Pension Schemes"<sup>12</sup>.

3.9.14 A recent Supreme Court decision in *Walker v Innospec Limited* [2017] UKSC 47<sup>13</sup> now impacts in this area. This case considered an exception in the Equality Act 2010<sup>14</sup>, whereby the benefit paid to a scheme member's same sex spouse or civil partner could be less than the benefit paid to their opposite-sex spouse, as it may not be based on the full service of deceased surviving partner. A surviving civil partner or same-sex spouse<sup>15</sup> of a private sector occupational pension scheme member would be eligible to receive survivor benefits based on the member's pensionable service only from 5 December 2005, when civil partnerships became possible.

3.9.15 Following interviews as part of this BRIA, it seems that many schemes either make no difference in their terms or decide to treat civil partners and same-sex

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<sup>8</sup> This followed the European Court of Justice judgement in *Barber v Guardian Royal Exchange Assurance Group*, Case 262/ 88, [1990] IRLR 240 at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61988CJ0262>.

<sup>9</sup> See the UK Government "Review of Survivor Benefits in Occupational Pension Schemes" at <https://www.gov.uk/government/publications/occupational-pension-schemes-review-of-survivor-benefits> for further information about differences in survivor benefits.

<sup>10</sup> For example, Category B pension is entitlement to state pension based on a current or deceased spouse's or civil partner's National Insurance record. A married man or civil partner's entitlement is restricted to those whose wives or partners were born on or after 6 April 1950. There is similar restriction for person married to a person of the same sex. Article 8(2) of The Marriage and Civil Partnership (Scotland) Act 2014 and Civil Partnership Act 2004 (Consequential Provisions and Modifications) Order 2014 provided that this restriction does not apply to the entitlement of a woman married to another woman where they were her male spouse prior to obtaining a gender recognition certificate. Another example is the guaranteed minimum pension. Paragraph 11 of Schedule 5 of the 2014 Order amends the Pension Schemes Act 1993 so that a woman in a marriage of a same sex couple whose spouse was her husband immediately prior to obtaining a gender recognition is entitled to be treated as the widow of a man.

<sup>11</sup> At <https://www.gov.uk/government/publications/occupational-pension-schemes-review-of-survivor-benefits>.

<sup>12</sup> At [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/323874/survivor-benefits-in-occupational-pension-schemes.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/323874/survivor-benefits-in-occupational-pension-schemes.pdf).

<sup>13</sup> The judgement and a summary can be accessed at <https://www.supremecourt.uk/cases/uksc-2016-0090.html>

<sup>14</sup> Equality Act 2010, schedule 9, paragraph 18.

<sup>15</sup> Unless they had been opposite sex spouses at the time of their marriage but became same sex spouses as a result of a full gender recognition certificate being issued to one of them.

spouses on the one hand and opposite-sex spouses on the other hand, in the same way. This is confirmed by information available from the UK Government<sup>16</sup>. However, the pension association noted that smaller pension schemes with reduced assets, may have sought to rely on the exception in the Equality Act 2010 more often than was the case with larger schemes.

### Option 3: self-declaration system with arrangements in place for those under 16

#### 3.10 Option 3 - benefits

3.10.1 People under 16 can apply for legal gender recognition.

#### 3.11 Option 3 - costs additional to identified costs for Option 2

3.11.1 The consultation seeks views on the options for permitting people under 16 to apply for legal gender recognition.

3.11.2 There are some countries operating self-declaration systems for legal gender recognition which permit children under 16 to apply. Where we have been able to identify the numbers of applications by people under 16, they are low as a proportion of the overall numbers. In Norway, which has a similar population size to Scotland, there were 9 children aged between 6 and 16 who applied for and obtained legal recognition in their acquired gender in the period between 1 July 2016 and September 2016. This represents 3.5% of the total number of applicants by September 2016. Given our estimate range of total applicants aged 16 and over of between 250 and 400 in the proposed new Scottish arrangements, fewer than 15 children might be expected to apply.

3.11.3 One of the options for people under 16 applying for legal gender recognition is a court-based process. The costs of using a tribunal or court to consider applications for legal gender recognition would be higher than would be the case if all applications were only considered by an administrative body. There might be start-up costs of £650,000 and then running costs of £300,000 a year for a new Scottish tribunal dealing with such applications. The other options discussed in the consultation (application by parents, people over 12 being able to apply, and applications from under 16s where they had capacity) would still incur costs, but these could reasonably be expected to be substantially less than where a court or tribunal based process were used. For example, if all people with parental responsibilities and rights for a child seeking legal recognition were required to apply on the child's behalf, the administrative body checking the application would need to check an application to ensure that the evidence indicated that all the correct people had been involved in the application.

3.11.4 Overall, unless a court or tribunal based approach is adopted to people under

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<sup>16</sup> Paragraph 10 of the Executive Summary in the UK Government "Review of Survivor Benefits in Occupational Pension Schemes at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/323874/survivor-benefits-in-occupational-pension-schemes.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/323874/survivor-benefits-in-occupational-pension-schemes.pdf) indicated that 27% of private pension schemes had a difference in the way survivor benefits between mixed sex spouses and civil partners were calculated.

16, we anticipate that the additional cost impact of extending the gender recognition system to people under 16 would be minimal.

#### Option 4: Self-declaration system and recognition of non-binary people.

##### 3.12 Option 4- benefits

3.12.1 The consultation also sets out a number of possible options for offering increased or full legal recognition for non-binary people (an umbrella terms for people who do not identify as either men or women but whose gender identity may lies somewhere between or outwith those categories or who may have no gender). The gender identities of non-binary people would be better recognised in society to varying degrees depending on the option or options selected.

##### 3.13 Option 4- costs additional to Option 2

3.13.1 All the options (other than 'no change') intended to improve the recognition of non-binary people, would involve costs. It is not possible currently to accurately identify the costs involved in the recognition of non-binary people, as much depends on exactly which option(s) are chosen. There is little evidence about the number of non-binary people in Scotland but the Equality and Human Rights Commission Note on Measuring Gender Identity<sup>17</sup> reported that 0.4% of people who answered a question about their gender identity reported that they identified in another way from a man or woman. Based on the mid-2015 estimate of the Scottish population of 5,373,000, this suggests that there might be 21,492 non-binary people in Scotland.

3.13.2 We estimate that the option with the lowest potential costs, which would be offset by charging a fee on a cost recovery basis, would be that of allowing a non-binary person to apply to be entered in a Book of Non-binary Identity run by National Records of Scotland. It is not possible to predict the level of interest and the income it might generate. However, given that an entry in the Book of Non-Binary Identity would have no legal effect, non-binary people may not wish to use this new public record.

3.13.3 A review of administrative and other official forms to allow for additional options for non-binary people would have costs in terms of resource time and for the production of new versions of existing paper and online forms or IT systems.

3.13.4 One example of required changes to IT systems would be a change to the Community Health Index (CHI) number. The Community Health Index is a register of NHS patients in Scotland. The CHI number is a unique 10 numeric character identifier allocated to each patient in NHS Scotland. One of the CHI number's digits is odd for male or even for female. A patient may request that their CHI number be changed to reflect that they have transitioned and are living in the opposite sex, whether or not they have been legally recognised in their acquired gender by the Gender Recognition Panel. There is no option for a person to be identified as anything other than either male or female. There would be IT costs to enable any change in the Community Index Number allocated to a person to identify them as

<sup>17</sup> At [https://www.equalityhumanrights.com/sites/default/files/technical\\_note\\_final.pdf](https://www.equalityhumanrights.com/sites/default/files/technical_note_final.pdf).

non-binary. The costs cannot currently be estimated due to the number of NHS Scotland systems which are understood to use the CHI number in its current format (possibly exceeding 400) and which *may* require to be changed if the format of the CHI were also altered. Changes to the format of other official documents such as passports and driving licences are not within the devolved competence of the Scottish Parliament, but we understand would involve costs in resources and IT systems also.

3.13.5 The consultation refers to two other possible options:

- Amending the Equality Act 2010 to broaden the protection against discrimination for people who propose to undergo, are undergoing or have undergone a process or part of a process to reassign their sex to include all people (including non-binary people) who face discrimination as a result of their gender identity; and
- Full legal recognition for non-binary people using the proposed self-declaration system whereby there would be recognition of non-binary people as an additional legal sex along with male and female.

3.13.6 Increasing the protections against discrimination on the basis of a person's gender identity and the introduction of a new legal sex for people with a non-binary gender identity would have financial impacts for business and service providers, including in the public sector. For example:

- NHS Scotland currently aims to accommodate all patients in hospital in single-sex wards;
- toilets or changing facilities are often designated for the use of either men or women;
- the Scottish Prison Service has estimated that the cost of a new small prison unit for 20-30 people might be between £8.7 million and £10.7 million including VAT.

3.13.7 The business and third sector organisations we interviewed in preparation for this BRIA agreed that legal recognition of non-binary people would require IT systems to be upgraded. In particular, two interviewees noted that an employer operating PAYE<sup>18</sup>, HM Revenue and Customs require them to provide information about whether employees are male or female when making a payroll return.

3.13.8 There are legislative options to reduce the impact of legal recognition of non-binary people on business and third sector. For example, one option could be to limit any requirement to adapt existing services or facilities for non-binary people only to what is reasonable in the particular circumstances. There are precedents for this. For instance, a disabled person's employer is under a duty in terms of the Equality Act 2010 to make reasonable adjustments to enable the disabled worker to access what they need to do and keep their job. Under those arrangements, what is reasonable for an organisation will depend, in part, on the size and nature of the organisation. Any limitation of this nature might require amendments to the Equality

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<sup>18</sup> Pay As you Earn (PAYE) is HM Revenue and Customs' system to collect Income Tax and National Insurance from employment.

Act 2010, which is generally reserved to the Westminster Parliament.

3.13.9 Permitting non-binary people to apply for legal recognition using the proposed self-declaration system of legal gender recognition would increase the number of applicants. The running costs of the system would increase accordingly. It seems likely that there would be a high initial intake of applications from existing non-binary people. When it first became possible for a transgender person living in their acquired gender to seek legal recognition under the 2004 Act, in the first year or two of implementation there were high numbers of applications compared to later years. Numbers have since remained relatively steady. In the financial year 2005-2006, there were 1,002 applications made to the Gender Recognition Panel; but the number of applications reduced in 2006-2007 to 693 and then reduced substantially again to 294 in 2007-2008. If the same number of non-binary people applied for legal recognition as trans men and trans women, additional member(s) of staff would be required to examine and process the applications. Running costs can be expected to increase commensurately.

3.13.10 The estimated set-up costs would also increase substantially from those under Option 2. This is because further IT changes would be necessary. Changing the National Records of Scotland's registration and related systems so that people could obtain a new birth certificate showing them to be legally recognised as non-binary would involve substantial additional IT and administrative staff time. Other national registers, such as the Register of Deaths and the Register of Marriages would also require to be able to record information about the legal sex of recognised non-binary people. For the purpose of recognising same sex marriages, the estimated costs of changes to the registration administration and family history system of National Records of Scotland were £75,000, for updating their statistical systems were £45,000, and for changes to forms and extracts were around £80,000.

#### **4. Scottish Firms Impact Test**

4.1 To appreciate the impact that the proposed legislation may have on businesses operating in Scotland, we sought to engage in a variety of business and third sector organisations, including financial institutions, a law firm, a University and a pension association. We secured interviews in March, April and May 2017 with the following:

- The University of Glasgow;
- Pinsent Masons LLP;
- Tesco Stores Limited;
- A technology company in the global payments industry (the technology company)
- A UK-wide association of pension schemes and pension professionals (the pension association)

4.2 The interviews with the University of Glasgow and the pension association were conducted face to face. The other interviews were conducted by telephone conference.

4.3 All the organisations were asked questions concerning:

- the potential impacts of a self-declaration system for legal gender recognition;
- the extent to which their record keeping systems necessitate that all staff are identified as either male or female;
- the extent to which employees and service users can identify themselves using gender neutral titles, such as “Mx”;
- the use of the recorded data about sex or gender identity in their staff records;
- whether they thought the legal recognition of non-binary people’s gender identity as a new legal sex would impact on their IT systems; and
- any other impacts they thought might arise if the gender identities of non-binary people were legally recognised.

4.4 The pension association provided information as to what they thought might be the impacts for pension schemes.

*Self-declaration system for legal gender recognition*

4.5 The majority of the organisations interviewed considered that the adoption of Option 2 (adoption of a self-declaration system for people aged 16 and above) would have minimal impact for them. Both the pension association and Pinsent Masons LLP noted that the likely increase in the numbers of people obtaining legal gender recognition under Option 2 might have a greater impact on smaller organisations who had not yet formulated policies on an employee or service user who had obtained legal recognition in their acquired gender. Smaller pension schemes, for example, would be unlikely to have encountered a member having legally changed their gender and would have costs in ascertaining the options and the impact that the change of legal sex had for that individual member or their survivor.

