

Equality Network and Scottish Trans Alliance

1 Do you have any comments on the proposal that applicants must live in their acquired gender for at least 3 months before applying for a GRC?

Yes

If yes, please outline these comments.:

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

Our response to this consultation is based in our knowledge and expertise in trans law, equality and human rights gained over the past thirteen years. It also incorporates the views we heard from trans people across Scotland at a range of different community events during the time the consultation was open. We visited fourteen community groups, at their meetings across Aberdeen, Edinburgh, Galashiels, Glasgow, Perth and Stirling. We also held four of our own consultation events in Edinburgh, Glasgow, Aberdeen and Inverness.

As an organisation, we generally use the term 'trans' (short for transgender) as an inclusive umbrella term for anyone whose gender identity or gender expression does not fully correspond with their sex assigned at birth. This includes trans men, trans women, non-binary people, and cross dressing people.

We believe it is generally best to use an inclusive and broad definition of trans people, rather than a narrow definition, in order to support the human rights of everyone who is impacted by discrimination based on their gender identity or gender expression. However, it is also important to be clear, when relevant, about the different situations and needs of more specific types of trans people.

Legal gender recognition is intended only for those trans people who transition permanently to live as a gender other than the one recorded on their birth certificate. Cross-dressing people do not need access to legal gender recognition because cross-dressing people remain predominantly living and identifying as the gender they were assigned at birth. Therefore, for the purposes of this consultation response, when we use the term 'trans people' we will be using it to refer only to trans men, trans women and non-binary people. Where we are only talking about trans men and trans women, we will make this explicit.

Throughout the Scottish Government's consultation paper, it tends to simply use the term 'trans people' to describe who the proposed changes may affect. It is our understanding that it is using this term only to describe trans men and trans women.

Scottish Trans Alliance and Equality Network have always been happy to discuss proposals to reform the Gender Recognition Act. This has included and will continue to include talking to people or organisations that oppose reforming the law. We believe that political debate should be about policies & statements, and conducted without personal abuse, harassment or threats of any kind. We aim to work that way and we ask everyone, LGBTI equality supporters or not, to do the same. We share the feelings of many people that conversations about trans equality and reforming the Gender Recognition Act have become overly heated, and that this has made it difficult to have constructive and helpful dialogue about this topic.

We don't think that people who have concerns or uncertainties about the reforms should be automatically labelled as transphobic. There has been lots of public discussion and media coverage on this topic, much of which has presented misinformation, either due to a lack of expertise or in an attempt to deliberately promote opposition to the proposed reforms. As well as this, given that the level of knowledge about