4.6 Several of the organisations interviewed had existing published policies supporting transgender employees and service users (Tesco Stores Limited, Pinsent Masons LLP and the University of Glasgow) and had sought advice or training from organisations such as Stonewall or Mermaids.

*Non-binary recognition- IT and facilities*

4.7 In respect of Option 4, there was uncertainty around the impacts and costs of legal recognition of non-binary people.

4.8 The organisations interviewed were aware of non-binary people and some had adapted their policies. Pinsent Masons LLP allowed a staff member and/or a service user to express a preference for the use of a gender neutral title such as “Mx”. Tesco Stores Limited were working towards staff being able to do so when their HR and payroll systems were implemented. Pinsent Masons LLP were considering making the option of gender neutral toilets available where possible in existing buildings and when they take on a new office.

4.9 Several interviewees noted that their own IT systems would require to be updated at a cost. Tesco Stores Limited advised that when their new IT system was implemented it would be capable of holding information about gender identity beyond male/female or man/woman. Pinsent Masons LLP already sought gender

diversity information from applicants for employment and held these securely but thought that there would be some IT costs for updating their systems to reflect legal recognition of non-binary staff. Both Tesco Stores Limited and the University of Glasgow noted that all payroll systems had to designate every employee as male or female, because of the HMRC payroll reporting requirements. The University of Glasgow noted that the Higher Education Statistical Agency collected information about the sex and gender identity of both university staff and students and the University carry out monitoring exercises in support of this.

### *Pensions*

4.10 The University of Glasgow, Tesco Stores Limited and the technology company were able to confirm that there would be no impact of the proposed changes on the operation of their occupational pension schemes. The pension association advised that there might be complex potential impacts for survivors' rights in defined benefit pension schemes, where the scheme member changed their legal gender and had been in a same sex marriage at the time. If one spouse in a same sex marriage changed their legal sex, this potentially changes the entitlement under a pension of their survivor from those of a same sex marriage to those of a mixed sex marriage<sup>19</sup>.

4.11 Under an exception provided by the Equality Act 2010, when dealing with the survivor of a member in a civil partnership or same sex marriage, a pension scheme can limit the survivor's benefits to the period of the member's service on and after 5 December 2005, over and above any contracted-out guaranteed minimum pension. In their experience, many schemes already chose not to rely on this exemption and paid equal benefits on death to the member's survivor irrespective of their sexual orientation but schemes which were smaller and had fewer resources, might decide in their circumstances to rely on this exemption.

[Note: The interview with the pension association was held before publication of the Supreme Court decision in *Walker v Innospec Limited* [2017] UKSC 47<sup>20</sup>.]

4.12 The recognition of non-binary people also had the potential to impact on pensions as often actuarial calculations are based on the member's sex as male or female, though increasingly they understood that unisex factors were being used to inform calculations.

### **Competition Assessment**

4.13 The proposals will not limit, either directly or indirectly, the number or range of suppliers.

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<sup>19</sup> For some pension schemes, there are differences in the benefits payable to a man or to a woman who survive an opposite sex spouse, and to those who survive a same sex spouse or civil partner. The differences are explained in detail in the UK Government Report "Review of Survivor Benefits in Occupational Pensions" at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/323874/survivor-benefits-in-occupational-pension-schemes.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/323874/survivor-benefits-in-occupational-pension-schemes.pdf).

<sup>20</sup> The judgement and a summary can be accessed at <https://www.supremecourt.uk/cases/uksc-2016-0090.html>.



4.14 The proposal will not limit the ability of suppliers to compete nor will it reduce supplier's incentives to compete vigorously.

### **Test run of business forms**

4.15 There are no new forms for business proposed. If the proposed self-declaration system for legal gender recognition were adopted, there would be a new form for an application and associated forms to complete, but these will not impact on business.

## **5. Legal Aid Impact Test**

5.1 There could potentially be costs for the Scottish Legal Aid Board in relation to the adoption of a self-declaration system for legal gender recognition, but any impact would be minimal.

5.2 For example, the proposal to cease requiring applicants to provide medical evidence or evidence of the applicant having lived in their acquired gender throughout a defined period prior to the applicant date would reduce any potential requirement for an applicant to consult a solicitor as part of the process of preparing their application. This should minimise the number of applicants who seek legal advice and use legal aid advice and assistance.

5.3 The consultation proposes that an appeal against a refusal of an application for legal gender recognition under the proposed self-declaration system would be made to the sheriff court, whereas under the 2004 Act arrangements an appeal in Scotland would be for the Court of Session. Removing the necessity for evidence to be submitted by an applicant for legal gender recognition over 16 should also reduce the possibilities for an application to be refused and thereby reduce the likelihood of appeals. The number of appeals under the 2004 Act is very low in any event. There have been two appeals, one of which was to the Court of Session in Scotland

5.4 If the proposed system were extended to allow people under 16 to apply, there may be implications for legal aid if the option for use of a court-based process were adopted. We have estimated that fewer than 5 children might be expected to apply for legal gender recognition given the numbers experienced in Norway which permit children aged 6 to 16 to change their legal gender. Consequently, we anticipate that the impact for legal aid of extending the gender recognition system to people under 16 would be minimal.

## **Enforcement, sanctions and monitoring**

### **Enforcement and sanctions**

6.1 The consultation proposes that a transgender person who wishes to apply for legal recognition of their acquired gender should be required to submit a statutory declaration stating that they:

- are applying of their own free will;
- understand the consequences of obtaining legal gender recognition; and

- intend to live in their acquired gender until death.

6.2 Under section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995, any person who knowingly and wilfully makes a statement false in a material particular in a statutory declaration shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding two years or to a fine or to both such fine and imprisonment.

### Monitoring

6.3 Statistics about the numbers of people obtaining legal gender recognition under the 2004 Act are published quarterly<sup>21</sup>. We do not propose that this should change.

### Implementation and delivery plan

7.1 The consultation will influence the Scottish Government's decisions about next steps and the content of any draft legislation.

7.2 If a Bill should be introduced, this BRIA would be finalised, taking account of points made by consultees. The final version of the BRIA would be published.

### Post-implementation review

7.3 If legislation is taken forward to reform the 2004 Act, that legislation would be reviewed within 10 years.

### Summary and recommendation

#### Summary of costs of adopting a self-declaration system for legal gender recognition in Scotland

8.1 The table of estimated costs below assumes that:

- up to 400 applications for legal gender recognition would be received per year;
- the Gender Recognition Register created under the 2004 Act would continue to be utilised to produce new birth certificates for successful applicants who were born or adopted in Scotland;
- the proposed self-declaration system would apply to people aged 16 and over whose acquired gender (the gender in which they live and with which they identify) is that of a man or a woman.

Cost	Estimate
Start-up costs (including IT systems, application forms, staff training, and preparation of guidance for applicants)	£250,000 to £300,000

<sup>21</sup> These can be found at <https://www.gov.uk/government/collections/tribunals-statistics>.

Administration costs	Up to £100,000 per annum
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8.2 There would be additional costs if:

- applicants younger than 16 could apply for legal gender recognition; or
- non-binary people were legally recognised.

**Declaration and publication**

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

**Signed:****Minister's name, title etc\*****Date:****Scottish Government Contact point:**

THIS WILL BE COMPLETED AFTER THIS CONSULTATION AND VIEWS HAVE BEEN OBTAINED FROM CONSULTEES

## ANNEX M: PARTIAL CHILD RIGHTS AND WELLBEING IMPACT ASSESSMENT (CRWIA)

<b>CRWIA front sheet</b>	
<p><b>Policy/measure</b></p> <p>A general description of the policy/measure</p>	<p>The Scottish Government intends to review and reform gender recognition law, so it is in line with international best practice for people who are transgender or intersex.</p> <p>This CRWIA relates to transgender people.</p> <p>“Gender recognition law” is the area of the law which allows a person to be legally recognised in a sex which is different to the one assigned to them at birth.</p>
<p><b>Initiating department</b></p> <p>The responsible team or division. If this is a cross-cutting policy, name the team that has overall responsibility</p>	<p>Family and Property Law team.</p>
<p><b>Policy aims</b></p> <p>What the policy or measure is trying to achieve; what are the expected outcomes</p>	<p>We are reviewing the current law. We will consult on proposals which will directly affect people under 18.</p> <p>Under the current law, someone can apply for gender recognition at 18. The applicant must show that they have “lived in the acquired gender throughout the period of two years ending with the date on which the application is made”.</p> <p>The Scottish Government proposes to reduce the minimum age of application to 16, in line with the age at which children and young people acquire a number of rights. The consultation also seeks views on what arrangements should be put in place for those under 16.</p> <p>The Scottish Government proposes to streamline the gender recognition process generally by removing the need for medical evidence and evidence of living in the acquired gender.</p>
<p><b>Timetable</b></p> <p>What is the time frame for a policy announcement/consultation/implementation?</p>	<p>The Scottish Government is holding a public consultation in 2017 and 2018 and intends new arrangements to be put in place by 2020.</p>
<p><b>Date</b></p>	<p>29 September 2017</p>

## CRWIA Stage 1 Screening – key questions

### 1. What aspects of the policy/measure will affect children and young people up to the age of 18?

The Articles of the UNCRC and the wellbeing indicators under the Children and Young People (Scotland) 2014 apply to all children and young people up to the age of 18, including non-citizen and undocumented children and young people.

- If we reduce the age at which a person can apply for gender recognition to 16, this will affect people aged between 16 and 18.
- If we allow children or their legal representatives to apply for gender recognition before the age of 16, that will affect people under the age of 16.

### 2. What likely impact – direct or indirect – will the policy/measure have on children and young people?

‘Direct’ impact refers to policies/measures where children and young people are directly affected by the proposed changes e.g. in early years, education, child protection or looked after children (children in care). ‘Indirect’ impact refers to policies/measures that are not directly aimed at children but will have an impact on them. Examples include: welfare reforms, parental leave, housing supply or local transport schemes.

- Whatever we propose is likely to have a direct effect on people under 18.

### 3. Are there particular groups of children and young people who are more likely to be affected than others?

Under the UNCRC ‘children’ can refer to: individual children, groups of children, or children in general. Some groups of children will relate to the groups with protected characteristics under the Equality Act 2010: disability, race, religion or belief, sex, sexual orientation. It may be possible to align the CRWIA with the Equality Impact Assessment in these cases. ‘Groups’ can also refer to children by age band or setting, or those who are eligible for special protection or assistance e.g. pre-school children, children in hospital, children in rural areas, looked after children, young people who offend, victims of abuse or exploitation, child asylum-seekers, or children living in poverty.

- The children primarily affected by the review are children who experience issues around their gender identity. The review will also affect other children, including the peers of those primarily affected.
- “Gender reassignment” is a protected characteristic under the Equality Act 2010. A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

**4. Who else have you involved in your deliberations?**

Have you included all policy leads who may have an interest in these developments?

- We have held an Equality Impact Assessment framing exercise involving colleagues from across government, including Equality Unit, Communities Analytical Services, and a member of the LGBT staff network. Those attending identified significant potential consequences for people under 18.

**5. Will this require a CRWIA?**

- Yes. Whatever we propose, including no change, will affect people under 18.

**CRWIA Declaration**

Tick relevant section, and complete the form.

**CRWIA required**

**CRWIA not required**

✓

**Authorisation**

**Jan Marshall, Deputy Director, Civil Law and Legal System**

**Date 26 October 2017**

## CRWIA Stage 2 Scoping - key questions

### 1. What children's rights are likely to be affected by the policy/measure?

List all relevant Articles of the UNCRC and Optional Protocols. All UNCRC rights are underpinned by the four general principles: non-discrimination; the best interests of the child; the right to life; survival and development; and the right to have children's views given due weight.

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#### Article 2

Being transgender may be an "other status". This article may also be relevant for a child who has a transgender parent or parents.

#### Article 3

Article 3(1) will be relevant if the Scottish Government introduces an administrative procedure which allows children to change their legal sex.

Article 3(2) may be relevant because the evidence available to the Scottish Government suggests that in some cases, a child who changes their gender may later change their mind about the change.

Article 3(3) may be relevant in relation to health advice and treatment provided to transgender children and to children concerned about their gender identity.

#### Article 5

This article of the Convention is key in relation to our proposals in relation to transgender children. It is about balancing the responsibilities and rights of parents against the right of the child to make decisions.

#### Article 6

Some of the options we are considering could affect the development of transgender children.

#### Article 7

Article 7(1) may be relevant. It provides that "the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents." Gender identity is recorded in the gender recognition register (and displayed on a birth certificate). This article also links to article 8.



The implementation handbook for the Convention<sup>1</sup>, published by UNICEF, says:

“Although the Convention does not specify what must be registered, other rights (to name and nationality, to know parentage, family and identity) imply that registration ought, as a minimum, to include:

the child’s name at birth,  
the child’s sex,  
the child’s date of birth,  
where the child was born,  
the parents’ names and addresses,  
the parents’ nationality status.”

### **Article 8**

The implementation handbook for the Convention says that gender identity is an aspect of identity.

### **Article 12**

Article 12 of the Convention is key in relation to our proposal that transgender children be allowed to apply to change their legal sex.

### **Article 13**

This article may be relevant in relation to transgender children. For example, the right could relate to receiving information about gender identity and the provisions of the law.

### **Article 14**

Article 14 may be relevant in relation to our proposals. The article is about the right to freedom of thought, conscience and religion. There may be cases where a parent or guardian’s beliefs conflict with a child’s beliefs.

### **Article 16**

Article 16 may be relevant. For example, transgender children should be entitled to receive confidential advice. Records or correspondence about a person’s transgender status or gender history should similarly be confidential and should be processed accordingly.

### **Article 17**

Article 17 may be relevant in relation to transgender children. There may be actions the Scottish Government could take in relation to the supply of information to meet the needs of individual transgender children. There is also a wider point about

<sup>1</sup> At [https://www.unicef.org/publications/index\\_43110.html](https://www.unicef.org/publications/index_43110.html)

educational material being available which recognises and educates children about diversity.

### **Article 18**

Article 18(1) refers to the principle that both parents have common responsibilities for the upbringing and development of the child. That is relevant to any system under which a parent or parents consent to a decision on behalf of a child.

Article 18(2) concerns assistance to parents and legal guardians in the performance of their child-rearing responsibilities. It may be relevant in relation to advice and support provided to parents of transgender children and parents of children with concerns about their gender identity.

### **Article 23**

This article, which relates to children with disabilities, may be relevant. We refer to evidence about the mental health of transgender children in paragraphs 4.6 and 4.8 below.

### **Article 24**

Article 24(1) provides for the right of the child to “the enjoyment of the highest attainable standard of health”. Article 24(2)(b) concerns “the provision of necessary medical assistance and health care to all children”. The rights relate to both physical and mental health.

### **Article 26**

This article concerns social security. It may be relevant in relation to children with a non-binary gender identity.

### **Article 28**

Article 28(2) says that “States parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention”.

Physical punishment is banned in Scotland’s schools and that applies in relation to all pupils.

### **Article 29**

Article 29 may be relevant, and in particular article 29(1)(a), which provides that “... the education of the child shall be directed to: (a) The development of the child’s personality ... to their fullest potential”.

### **Article 31**

Article 31 may be relevant – particularly in relation to non-binary children.

Article 31(1) concerns the right of the child “to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts...”.

Some activities may be split by gender e.g. into activities for boys and activities for girls.

### **Article 37**

Article 37(c) provides that “every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person...”. This may be relevant in relation to transgender children who are deprived of their liberty.

### **Article 40**

Article 40(2)(vii), which concerns the right of a child alleged to committed a criminal offence to “have his or her privacy fully respected at all stages of the proceedings”, may be relevant to our proposals.

Article 40(4) may be relevant in relation to transgender children. It contains examples of alternatives to institutional care. It provides that such alternatives “shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”

## **2. How will the policy/measure affect children’s wellbeing as defined by the wellbeing indicators?**

List all wellbeing indicators relevant to the policy/measure. The indicators are: Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible and Included.

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All of the wellbeing indicators are relevant to our proposals.

## **3. How many children and young people are likely to be affected by the policy or measure?**

List potential sources of official and other data, or note the need to locate this information. Are there different levels of impact for different groups of children?

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3.1 There is limited information about the numbers of transgender children and research suggests that the majority of transgender people do not disclose their feelings to others until after they reach 18. The findings of a study in the UK has suggested that there is an incidence of gender dysphoria of around 1:80,000 in

people aged between 4 and 16.<sup>2</sup> Prevalence information based on those seeking medical treatment for gender dysphoria are likely to constitute under-estimates as not everybody will seek treatment at a young age. A range of studies we have identified concerning the numbers of children is set out in Appendix A.

3.2 A number of studies in the Netherlands show that for children, parents reported 1.4% of boys and 2% of girls want to be the opposite sex. For people aged 15 to 70 year olds 0.6% of men and 0.2% of women reported an ambivalent or incongruent gender identity.

3.3 If we assume that the average of the outcomes in these studies is representative in Scotland, then a gender recognition system extended to people under 18 could affect about 15,683 people under that age in Scotland.<sup>3</sup>

3.4 The number of Scottish children presenting at gender identity clinics for advice and support has been increasing. The Young Peoples Gender Service at Sandyford in Glasgow report increasing numbers of young people seeking their help. In 2013, 34 people aged 17 and under were referred. This increased to 187 in 2015.

3.5 Some countries permit children to change their legal gender. The table in Appendix B contains information about 11 other countries and territories including nine which have processes for people aged under 18. There is also some data available about the numbers of under 18 year olds doing so. Numbers are generally low as a percentage of those otherwise obtaining recognition. The Republic of Ireland and Norway have similar populations to Scotland though they have differing recognition systems. In 2016, six 16 and 17 year olds changed their recognised legal gender in the Republic of Ireland which uses a court process for children.<sup>4</sup> This is 5.5% of the total number of people who changed their legal gender there (110) in 2016. In Norway, which does not have a court process for children between 6 and 16, between 1 July 2016 and September 2016, nine children changed their legal gender. This is 3.6% of the total applicants in the same period (250).

3.6 In 2012, the Equality and Human Rights Commission Technical Note on Measuring Gender Identity<sup>5</sup> reported that 0.4% of a sample of around 10,000 people answering a trial question about their gender identity reported that they identified in a way other than as male or female. A survey carried out by the Scottish Trans Alliance indicated that, of the 895 respondents whose gender identity was non-binary, 4.3% were aged under 16.<sup>6</sup>

#### **4. What research evidence is available?**

Preliminary identification of the research base for this policy/measure.

<sup>2</sup> At [http://www.jahonline.org/article/S1054-139X\(13\)00661-7/fulltext](http://www.jahonline.org/article/S1054-139X(13)00661-7/fulltext).

<sup>3</sup> The 2011 census estimates that there were 1,042,597 people under 18 in Scotland, see <http://www.scotlandscensus.gov.uk/ods-web/standard-outputs.html>.

<sup>4</sup> At <http://www.welfare.ie/en/downloads/GRAAnnualReport2016.pdf>.

<sup>5</sup> At [https://www.equalityhumanrights.com/sites/default/files/technical\\_note\\_final.pdf](https://www.equalityhumanrights.com/sites/default/files/technical_note_final.pdf).

<sup>6</sup> At <https://www.scottishtrans.org/wp-content/uploads/2016/11/Non-binary-report.pdf>.

4.1 There is evidence that children can experience incongruence between their assigned gender and their gender identity early in life. One study indicates the average age was 8.<sup>7</sup>

4.2 There is a limited evidence base about whether children will continue to experience these feelings in the longer term. Follow-up studies indicate overall that for 85.2% of the children, their distress discontinued either before or early in puberty.<sup>8</sup> However, the rates in the individual studies varied widely. For instance, a 2008 study indicated that in 39% of children the feelings did continue beyond the onset of puberty<sup>9</sup> whereas older studies from before 2000 had very much lower rates for children continuing to experience distress after the onset of puberty. It is thought that pre-2000 studies have included children who would not now be considered to be experiencing gender dysphoria. The studies may also be affected by the small clinical population of children with gender dysphoria – studies looking at whether gender dysphoric feelings persisted had a total population of 317 people.

4.3 There is also evidence that the more extreme a child's gender dysphoria was before puberty, the less likely it was that their feelings will recede with the onset of puberty.<sup>10</sup> For those who have reached puberty and continue to experience distress, evidence indicates that their distress then tends to intensify and that depression or self-harming behaviours are also more common in ages 12 and over.<sup>11</sup> It is understood that physical changes caused by puberty may intensify the levels of distress experienced.

4.4 Available evidence suggests that factors arising around the ages of 10 to 13 may help explain changes in how a child feels about their gender:

- the changes in social roles between boys and girls as their gender role become more distinct;
- the anticipation or experience of physical changes as a result of puberty; and
- their first experience of experiencing falling in love and discovering their sexual identity.<sup>12</sup>

4.5. Evidence indicates that there is a difference of experience between boys and girls.<sup>13</sup> Although more boys are referred to gender identity clinics, some studies suggest that gender dysphoria is more prominent in girls.

<sup>7</sup> Kennedy, N. & Hellen, M. (2010) Transgender children: more than a theoretical challenge. *Graduate Journal of Social Science*, 7 (2), 25–43.

<sup>8</sup> Ristori, J and Steensma T.D “Gender dysphoria in childhood” in *International Review of Psychiatry, Gender dysphoria and gender incongruence*, Vol 28, 2016 Issue 1.

<sup>9</sup> Wallien and Cohen-Kettenis “Psychosexual outcome of gender-dysphoric children” *Journal of the American Academy of Child and Adolescent Psychiatry*, 47, 1413–1423.

<sup>10</sup> Di Ceglie, D., Freedman, D., McPherson, S. & Richardson, P. (2002) *Children and Adolescents Referred to a Specialist Gender Identity Development Service: Clinical Features and Demographic Characteristics*. *International Journal of Transgenderism*.

<sup>11</sup> Di Ceglie et al (2010) above, and Steensma T.D et al (2010) “Desisting and persisting gender dysphoria after childhood; A qualitative follow up study”, *Clinical Child Psychology and Psychiatry* Vol16 issue 4

<sup>12</sup> Steensma T.D et al (2010) above.

4.6 There is evidence that transgender young people are more than twice as likely as non-trans people to be diagnosed with depression (50.6% compared to 20.6%<sup>14</sup>) and with anxiety (26.7% compared to 10%). There is evidence that this most likely arises due to their experience of discrimination, lack of acceptance, and the abuse they may face and is not an inherent feature of their being transgender.<sup>15</sup> There is also evidence that transition to living in their preferred gender and being supported with gender confirming medical interventions may help improve mental health, in many cases reaching levels experienced in the general population.<sup>16</sup>

#### The views of transgender children and young people

4.7 Scottish Government officials met members of LGBT Youth Scotland groups aged 13 and over. Their view was that legal gender recognition must be made available to people younger than 16. A person should be able to transition and live in their acquired gender before they have to take their qualifications or go to university. They felt that this would better support their rights not to be discriminated against, for example, at school. A high proportion expressed the desire for their parents (or other people with responsibility for them) to be involved and supporting them through the recognition process.

4.8 LGBT Youth Scotland gave evidence to the Women and Equality Select Committee inquiry into Transgender Equality which setting out the views of transgender people aged under 18<sup>17</sup> about the benefits of legal gender recognition in terms of reducing discrimination and improving their mental health.

### **5. Has there been any public or stakeholder consultations on the policy/measure?**

This partial CRWIA will be published along with a public consultation document seeking views on our proposals.

Prior to publication of the consultation, the Scottish Government met:

- Members of LGBT Youth<sup>18</sup> groups aged 13 and over; and
- Gender identity specialists from the Sandyford Clinic<sup>19</sup> and the Gender Identity Clinic at the Chalmers Centre in Edinburgh.<sup>20</sup>

<sup>13</sup> This was indicated in the studies referenced in Annex A which used the Child Behaviour Checklist

<sup>14</sup> Mental Health of Transgender Youth in Care at and Adolescent Urban Community Health Centre: A Matched Retrospective Cohort Study, Sari L. Reisner and Ors, Journal of Adolescent Health March 2015 Vol 56 Issue 3 pages 274-279

<sup>15</sup> Rebeca Robles et al "Removing transgender identity from the classification of mental disorders: a Mexican field study for ICD-11" [http://dx.doi.org/10.1016/S2215-0366\(16\)30165-1](http://dx.doi.org/10.1016/S2215-0366(16)30165-1)

<sup>16</sup> Dhejne C et al "Mental Health and gender dysphoria: A review of the literature (2016)

<sup>17</sup> At

<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Women%20and%20Equalities/Transgender%20Equality/written/19582.html>

<sup>18</sup> At <https://www.lgbtyouth.org.uk/>.

<sup>19</sup> At <http://www.sandyford.org/>.

**6. Has there been any estimate of the resource implications of the policy/measure?**

Capital costs, expenditure, recruitment and training costs for the workforce etc.

Initial expenditure for a new self-declaration system of gender recognition for Scotland (including a new IT system, staff resourcing and training) have been estimated at £250,000 to £300,000, with administrative costs in the first year of around £100,000.

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<sup>20</sup> At <http://lothiansexualhealth.scot.nhs.uk/services/gic/Pages/default.aspx>

## CRWIA Stage 3

### Data Collection, Evidence Gathering, Involvement of/Consultation with Stakeholder Groups - key questions

#### 1. What does the evidence tell you?

The evidence base may include demographic information, academic research, service monitoring/inspection reports, service evaluation reports, user surveys etc. Identify any gaps in the evidence base. In particular, look at what the evidence tells you about children and young people's views and experiences of the relevant service(s); and/or what it tells you about children and young people's views of the policy proposal.

The evidence suggests that:

- An increasing number of children and young people are seeking advice and support from gender identity clinics.
- A number of children and young people self-report as being trans.
- There is mixed evidence on how many children before puberty reporting incongruence between their assigned gender and their gender identity will continue to experience this in the longer term.
- Transgender young people are more likely to be diagnosed with depression and anxiety than non-trans young people. This seems to be most likely as a result of trans young people experiencing discrimination, lack of acceptance and abuse.

There is little consistency internationally in relation to the minimum age at which people can apply for legal gender recognition.

#### 2. What further data or evidence is required?

Is the evidence up to date, robust and reliable, sufficiently relevant to what is being proposed, or do you need to commission new research?

The Scottish Government welcomes any further evidence which consultees may have, particularly on whether the availability of legal gender recognition at ages below 16 would improve outcomes for trans young people.

#### 3. Has there been any consultation on the development of the proposal(s)?

Public or targeted consultation with children and young people, their parents/carers, the children's workforce - is there enough information on the views of the children and young people who will be affected by the policy/measure?

There will be a full public consultation. This CRWIA forms part of that consultation.

#### 4. Should children and young people be further involved in the development of this policy? Are there particular groups of children and young people whose views should be sought?

Specify how - outline the purpose, format, timetable and the questions you want to ask

Yes. The Scottish Government welcomes responses to the consultation from children and young people and will seek to engage further with children and young



people during the consultation.

**5. Should other stakeholders and experts be further involved in the development of this policy?**

Specify how - outline the purpose, format, timetable and the questions you want to ask

The Scottish Government would particularly welcome any further evidence which professionals working with children and young people may have, particularly on whether the availability of legal gender recognition at ages below 16 would improve outcomes for trans young people.

## **APPENDIX A - CRWIA STAGE 2 – SCREENING – EVIDENCE BASE**

### **TRANSGENDER CHILDREN – EVIDENCE OF NUMBERS EXPERIENCING GENDER DYSPHORIA OR DISCOMFORT WITH THEIR ASSIGNED GENDER**

Kuyper, L & Wijsen, C (2014) Gender Identities and Gender Dysphoria in the Netherlands *Archives of Sexual Behaviour* Volume 43 Issue 2, draws on a number of other research studies including:

- A Dutch study found parents reported that their child “wishes to be opposite sex” for 1.4% of boys and 2% of girls (from Verhust, van der Ende & Koot 1996). This was based on the Child Behaviour Checklist (CBCL), a parent report questionnaire on behavioural issues.
- A large scale twin study using the CBCL found that at age 7, 3.7% of boys and 5.7% of girls behaved like the opposite sex and/or wished to be the opposite sex. By age 10, this fell to 2.7% and 3.6% respectively (Van Beijsterveldt 2006).
- A study of US boys and girls (age 4-11) found 1.0% of boys and 3.5% of girls wished to be the opposite sex (Zucker et al 1997).
- A study of 5010 first year college students from the National Taiwan University found 7.3% of female and 1.9% of male students reported that they (very) often wished to be of the opposite sex (Lai et al 2010).
- Using the same question with 760 Dutch 11-18 year olds, 5% of boys and 8.4% of girls indicated that they wanted to be of the opposite sex (5.2% & 8.2% respectively, “a bit or sometimes” and 0.0 and 0.2% respectively “clearly or often”) (Tick, van der Ende and Verhulst 2008).
- Self-identification as transgender amongst a sample of 2,730 young people in grades 6-8 in San Francisco Public Schools found that 1.3% identified as transgender, when presented with a transgender-inclusive item on gender “What is your gender (female; male; transgender)?” (Shields et al 2013).
- The studies using the CBCL (by Van Beijsterveldt 2006 & Zucker et al 1997) found that parents indicating “opposite sex behaviour” as “somewhat or sometimes true” greatly outnumbered the parents who said it was “very true or often true”. Both studies also found higher rates of children behaving like the opposite sex than wishing to be of the opposite sex.

## APPENDIX B- CRWIA STAGE 2- SCREENING- EVIDENCE BASE

### SCOTTISH GOVERNMENT'S UNDERSTANDING OF LEGAL GENDER RECOGNITION PROCESSES FOR CHILDREN IN OTHER COUNTRIES

Country/territory	Minimum age	Court process	Administrative process	Who can apply and evidence required
Argentina	None	Only where disagreement.	National Registry of Persons' office	Application by person's legal representatives but must be express consent of person under 18. If the legal representatives cannot agree, application is made through a court.
Australian Capital Territory <sup>21</sup>	None	-	Registrar-General	For under 18s, those with parental responsibility must apply. They must declare that application is in child's best interests. In addition, a doctor or psychologist must confirm the child has had appropriate clinical treatment for alteration of their sex <sup>22</sup> .
Belgium	16	-	Civil Registrar	Persons aged 16 and 17 may request the civil registrar to change their recorded sex, provided there is parental authorisation and after consultation with a psychiatrist.

<sup>21</sup> Births, Deaths and Marriages Registration Act 1997, section 24(2).

<sup>22</sup> At the URL below

[https://www.accesscanberra.act.gov.au/app/answers/detail/a\\_id/1691/kw/CHANGE%20OF%20SEX](https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/1691/kw/CHANGE%20OF%20SEX)

Country/territory	Minimum age	Court process	Administrative process	Who can apply and evidence required
British Columbia <sup>23</sup>	None	-	Vital Statistics Agency	People aged 18 and under apply themselves. Their legal guardians must consent and they must also enclose a statutory declaration from a physician or psychologist confirming their gender identity.
Denmark	18	-	-	-
France	16	Yes	-	Emancipated minors (those aged 16 and above who have been emancipated by an order of the guardianship judge) may apply using the same court based procedure as a person of 18.
Republic of Ireland <sup>24</sup>	16	Yes- for 16 and 17 year olds an order of court must be submitted with application.	Client Identity Services of Department of Social Protection.	Court must be satisfied that applicant's parents or legal representatives consent. Two medical reports must confirm the applicant's capacity and that they have transitioned or are transitioning to live in their preferred gender.
Malta <sup>25</sup>	None	Yes		Parents apply to the Civil Court of

<sup>23</sup> Information on the process is at <http://www2.gov.bc.ca/gov/content/life-events/births-adoptions/births/birth-certificates/change-of-gender-designation-on-birth-certificates>. The legislation is the Vital Statistics Act, at section 27 here-

[http://www.bclaws.ca/civix/document/id/complete/statreg/96479\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96479_01).

<sup>24</sup> At <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html>

<sup>25</sup> At <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>

Country/territory	Minimum age	Court process	Administrative process	Who can apply and evidence required
				Registry who must 1. ensure that the best interests of the child are the paramount consideration and 2. give due weight to the child's views based on their age and maturity
New Zealand <sup>26</sup>	18, (those aged 16 and over can apply if they are married or in civil union or de facto relationship. <sup>27</sup> )	Yes		The person must demonstrate they have:  1. assumed the gender identity of person of the nominated sex; 2. undergone appropriate medical treatment; and 3. Will maintain a gender identity of a person of the nominated sex.
Norway	6 <sup>28</sup>		Tax office- National Population Register	Application by both child seeking recognition <u>and</u> those with parental responsibilities. If parents don't agree, application is to the County Governor of Oslo and Akershus.
Spain <sup>29</sup>	18	-	-	-

<sup>26</sup> At [https://www.dia.govt.nz/diawebsite.nsf/wpg\\_URL/Services-Births-Deaths-and-Marriages-Information-for-Transgender-Applicants?OpenDocument](https://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Births-Deaths-and-Marriages-Information-for-Transgender-Applicants?OpenDocument).

<sup>27</sup> At [http://www.legislation.govt.nz/act/public/1995/0016/latest/versions.aspx?search=ts\\_act%40bill%40regulation%40deemedreg\\_births+deaths+marriages+and+relationships+act+1995\\_resele\\_25\\_a&p=1](http://www.legislation.govt.nz/act/public/1995/0016/latest/versions.aspx?search=ts_act%40bill%40regulation%40deemedreg_births+deaths+marriages+and+relationships+act+1995_resele_25_a&p=1) and <http://www.youthlaw.co.nz/information/relationships/marriage-civil-unions-de-facto-2/>.

<sup>28</sup> Unless the child has an intersex condition/variation of sex development, in which case an application can be made notwithstanding they are under 6 years of age.

<sup>29</sup> The Scottish Government understands that the age of legal majority is 18 in Spain. See The Legal Status of Transsexual and Transgender Persons, Jens M Scherpe (ed) Spain at page 268.

## ANNEX N: PARTIAL EQUALITY IMPACT ASSESSMENT RECORD

<b>Title of policy/ practice/ strategy/ legislation etc.</b>	The review of the Gender Recognition Act 2004 (the 2004 Act)
<b>Minister</b>	Cabinet Secretary for Communities, Social Security and Equalities
<b>Directorate: Division: Team</b>	Civil Law and Legal System
<b>Is this new policy or revision to an existing policy?</b>	New policy, although it is already possible under the 2004 Act to obtain legal gender recognition

### Screening

#### *Policy Aims*

1. Through public consultation, we will seek views on:

- Whether the Scottish Government should bring forward legislation introducing a simplified process based on self-declaration for transgender<sup>1</sup> people to obtain legal recognition of their acquired gender<sup>2</sup>, to replace the existing arrangements under the 2004 Act in Scotland. Applicants would not be required to provide medical evidence or evidence of their having lived in their acquired gender throughout a defined period.
- Whether the proposed self-declaration system for legal gender recognition should be open to applicants aged 16 and over. (The 2004 Act currently requires an applicant to be 18 or over.)

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<sup>1</sup> Transgender (or trans) is an umbrella term used to describe a diverse range of people who find that their gender does not fully correspond with the sex they were assigned at birth.

<sup>2</sup> The 2004 Act describes this as the gender (either the “male gender” or the “female gender”) in which an applicant is living and seeking recognition.

- The options for allowing people aged under 16 to apply for legal gender recognition.
- The options for recognising people whose gender identity is not that of a man or woman (non-binary people).

2. The 2004 Act requires applicants, who must be aged 18 or over, to apply to a UK-wide tribunal, the Gender Recognition Panel, to be recognised in their acquired gender. Of the three possible tracks to recognition - the standard track, the alternative track and the overseas track - the most commonly used is the standard track. Under this track, applicants must:

- Demonstrate, by submitting two medical reports, that they have or have had gender dysphoria. This is a recognised condition where a person experiences discomfort or distress because there is a mismatch between their biological sex and their gender identity.
- Demonstrate that they have lived in their acquired gender throughout the period of two years<sup>3</sup> prior to the date of their application and provide proof of this, such as their passport, payslips, or utility bills.
- Provide a statutory declaration that they have lived in their acquired gender for the required period and intend to live in their acquired gender until death.

3. The 2004 Act is UK-wide, but the process of applying for legal recognition of the gender with which a person identifies is a devolved matter that the Scottish Parliament can legislate for. There are some reserved areas impacting on gender recognition where responsibility lies with the Westminster Parliament.

4. Action 13 of the Fairer Scotland Action Plan states that the Scottish Government:

“will review and reform gender recognition law so it is in line with international best practice for people who are Transgender or Intersex.”

5. If implemented in legislation, the proposals would contribute to the Scottish Government’s National Outcomes flowing from the Strategic Objectives of Wealthier and Fairer, and Healthier.

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<sup>3</sup> This is sometimes called the Real Life Experience test.

### **Who will it affect?**

6. The policy will primarily affect transgender (including non-binary) people.
7. A separate consultation will be published in relation to intersex people/people with a variation of sex development

### ***What might prevent the desired outcomes being achieved?***

8. This consultation is seeking views on potential changes to the 2004 Act in relation to obtaining legal gender recognition. Depending on the outcome of this consultation, the Scottish Government would intend to introduce a Bill in the Scottish Parliament. The timings of any such Bill depend on the availability of Parliamentary time.



## **Stage 1: Framing**

### ***Results of framing exercise***

9. We met with colleagues from Equality, Communities Analytical Services, Education and a member of the LGBT staff network for the purpose of the framing exercise.

### **Groups of people potentially affected positively by the proposals**

10. The framing exercise suggested that the following groups of people might be affected positively by the proposals.

#### **Age**

- We propose to allow people aged 16 and 17 to apply for legal gender recognition using the proposed self-declaration process and seek views on what arrangements, if any, should be put in place for those under 16. Under the existing arrangements, all applicants must be aged 18 or over. Reducing the age at which applications can be made would benefit younger people who wish to apply for legal gender recognition but cannot at the moment.
- A self-declaration process would simplify the process for obtaining legal gender recognition by removing any requirements for medical evidence and evidence that the applicant has been living in their acquired gender. To the extent that older transgender people may experience difficulties in obtaining legal gender recognition as a result of difficulties in gathering evidence where their transition took place many years ago, this simplification may reduce those barriers.

#### **Disability**

- There is evidence that transgender people have a higher incidence of mental health issues than the general population<sup>4</sup> but that these mental health issues are related to the prejudice and discrimination experienced by transgender people<sup>5</sup>.

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<sup>4</sup> At [http://www.scottishtrans.org/wp-content/uploads/2013/03/trans\\_mh\\_study.pdf](http://www.scottishtrans.org/wp-content/uploads/2013/03/trans_mh_study.pdf) (Trans Mental Health and Emotional Wellbeing Study 2012, Jay McNeil, Louis Bailey, Sonja Ellis, James Morton & Maeve Regan indicates that 66% of respondents reported that they had used mental health services for reasons other than access to gender reassignment medical assistance.

Evidence also suggests that transgender people's mental health may benefit from socially transitioning to live in accordance with their gender identity.<sup>6</sup> Streamlining the legal gender recognition process by removing any requirement for medical evidence or evidence of living in the acquired gender might further reduce stigma and improve mental health.

## **Gender Reassignment**

- Transgender people who want to be legally recognised in their acquired gender should benefit from the proposal to introduce a self-declaration process of legal gender recognition. The application process would be simpler and less intrusive.
- Transgender people who do not identify as men or women would benefit if legal recognition of non-binary people was introduced.

## **Marriage and Civil Partnership**

- The consultation will seek views on whether the requirement for a married applicant to obtain spousal consent when obtaining legal gender recognition should be dropped.<sup>7</sup> This could be beneficial for the trans person.
- The consultation will also seek views on whether mixed sex civil partnership should be recognised for the purpose of allowing one of the partners to obtain legal gender recognition without the partnership being changed to marriage or dissolved. This could be beneficial for the couple.
- If non-binary people were also legally recognised, this would have a positive impact on them as they would be able to be married or enter a civil partnership as a non-binary person rather than as a man or woman.

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<sup>5</sup> Rebeca Robles et al "Removing transgender identity from the classification of mental disorders: a Mexican field study for ICD-11"

[http://dx.doi.org/10.1016/S2215-0366\(16\)30165-1](http://dx.doi.org/10.1016/S2215-0366(16)30165-1).

<sup>6</sup> Dhejne C, et al "Mental Health and gender dysphoria: A review of the literature" (2016) *International Review of Psychiatry* 28(1), 44-57. Abstract is at <https://biblio.ugent.be/publication/7081076>.

<sup>7</sup> When an applicant is married and does not have spousal consent, the Gender Recognition Panel has to issue an interim Gender Recognition Certificate (GRC). A person in a marriage registered in Scotland who holds an interim GRC may apply to the sheriff for a full GRC under section 4E of the 2004 Act.

## Religion and belief

- Some religious and belief bodies and some people belonging to those bodies might be in favour of changes to the 2004 Act.

## Sex

- At present, more trans women (that is people who were assigned male at birth but now identify as a woman) obtain legal gender recognition under the 2004 Act than trans men. This reflects existing evidence of prevalence of trans men and trans women generally. It is unclear why this is the case, though there are theories suggesting that people assigned female at birth transition less often to live as a man because it is more socially acceptable for a woman to exhibit what are considered to be masculine behaviours or dress.<sup>8</sup> To the extent that a difference between the numbers of successful applicants who are trans women or trans men might arise due to additional barriers faced by trans men, adopting a self-declaration process of legal gender recognition would minimise these difficulties.
- Legal recognition of another gender (non-binary people) will help bring about greater inclusion and acceptance of people who do not identify as male or female.

## Groups of people potentially affected negatively by the proposals

11. The framing exercise suggested that there might be negative impacts for the following groups of people.

## Age

- People younger than 16 who want to be able to apply for legal gender recognition in their acquired gender would be unable to do so if the proposed new system of legal gender recognition does not extend to them.

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<sup>8</sup> There is a discussion of the theories in [Meier S.C., Labuski C.M. \(2013\) The Demographics of the Transgender Population. In: Baumle A. \(eds\) International Handbook on the Demography of Sexuality. International Handbooks of Population, vol 5. Springer, Dordrecht.](#)

## **Disability**

- A self-declaration process may not support people with a learning disability or additional support needs to fully understand what legal recognition in an acquired gender might mean for them. This could lead to dissatisfaction or unhappiness, may contribute to mental health issues and could increase the number of applications made by those who want to transition back to their previous legal gender.

## **Gender reassignment**

- We are aware of concerns around whether implementing a self-declaration process for legal gender recognition would increase the risk that people who obtained legal recognition of their acquired gender might later regret their decision.

## **Marriage and Civil Partnership**

- The consultation considers whether it should continue to be necessary for a married person seeking legal gender recognition to have their spouse's consent. There may be a positive impact for transgender people if this requirement is dropped, but a negative impact for their spouse if it is dropped, in that the nature of their legal relationship can be altered by the action of their transgender spouse alone.
- Currently, it is not possible for one of the parties in a civil partnership to obtain a full Gender Recognition Certificate (GRC), without the civil partnership being changed to a marriage or ending the civil partnership. Scotland does not recognise mixed sex civil partnerships. If civil partnership were to be available to mixed sex couples, some would argue that this undermines civil partnership which has only been available for same sex couples to date and which was introduced in response to the long term discrimination that they experienced in not having their relationships legally recognised.
- Under the current arrangements, if a party who is in a civil partnership wants to obtain legal gender recognition, the partnership must be changed to a marriage or dissolved. Continuing with these arrangements under any proposed self-declaration process may adversely affect people in a civil partnership.

## **Religion and belief**

- The views of a child or younger transgender person may already clash with those of their parents or carers. If legal gender recognition is extended to people under 16, the potential for this may increase. These views may be influenced by their respective religions and beliefs.
- Some religious bodies may have concerns on either doctrinal or societal grounds about the adoption of a self-declaration system for obtaining legal gender recognition.
- People of some religions believe quite strongly that there are only two genders, man and woman. Recognising non-binary people would be in conflict with this.
- Some religious bodies may have doctrinal or societal concerns about recognising mixed sex civil partnership.

## **Sex**

- Some women's groups may have concerns on equality or societal grounds to a self-declaration system for obtaining legal gender recognition.

## ***Extent/Level of EQIA required***

12. Following the framing exercise, we believed that the extent of the EQIA required was high.
13. A partial Child Rights and Wellbeing Impact Assessment has been prepared separately and will be cross-referred to in this EQIA.

## Stage 2: Data and evidence gathering, involvement and consultation

There is limited evidence about the numbers of transgender people in Scotland and their experiences. In particular, no systematic or reliable data has been collected through the Census or through other Government-sponsored surveys. Evidence from smaller scale surveys may not be representative. In addition, when evidence concerning people who have the protected characteristic of gender reassignment is based on data about those who have been diagnosed with gender dysphoria or attended a gender identity clinic, this evidence also may not be representative.

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
<b>AGE</b>	<p>1. The partial Child Rights and Wellbeing Impact Assessment sets out the evidence we have gathered in relation to people under 18.</p> <p>2. A report about the mental health and wellbeing of transgender people reported that of the 889 people surveyed, the average age at which participants began living part-time in their felt gender was 23 (based on 487 who answered the question). The average age at which they began living full-time as their felt gender was 31 (based on 545 people answering the question).<sup>9</sup></p> <p>3. In the UK in 2007/2008, 392 people</p>	<p>2. Trans Mental Health and Emotional Wellbeing Study 2012, Jay McNeil, Louis Bailey, Sonja Ellis, James Morton &amp; Maeve Regan, published</p> <p>3. Tribunals and Gender</p>	

<sup>9</sup> At [http://www.scottishtrans.org/wp-content/uploads/2013/03/trans\\_mh\\_study.pdf](http://www.scottishtrans.org/wp-content/uploads/2013/03/trans_mh_study.pdf).

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>were issued with full GRCs. 67 (17%) were aged at 58 and over.<sup>10</sup> In 2016/2017, 318 people were issued with full GRCs and the number of successful applicants aged 58 and over had increased slightly to 22% of the total of successful applicants.<sup>11</sup></p>	<p>Recognition Statistics (Ministry of Justice)</p>	
<b>DISABILITY</b>	<p>1. In a survey of 889 trans people in 2011, 32% (of the sample) indicated that they had a disability or chronic health condition.<sup>12</sup></p> <p>2. This can be compared to evidence that in 2014, 23% of the Scottish population had a disability or long term limiting health condition.<sup>13</sup></p> <p>3. In the survey mentioned at 1 above, 36% identified that they had a mental health issue. 88% (of 549 who answered the question) had been diagnosed with depression or considered they were or had been depressed and 48% (of 483) had attempted suicide at least once.</p>	<p>1. Trans Mental Health and Emotional Wellbeing Study 2012, Jay McNeil, Louis Bailey, Sonja Ellis, James Morton &amp; Maeve Regan.</p> <p>2. Scottish Government</p> <p>3. Trans Mental Health and Emotional Wellbeing Study 2012, Jay McNeil, Louis Bailey, Sonja Ellis, James Morton &amp; Maeve Regan</p>	

<sup>10</sup> At <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2017-and-2016-to-2017> - see Main Tables at Table GRP 4.

<sup>11</sup> At <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2017-and-2016-to-2017> see Main Tables at Table GRP 4.

<sup>12</sup> At [http://www.scottishtrans.org/wp-content/uploads/2013/03/trans\\_mh\\_study.pdf](http://www.scottishtrans.org/wp-content/uploads/2013/03/trans_mh_study.pdf).

<sup>13</sup> At <http://www.gov.scot/Topics/People/Equality/Equalities/DataGrid/Disability>.

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>4. In the general population, depression will be diagnosed in between 4% and 10% and just under 7% will attempt suicide.<sup>14</sup></p> <p>5. Evidence indicates that the mental health issues experienced by transgender people are related to the prejudice and discrimination they experience.<sup>15</sup></p> <p>6. Evidence indicates that transitioning to the gender with which the person identifies helps resolve distress and mental health issues<sup>16</sup>.</p>	<p>4. Mental Health Foundation</p> <p>5. The Lancet Psychiatry 26 July 2016</p> <p>6. Dhejne C, et al “Mental Health and gender dysphoria: A review of the literature” (2016) International Review of Psychiatry 28(1)</p>	
<b>GENDER REASSIGNMENT</b>	<p>1. These are the numbers of updated Scottish birth certificates issued following gender recognition:</p> <p>2005 – 47 2006 – 44 2007 – 30 2008 – 16</p>	<p>1. National Records of Scotland</p>	<p>Countries which have adopted self-declaration systems for legal gender recognition have done so from 2012 onwards. As a result, there is a lack of information about the long term experience in those countries, including information about the numbers of</p>

<sup>14</sup> At <https://www.mentalhealth.org.uk/statistics/mental-health-statistics-suicide>.

<sup>15</sup> Rebeca Robles et al “Removing transgender identity from the classification of mental disorders: a Mexican field study for ICD-11” [http://dx.doi.org/10.1016/S2215-0366\(16\)30165-1](http://dx.doi.org/10.1016/S2215-0366(16)30165-1).

<sup>16</sup> Dhejne C, et al “Mental Health and gender dysphoria: A review of the literature” (2016) International Review of Psychiatry 28(1), 44-57. Abstract is at <https://biblio.ugent.be/publication/7081076>.



Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>2009 – 18 2010 – 18 2011 – 24 2012 – 13 2013 – 16 2014 – 16 2015 – 25 2016 - 20</p> <p>2. The average number of full Gender Recognition Certificates issued annually since the 2004 Act was implemented is 385.<sup>17</sup></p> <p>3. Between 1 April 2016 and 31 March 2017, the Gender Recognition Panel received 364 applications for recognition<sup>18</sup>, issued 318 full GRCs and refused 15 applications.<sup>19</sup></p> <p>4. In 2011, there were estimated to be 12,500 people in the UK who had sought medical care for gender variance, of whom around 7,500 would undergo or had</p>	<p>2. and 3. Tribunals and Gender Recognition Statistics (Ministry of Justice)</p> <p>4. Gender Identity Research and Education Society 2011</p>	<p>successful applicants who later wish to re-apply.</p> <p>In the UK, a transgender person is not required to produce their GRC in order to access services. Organisations tend to permit people to use single-sex services based on their gender identity. In certain cases, the Equality Act 2010 allows restrictions to be imposed by an employer on their employee or to allow a service to be restricted to certain people: for example in limited cases, employment or access to a service can be restricted to people who are of a particular sex and who do not have the protected characteristic of gender reassignment.</p> <p>The consultation will seek views on options for ensuring that the</p>

<sup>17</sup> At <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2017-and-2016-to-2017>. See Main Tables at Table GRP 4.

<sup>18</sup> At <https://www.gov.uk/government/collections/tribunals-statistics>.

<sup>19</sup> At <https://www.gov.uk/government/collections/tribunals-statistics>.

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>undergone transition. This represents an 11% increase from the position in 1998.<sup>20</sup></p> <p>5. The Equality and Human Rights Commission Note on Measuring Gender Identity<sup>21</sup> from 2010 notes that 1% (100) of a group of 10,000 people surveyed in the UK said they had gone through part of, or thought about undergoing, a gender reassignment process<sup>22</sup>. Based on the estimated population of Scotland in mid-2015<sup>23</sup>, this would equate to 53,730 people.</p> <p>6. The foregoing evidence suggests that comparatively few transgender people have used the existing gender recognition process in the 2004 Act, compared to those who have transitioned to live full-time in their acquired gender.</p> <p>7. There is no evidence from countries</p>	<p>5. Technical Note: Measuring Gender Identity (Equality and Human Rights Commission)</p>	<p>proposed legal gender recognition process is robust. We will consult on whether an applicant must complete a statutory declaration as part of the process. A person knowingly making a false statement in a statutory declaration is committing a criminal offence. We will also consult on whether to limit the number of occasions on which a person may apply to obtain legal gender recognition.</p>

<sup>20</sup> At <http://www.gires.org.uk/wp-content/uploads/2014/10/Prevalence2011.pdf>.

<sup>21</sup> At [https://www.equalityhumanrights.com/sites/default/files/technical\\_note\\_final.pdf](https://www.equalityhumanrights.com/sites/default/files/technical_note_final.pdf). The aim of this research was to identify a suite of questions the answers to which would give a more comprehensive picture of the transgender population in Britain and which would be acceptable and understood by a wide range of people.

<sup>22</sup> At [https://www.equalityhumanrights.com/sites/default/files/technical\\_note\\_final.pdf](https://www.equalityhumanrights.com/sites/default/files/technical_note_final.pdf). Section 7 of the Equality Act 2010 states that “A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex”.

<sup>23</sup> At <https://www.nrscotland.gov.uk/news/2016/scotlands-population-at-its-highest-ever>.

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>which have recently adopted self-declaration systems for legal gender recognition, about whether and how often people whose acquired genders have been legally recognised, seek to change their decision.</p> <p>8. In a survey of 889 trans people in 2011, in discussing the physical changes which they had undergone in relation to being trans or transitioning, 86% had no regrets, with 10% having minor regrets and 2% having major regrets. In terms of social changes that they had made in relation to being trans or transitioning, 53% (of 523) had no regrets. 34% had minimal regrets, and 9% had significant regrets.<sup>24</sup></p> <p>9. A Swedish study published in 2014 examined the outcomes of applications in Sweden for legal and surgical sex reassignment<sup>25</sup> between 1960 and 2010. This indicated that out of the 681 people who changed their sex legally and surgically, 2.2% of them later regretted this and sought to reverse their decision. The study reported a significant decline in</p>	<p>8. Trans Mental Health and Emotional Wellbeing Study 2012, Jay McNeil, Louis Bailey, Sonja Ellis, James Morton &amp; Maeve Regan</p> <p>9. Dhejne, Cecilia et al (2014). "An Analysis of All Applications for Sex Reassignment Surgery in Sweden, 1960-2010: Prevalence, Incidence, and Regrets", Archives of sexual behavior. 43</p>	

<sup>24</sup> At [http://www.scottishtrans.org/wp-content/uploads/2013/03/trans\\_mh\\_study.pdf](http://www.scottishtrans.org/wp-content/uploads/2013/03/trans_mh_study.pdf).

<sup>25</sup> At [https://www.researchgate.net/publication/262734734\\_An\\_Analysis\\_of\\_All\\_Applications\\_for\\_Sex\\_Reassignment\\_Surgery\\_in\\_Sweden\\_1960-2010\\_Prevalence\\_Incidence\\_and\\_Regrets](https://www.researchgate.net/publication/262734734_An_Analysis_of_All_Applications_for_Sex_Reassignment_Surgery_in_Sweden_1960-2010_Prevalence_Incidence_and_Regrets).

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>regrets over the time period.</p> <p>10. There is some evidence regarding numbers of applicants for legal gender recognition from countries which have adopted self-declaration systems. In Denmark, on average 289 people per year have changed their legal sex using their self-declaration arrangements for legal gender recognition. In Norway, where a self-declaration system for legal gender recognition was adopted in 2016, 706 people obtained legal recognition of their gender in the subsequent nine month period.</p> <p>11. The Women and Equalities Select Committee Inquiry into Transgender Equality<sup>26</sup> heard evidence about the operation of the protection under section 22 of the 2004 Act for the privacy of transgender people who apply for legal gender recognition and about the misuse of an exemption for protected information to be disclosed in court.</p>	<p>10. Source is Danish Ministry of Social Security and the Interior, and Norwegian Ministry of Health and Care.</p> <p>11. UK Parliament, 2016.</p>	

<sup>26</sup> See paragraph 76 of their Report at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2015/transgender-equality/>.

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
<p><b>MARRIAGE AND CIVIL PARTNERSHIP</b> (the Scottish Government does not require assessment against this protected characteristic unless the policy or practice relates to work, for example HR policies and practices - refer to Definitions of Protected Characteristics document for details)</p>	<p>1. In April to June 2017, 70 full GRCs were granted, including five for married applicants where spousal consent was given.<sup>27</sup> (There is no split of this information for Scotland).</p> <p>2. The Registrar General for Scotland has issued 3 updated marriage certificates following gender recognition since this became possible following changes made by the Marriage and Civil Partnership (Scotland) Act 2014.</p> <p>3. Between 2010 and 2016, there were seven divorces in Scotland on the ground that an interim GRC had been issued to one of the parties to the marriage.<sup>28</sup> Between 2010 and 2016, there were no dissolutions of civil partnership on this basis.<sup>29</sup></p>	<p>1. Tribunal and gender recognition certificate statistics (Ministry of Justice)</p> <p>2. National Records of Scotland</p> <p>3. Scottish Government</p>	
<p><b>PREGNANCY AND MATERNITY</b></p>	<p>There is no statistical evidence about the numbers of trans men giving birth.</p>		<p>Statistical evidence about this is unlikely to be collected. In the Register of Births in Scotland, the person who carries and gives birth to a child is listed as the child's 'mother'.</p>

<sup>27</sup> At <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2017-and-2016-to-2017>.

<sup>28</sup> At <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/supptab1516>. Table 2 gives divorces granted by ground.

<sup>29</sup> At <http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/supptab1516>. Table 3 gives dissolutions granted by ground.

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
<b>RACE</b>	<p>1. In a survey of mental health and wellbeing of transgender people, the vast majority of the sample, 86%, was White UK (British, Northern Irish, Scottish, Welsh or English), with fewer than 8% being from other white backgrounds. Other ethnic groups represented less than 7% of the sample.<sup>30</sup></p> <p>2. Information from 2014 indicates that 96.5% of the Scottish population were White, 3.5% being from minority ethnic groups.<sup>31</sup></p> <p>3. There is no statistical evidence published about the ethnic origin of people who are issued with a full GRC under the 2004 Act.</p>	<p>1. Trans Mental Health and Emotional Wellbeing Study 2012, Jay McNeil, Louis Bailey, Sonja Ellis, James Morton &amp; Maeve Regan</p> <p>2. Scottish Surveys Core Questions, Scottish Government.</p>	
<b>RELIGION OR BELIEF</b>	<p>1. Almost two thirds (62%) of transgender people who took part in a survey into the mental health and wellbeing of stated that they had no religious beliefs.<sup>32</sup></p>	<p>1. Trans Mental Health and Emotional Wellbeing Study 2012, Jay McNeil, Louis Bailey, Sonja Ellis, James Morton &amp; Maeve Regan</p>	

<sup>30</sup> At [http://www.scottishtrans.org/wp-content/uploads/2013/03/trans\\_mh\\_study.pdf](http://www.scottishtrans.org/wp-content/uploads/2013/03/trans_mh_study.pdf).

<sup>31</sup> At <http://www.gov.scot/Topics/People/Equality/Equalities/DataGrid/Ethnicity>.

<sup>32</sup> At [http://www.scottishtrans.org/wp-content/uploads/2013/03/trans\\_mh\\_study.pdf](http://www.scottishtrans.org/wp-content/uploads/2013/03/trans_mh_study.pdf).

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
<b>SEX</b>	<p>1. A higher proportion of people legally recognised in their acquired gender under the 2004 Act are trans women (male to female).</p> <p>2. However, the proportion of trans men (female to male) being legally recognised under the 2004 Act has increased. In April to June 2012, 29% of successful applicants were trans men.<sup>33</sup> In the same period in 2017, 46% of successful applicants were trans men.<sup>34</sup></p> <p>3. This may reflect the numbers of trans men and trans women in the UK more generally: a report indicated that 80% of a group who had sought medical care for gender variance were trans women.<sup>35</sup></p> <p>4. The position in the UK similarly reflects the apparent position in other countries that there are more trans women than trans men.<sup>36</sup></p>	<p>1. and 2. Tribunal and gender recognition certificate statistics (Ministry of Justice)</p> <p>3. Gender Identity Research and Education Society, 2011</p> <p>4. International Handbook on the Demography of Sexuality, International Handbooks of Population, Dordrecht.</p>	

<sup>33</sup> At [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/218503/grp-stats-apr-jun12.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218503/grp-stats-apr-jun12.pdf).

<sup>34</sup> At [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/644443/tribunal-grc-statistics-q1-2017-18.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/644443/tribunal-grc-statistics-q1-2017-18.pdf).

<sup>35</sup> At <http://www.gires.org.uk/wp-content/uploads/2014/10/Prevalence2011.pdf>.

<sup>36</sup> See the evidence from 19 countries set out in [Meier S.C., Labuski C.M. \(2013\) The Demographics of the Transgender Population. In: Baumle A. \(eds\) International Handbook on the Demography of Sexuality. International Handbooks of Population, vol 5. Springer, Dordrecht.](#)

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	<p>5. There is no published information on whether a higher proportion of unsuccessful applicants for legal gender recognition under the 2004 Act were transgender men, though the numbers of unsuccessful applications is generally low.</p> <p>6. The Equality and Human Rights Commission Technical Note on Measuring Gender Identity<sup>37</sup> reported that 0.4% of people indicated that they identified in another way from a man or woman.</p> <p>7. Given the estimate of Scotland's population in 2015 of 5,373,000, this would equate to 21,492 non-binary people.<sup>38</sup> This suggests that recognition of non-binary people would have little to no impact for example, on the collection of equality data about the gender pay gap between men and women.</p> <p>8. A survey of 895 non-binary people in 2015 indicated that they were being discriminated against because of the lack</p>	<p>6. Equality and Human Rights Commission Note on Measuring Gender Identity.</p> <p>7. Mid-2015 population estimates Scotland and corrected population estimates for mid-2012, mid-2013 and mid-2014, National Records of Scotland.</p> <p>8. Scottish Trans Alliance, Equality Network "Non-binary people's experiences</p>	

<sup>37</sup> At [https://www.equalityhumanrights.com/sites/default/files/technical\\_note\\_final.pdf](https://www.equalityhumanrights.com/sites/default/files/technical_note_final.pdf).

<sup>38</sup> At <https://www.nrscotland.gov.uk/news/2016/scotlands-population-at-its-highest-ever>.



Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
	of legal recognition of their gender identities. <sup>39</sup>	in the UK”	
<b>SEXUAL ORIENTATION</b>	<p>1. In a survey of mental health and wellbeing of transgender people, of those who completed a question about sexual orientation</p> <ul style="list-style-type: none"> <li>• 27% identified as bisexual;</li> <li>• 24% identified as queer; and</li> <li>• 20% identified as straight/heterosexual.<sup>40</sup></li> </ul>	1. Trans Mental Health and Emotional Wellbeing Study 2012, Jay McNeil, Louis Bailey, Sonja Ellis, James Morton & Maeve Regan	

<sup>39</sup> At <https://www.scottishtrans.org/non-binary/>.

<sup>40</sup> At [http://www.scottishtrans.org/wp-content/uploads/2013/03/trans\\_mh\\_study.pdf](http://www.scottishtrans.org/wp-content/uploads/2013/03/trans_mh_study.pdf).

**Stage 3: Assessing the impacts and identifying opportunities to promote equality**

Having considered the data and evidence you have gathered, this section requires you to consider the potential impacts – negative and positive – that your policy might have on each of the protected characteristics. It is important to remember the duty is also a positive one – that we must explore whether the policy offers the opportunity to promote equality and/or foster good relations.

**Do you think that the policy impacts on people because of their age?**

Age	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination, harassment and victimisation			√	There may be benefits both for older people and for younger people through having a self-declaration system for gender recognition but this is best recognised in the next category of “advancing equality of opportunity”.
Advancing equality of opportunity	√			Younger people could apply for legal gender recognition.  Older people may be apply without having to obtain evidence they may no longer have to hand.
Promoting good relations among and between different age groups			√	Policy is not designed for this.

**Do you think that the policy impacts on disabled people?**

<b>Disability</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination, harassment and victimisation			√	Policy is not designed for this.
Advancing equality of opportunity	√			Living openly in an acquired gender may improve a transgender person's mental health. The SG will consider further the need for clear and straightforward guidance for people with learning disabilities in relation to any self-declaration system for obtaining legal gender recognition.
Promoting good relations among and between disabled and non-disabled people			√	Policy is not designed for this.

**Do you think the policy impacts on people because of their marriage or civil partnership?**

<b>Marriage and Civil Partnership<sup>41</sup></b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	Policy is not designed for this.

<sup>41</sup> In respect of this protected characteristic, a body subject to the Public Sector Equality Duty (which includes Scottish Government) only needs to comply with the first need of the duty (to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010) and only in relation to work. This is because the parts of the Act covering services and public functions, premises, education etc. do not apply to that protected characteristic. Equality impact assessment within the Scottish Government does not require assessment against the protected characteristic of Marriage and Civil Partnership unless the policy or practice relates to work, for example HR policies and practices.

**Do you think that the policy impacts on women because of pregnancy and maternity?**

<b>Pregnancy and Maternity</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	Existing benefits and services for women who are expecting a baby and for women who have given birth will remain.
Advancing equality of opportunity			√	Existing benefits and services for women who are expecting a baby and for women who have given birth will remain.
Promoting good relations			√	Existing benefits and services for women who are expecting a baby and for women who have given birth will remain.

**Do you think the policy impacts on people on the grounds of their race?**

<b>Race</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	Policy is not designed for this.
Advancing equality of opportunity			√	Policy is not designed for this.
Promoting good race relations			√	Policy is not designed for this.

**Do you think the policy impacts on people because of their religion or belief?**

<b>Religion or belief</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	Policy is not designed for this.
Advancing equality of opportunity			√	Policy is not designed for this.
Promoting good relations			√	<p>Some religious bodies may express concerns on societal or doctrinal grounds to introducing a self-declaration system for obtaining legal gender recognition and the possibility of recognising non-binary people.</p> <p>However, the proposed policies will not impact on a person's beliefs which is why we have ticked the "none" box.</p> <p>The Scottish Government is not seeking any change to the provisions in the Equality Act 2010 on celebrants not having to marry persons with a full GRC, or register their civil partnership, other than minor consequential changes to reflect the name of the new gender recognition legislation.</p> <p>Similarly, the Scottish Government is not seeking any change to the Equality Act 2010 provisions allowing religious bodies to impose restrictions on who can become ministers of religion.</p> <p>Some religious bodies will be opposed to the proposed changes, but others may not or may not have a view.</p>

**Sex. Do you think that the policy impacts on men and women in different ways?**

Sex	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination			√	Policy is not designed for this.
Advancing equality of opportunity			√	<p>Some women’s groups may have concerns that simplifying the process for obtaining legal gender recognition, and recognising non-binary people, could have a negative impact on equality for women, on work to improve the representation of women in public life and on the safety of women.</p> <p>However, the Scottish Government remains committed to action in areas such as:</p> <ul style="list-style-type: none"> <li>• tackling the pay gap between men and women;</li> <li>• tackling gender based violence and violence against women;</li> <li>• encouraging girls and women into certain professions such as engineering and technology;</li> <li>• increasing the representation of women on boards and in public life more generally.</li> </ul> <p>Given the commitment to this continued action, we have ticked the “none” box.</p>
Promoting good relations between men and women			√	Policy is not designed for this.

**Do you think that the policy impacts on people because of their sexual orientation?**

<b>Sexual orientation</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	Policy is not designed for this.
Advancing equality of opportunity	√			There could be a benefit for some people if the law should be changed so that transgender people in a civil partnership could obtain legal gender recognition and stay in their civil partnership without having to end it or change it to marriage (although it is possible that some would argue that civil partnership should just remain for same sex couples only).
Promoting good relations			√	Policy is not designed for this.

**Do you think your policy impacts on transsexual people?**

<b>Gender reassignment</b>	<b>Positive</b>	<b>Negative</b>	<b>None</b>	<b>Reasons for your decision</b>
Eliminating unlawful discrimination			√	There are benefits for transgender people through having a self-declaration system for gender recognition but this is best recognised in the next category of “advancing equality of opportunity”.
Advancing equality of opportunity	√			Introducing a self-declaration system for obtaining legal gender recognition will enable trans people to obtain legal rights without having to go through an overly intrusive system established by the current Gender Recognition Act 2004.
Promoting good relations			√	Policy is not designed for this.

#### Stage 4: Decision making and monitoring

##### *Identifying and establishing any required mitigating action*

Have positive or negative impacts been identified for any of the equality groups?	There are positive impacts for the protected characteristics of age, disabled people and transgender people and potential positive impacts for the protected characteristic of sexual orientation.
Is the policy directly or indirectly discriminatory under the Equality Act 2010?	No
If the policy is indirectly discriminatory, how is it justified under the relevant legislation?	-
If not justified, what mitigating action will be undertaken?	-

##### *Describing how Equality Impact analysis has shaped the policy making process*

No direct changes have been made to this policy as a result of this EQIA. However, the EQIA has highlighted the need to consider carefully any points raised by consultees relating to the protected characteristics of sex (particularly in relation to women) and religion and belief.

There are no direct implications for finance as a result of this EQIA. As indicated elsewhere in this consultation, there are costs in relation to changing the system for obtaining legal gender recognition as male or female but these are limited given that there is already a system in place. Costs in relation to the recognition of non-binary people are harder to quantify.



The EQIA confirms that the proposed policy would have benefits for transgender people.

### ***Monitoring and Review***

The Scottish Government and National Records of Scotland will publish statistics on the number of applications received under the new system.

### **Stage 5 - Authorisation of EQIA**

Please confirm that:

- ◆ This Equality Impact Assessment has informed the development of this policy:

Yes  No

- ◆ Opportunities to promote equality in respect of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation have been considered, i.e.:

- Eliminating unlawful discrimination, harassment, victimisation;
- Removing or minimising any barriers and/or disadvantages;
- Taking steps which assist with promoting equality and meeting people's different needs;
- Encouraging participation (e.g. in public life)
- Fostering good relations, tackling prejudice and promoting understanding.

Yes  No

- ◆ If the Marriage and Civil Partnership protected characteristic applies to this policy, the Equality Impact Assessment has also assessed against the duty to eliminate unlawful discrimination, harassment and victimisation in respect of this protected characteristic:

Yes  No  Not applicable

**Declaration**

**I am satisfied with the equality impact assessment that has been undertaken for the review of the Gender Recognition Act 2004 and give my authorisation for the results of this assessment to be published on the Scottish Government's website.**

**TO BE COMPLETED WHEN FINAL VERSION OF EQIA IS PUBLISHED**

**Name:**

**Position:**

**Authorisation date:**

## **ANNEX O: PARTIAL PRIVACY IMPACT ASSESSMENT (PIA)**

### **1. Introduction**

1.1 The Gender Recognition Act 2004 (the 2004 Act) allows a person to apply for a change of their legal gender from that in which they were originally registered at birth to that of the gender in which they identify and live (known in the 2004 Act as their acquired gender).

1.2 In the Fairer Scotland Action Plan, the Scottish Government committed to reviewing and reforming gender recognition law so it is in line with international best practice for people who are transgender or intersex. We also committed to carrying out a public consultation on establishing new arrangements for dealing with applications for legal gender recognition and the minimum age at which applications for gender recognition could be made.

1.3 The purpose of this document is to assess and report on any potential Privacy Impacts as a result of the proposals made in the consultation on the Scottish Government's review of the 2004 Act.

### **2. Document metadata**

#### 2.1 Name of Project

Review of the Gender Recognition Act 2004.

#### 2.2 Date of report

17 August 2017

#### 2.3 Author of report

Family and Property Law team, Civil Law and Legal System division

#### 2.4 Information Asset Owner (IAO) of relevant business unit

Jan Marshall, head of Civil Law and Legal System division.

#### 2.5 Date for review of Privacy Impact Assessment (PIA)

This PIA will be reviewed after the public consultation is completed and the Scottish Government has decided on the appropriate next steps.

### **3. Description of the project**

3.1 Under the 2004 Act, applications for legal gender recognition are submitted to the Gender Recognition Panel (the Panel), a UK tribunal who will decide whether a particular applicant meets the Act's requirements. Further information about the current process under the 2004 Act can be found at part 2 of the consultation and also in Annex C of the consultation.

3.2 Successful applicants are issued with a full gender recognition certificate by the Panel the effect of which is to change their legal gender in the UK to that of their acquired gender. Where a successful applicant's birth was registered in Scotland, the Panel will notify the Registrar General for Scotland, who is required to provide the successful applicant with an updated extract from the Register of Births showing them in their new legal gender.

3.3 This is done by creating a record of their birth and their new legal gender in the Gender Recognition Register (the GRR) from which the new extract can be generated. Information held in the GRR is not publicly accessible. Where a successful applicant is in a Scottish marriage, an updated extract from the Register of Marriages can also be issued by the Registrar General.

3.4 The consultation will seek views on the Scottish Government's intention to bring forward legislation to implement new arrangements to allow applicants to change their legal gender in Scotland.

3.5 Under the proposed reformed arrangements, applicants would change their legal gender by submitting an application form incorporating a statutory declaration of their intention to remain in their acquired gender for the remainder of their life to an administrative body, rather than to a tribunal. Applicants would no longer require to produce documentary evidence demonstrating a diagnosis of gender dysphoria and that they have lived in their acquired gender for a period prior to the application. This change would reduce the amount of data processed when an application for legal gender recognition is made.

3.6 The Scottish Government have not yet decided who would be responsible for processing revised applications for gender recognition under the proposed new system. The options are:

- a dedicated team within the Scottish Government; or
- National Records for Scotland (NRS), of which the Registrar General is the Head.

3.7 There are no proposals to alter the current arrangements allowing a successful applicant whose birth was registered in Scotland or married in Scotland to obtain updated birth and marriage extracts. Depending on the next steps following the consultation, further provision may be required for civil partnership extracts to be updated.

#### **4. Description of personal data to be processed**

4.1 The organisation processing applications under a reformed system of legal gender recognition in Scotland would likely require a range of information from an applicant, including:

- the applicant's name, including any former names;
- the applicant's residential address;
- the applicant's date and place of birth;

- the applicant's contact information, including telephone number and an email address;
- a statutory declaration made by the applicant certifying the truth of certain statements of fact and witnessed by a person authorised to administer an oath, namely a notary public or a Justice of the Peace;
- information about the person witnessing the statutory declarations such as their name, business address and contact details; and
- either information from the person witnessing the statutory declaration as to the identification of the applicant giving the declaration, or additional documentary evidence of the applicant's identity.

4.2 Depending on the Scottish Government's decisions about next steps following on from the consultation, it may also be necessary to process data about an applicant's marital or civil partnership status.

4.3 The information required from an applicant will be similar to what is currently required under the 2004 Act process but no evidence in the form of medical reports or additional evidence of living in the acquired gender would be necessary.

## **5. How the data will be processed**

5.1 How will information be gathered?

5.1.1 We anticipate that an application for legal gender recognition will be completed by the applicant and the person witnessing the applicant's statutory declaration and then transmitted by post to the organisation appointed to handle them. This is how applications are submitted under the existing arrangements. Electronic application processes may become possible in the future.

5.1.2 Using information in the application form, we anticipate that an electronic record of all applications would be created. The recorded data must allow a Scottish gender recognition certificate to be generated for successful applications and for retrieval of relevant data on receipt of enquiries from applicants.

5.2 Who will have access?

5.2.1 Access to the information collected would be restricted to:

- staff within the dedicated team processing applications;
- the IT system provider; and
- those within the dedicated team reviewing decisions not to issue a gender recognition certificate or considering whether to revoke an issued certificate.

5.2.2 As is currently the case, the data in applications will not be publicly available nor will information in the GRR, on the assumption that this continues to be used under a reformed system in Scotland. We anticipate that the numbers of applications, successful and unsuccessful, may be publicised, along with appropriate demographical information though this would not enable any person to be identified. Statistical information is published currently by HM Courts and Tribunals Service about applications to the Panel.

5.2.3 Under section 22 of the 2004 Act, it is an offence for a person who has acquired information in an official capacity about another person's application for legal gender recognition or their gender history to disclose that information to a third person. Some disclosures are exempt. Data protection is a reserved matter and we anticipate that the overall effect of the scheme of the 2004 Act in this regard will be at least be retained or enhanced under a reformed process.

5.2.4 All Scottish Government staff are required to undertake mandatory training on data protection annually. Amongst other topics, this training provides a summary of the Data Protection Act 1998, defines personal data and sensitive personal data, outlines the Government's legal obligation and gives an overview of best practice on handling personal data and requests for access to it (Subject Access Requests).

5.2.5 NRS also have a [published policy in respect of data protection](#), including a commitment to ensuring staff understand their responsibilities under the Data Protection Act.

### 5.3 How will data be transmitted?

5.3.1 As no decision has been taken who would receive and process applications for legal gender recognition, it is not clear whether data would require to be formally transmitted to NRS to allow them to create an entry in the GRR and to provide updated birth or marriage extracts as appropriate. At present, the Panel advise NRS of a successful application by email. A limited number of NRS staff (currently 8 in total) has access to this information.

5.3.2 The information that NRS staff are required to enter in the GRR is currently prescribed by [The Gender Recognition \(Prescription of Particulars to be Registered\) \(Scotland\) Regulations 2006](#).

5.3.3 Information about applications received is likely to be stored in a purpose-built IT system. The system will be used to create Scottish gender recognition certificates. The intention is that these would be issued to applicants by hard copy in the post, as is currently the case.

5.3.4 As stated, NRS have a [published policy in respect of data protection](#).

### 5.4 How will data be stored and disposed of when no longer needed?

5.4.1 Our initial thinking is that information about applications received is likely to be stored in a purpose-built IT system.

5.4.2 Once the Scottish Government have decided on the appropriate next steps after conclusion of the consultation, including about review or appeal timescales and provision for the revocation of gender recognition certificates, appropriate retention timescales will be identified. The aim will be to retain personal information only for as long as necessary for the effective administration of the reformed gender recognition system.

## 5.5 Who will own and manage the data?

5.5.1 The body processing the data will own the information. However, a decision on who will process applications for legal gender recognition under any revised arrangements has not yet been taken.

## 5.6 How will the data be checked for accuracy and kept up to date?

5.6.1 Decisions about how applications for legal gender recognition will be examined under a reformed process, including whether the identity of an applicant will be cross-checked with other records, have yet to be taken. A quality assurance process could be used to offer assurance as to the accuracy of the recorded data when compared to the information supplied by an applicant.

5.6.2 Errors made in the data collected at the date of application would be corrected, but there would otherwise be no requirement to maintain the on-going accuracy of the data once a decision had been taken to accept or refuse the application to which it related.

## 6. Data sharing with internal and external partners

6.1 Any Bill taken forward following on the public consultation would provide the appropriate legal authority:

- for the body making the decision to receive and process applications for legal gender recognition;
- to issue a successful applicant with a gender recognition certificate;
- if necessary and where appropriate, to communicate information about successful applications to NRS; and
- for NRS to use the data provided to produce updated birth and other extracts from the registers for which the Registrar General is responsible.

## 7. Stakeholder analysis and consultation

7.1 There are a range of stakeholder groups with an interest in the privacy of applicants seeking legal gender recognition. These include:

- transgender people who may wish to apply for legal gender recognition under any reformed Scottish arrangements and who will need to supply personal information to allow their application to change their legally recognised gender to be processed;
- the Information Commissioner who upholds data privacy for individuals;
- representative rights and advice bodies dealing with transgender people (for example the Scottish Transgender Alliance, LGBT Youth and Stonewall Scotland) who will have an interest in ensuring the effective administration and security of any replacement arrangements for legal gender recognition in Scotland;
- National Records of Scotland who will wish to receive the necessary information swiftly and securely to allow entries to be created in the GRR, and to provide applicants with updated birth and other extracts.

7.2 In July 2017, we met with NRS to consider the privacy issues arising under the existing arrangements. NRS have seen this partial PIA in draft for their interests.

7.3 This partial PIA forms part of a wider public consultation on the review.

## **8. Potential privacy issues**

### *Involvement of multiple organisations*

8.1 The current arrangements involve both the Panel and the NRS handling data about applications for legal gender recognition in accordance with their legal duties under the 2004 Act. Depending on the Scottish Government's decisions on next steps following the consultation, it may be proposed that the Scottish Government, or NRS replace the Panel in its role of examining and processing applications for legal gender recognition.

### *Anonymity and pseudonymity- data matching*

8.2 If a self-declaration process for legal gender recognition were adopted in Scotland, we anticipate that all necessary information would be collected from the application form and any additional documents an applicant was required to submit. Processing would not involve matching sets of data already collected.

### *Technology*

8.3 The proposals do not involve the adoption of new or additional information technologies that have the potential for privacy intrusion.

### *Identification methods*

8.4 We anticipate that under a reformed process, successful applicants for legal gender recognition would be issued with gender recognition certificates. A unique identifier might be used to link a particular gender recognition certificate to information about the original application. However, personal data will not be available to the public and would be restricted to those administering the recognition process.

8.5 Under the existing arrangements, authentication of an applicant's identity is provided through the evidence submitted with an application such as evidence of their having lived in their new gender prior to the application and the content of the statutory declaration. A decision will require to be made as to how an applicant's identity is suitably authenticated under any proposed new system of legal gender recognition. For example, an option is for the person witnessing the applicant's statutory declaration to indicate that they have had sight of appropriate evidence of identity.

### *Personal data*



8.6 The Scottish Government's decisions on next steps will be taken following the public consultation. However, the policy proposal either has no impact, or has no increased impact on:

- the handling of types of personal data of particular concern to individuals, such as sexual life or race and ethnic origin;
- the handling of personal details of each individual in an existing database; or
- the handling of personal data about a large number of individuals.

8.7 We do not anticipate that data would be processed by consolidation, inter-linking, cross-referencing or matching of person data from multiple sources. Data to be processed would be submitted by applicants.

8.8 Under the current arrangements, there is no publicly-visible connection from a person's original entry in the Register of Births to an entry in the GRR for the same person following on their change of legal gender. Information in the GRR cannot be viewed by the public and a limited number of staff at NRS have access to the information in the GRR (currently 8 in total). The GRR entry for a Scottish-born person's change of legal gender under the current arrangements contains all the information from the original birth register entry as well as information about their change of legal gender.

8.9 This ensures that if NRS are approached by a person seeking an extract birth certificate in the name of a person following their gender change, an extract is provided from the GRR. That the extract derives from the records in the GRR is not disclosed on its face and it is essentially identical to an extract certificate taken from the Register of Births. Our consultation considers whether non-binary people (people whose gender identity is not as a man or woman but somewhere in between or beyond those binary categories) should be able to apply for legal gender recognition. If this option is taken forward, our assumption is that the new birth certificate will effectively disclose that they have obtained legal gender recognition as their sex will be disclosed to be neither male nor female.

#### *Changes to data handling procedures*

8.10 The Scottish Government's decisions on next steps will be taken following the consultation. In particular, data retention arrangements can only be finalised at that stage. The personal data used in connection with the current legal gender recognition process is not publicly available and there are no proposals to make such data available.

8.11 The policy proposal does not involve:

- new or changed data collection policies or practices that are unclear or intrusive; or
- changes to data quality assurance, processes and standards that may be unclear or unsatisfactory; or
- new or changed data security access or disclosure arrangements that may be unclear or extensive;

- new or changed data retention arrangements that may be unclear or extensive; or
- a change in the medium for disclosure of publicly available information such that the data becomes more readily accessible than before.

### *Statutory exemptions/protection*

8.12 Under section 22 of the 2004 Act, it is an offence for a person who has acquired information in an official capacity about a person's application for legal gender recognition or their gender history to disclose that information to any other person. There are exceptions provided, for example where the disclosure:

- does not enable the subject of the information to be identified;
- has been agreed to by the subject of it;
- is in accordance with an order of a court or tribunal;
- is for the purpose of preventing or investigating crime;
- is made to the Registrar General for Scotland; or
- is made for the purpose of obtaining legal advice; or
- is made to a medical professional for medical purposes where the subject of the information cannot give consent.

8.13 Data protection is a reserved matter. The Scottish Ministers have power under section 22(5) and (6) to make an order prescribing circumstances in which the disclosure of protected information is not constitute an offence under section 22 where the provision being made would be within the Scottish Parliament's competence.

8.14 We do not propose systematic disclosure of personal data to or access by a third party that is not subject to comparable privacy regulation.

### *Other risks*

8.15 There are no other risks to privacy not covered by the above information.

## **9. The Data Protection Act Principles**

9.1 The consultation is intended to assist Scottish Government in reaching a view on the appropriate next steps. The content of draft legislation will be finalised after that. The consideration of the principles against the refined policy proposals will be done at that time and on review of this PIA.

**7. Risks identified and appropriate solutions or mitigation actions proposed**

Risk	Ref	Solution or mitigation	Result
<p>We anticipate a reformed system where applications are processed either by officials at Scottish Government or NRS, will require an IT system to handle data used for processing applications.</p> <p>Data may be stored by third party IT provider</p>		<p>Depending on final decisions, if third party IT provider is involved, use contract with IT provider setting out steps to minimise risk of inappropriate access to and use of personal data.</p>	<p>Reduced</p>
<p>Under a reformed system personal data might be released due to insecure IT system</p>		<p>Depending on final decisions, work with IT provider to ensure sufficient built in safeguards to reduce the risks of unauthorised access to data.</p>	<p>Reduced</p>
<p>Under a reformed system, personal data might be released through inappropriate sharing of data obtained through processing of applications.</p>		<p>Maintaining existing legal arrangement for unauthorised disclosure of such information.</p> <p>Privacy and data handling should continue to form important part of staff training under any reformed system of legal gender recognition</p>	<p>Reduced</p>

## 8. Incorporating Privacy Risks into planning

Risk	Ref	How risk will be incorporated into planning	Owner
<p>A reformed system will require a new IT system to handle data used for processing applications.</p> <p>Data might be stored by third party IT provider</p>		<p>If necessary, project plan would incorporate a contract between the relevant parties.</p>	<p>N/A at this stage</p>
<p>Under a reformed system personal data might be released due to new insecure IT system</p>		<p>Project plan would include addressing security issues arising in system design.</p>	<p>N/A at this stage</p>
<p>Under a reformed system, personal data released through inappropriate sharing of personal data obtained through processing of applications.</p>		<p>(1) Project plan would include development of information sharing protocols between all organisations involved in the process.</p> <p>(2) Time would be allocated for training on data protection and privacy issues for staff new to roles.</p>	<p>N/A at this stage</p>

**9. Authorisation and publication**

I confirm that the impact of [the Scottish Government Review of the Gender Recognition Act 2004](#) has been sufficiently assessed against the needs of the privacy duty:

**TO BE COMPLETED WHEN FINAL VERSION OF PIA IS PUBLISHED**

Name and job title of a Deputy Director or equivalent	Date each version authorised



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Any enquiries regarding this publication should be sent to us at  
The Scottish Government  
St Andrew's House  
Edinburgh  
EH1 3DG

ISBN: 978-1-78851-398-2 (web only)

Published by The Scottish Government, November 2017

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
PPDAS318246 (11/17)

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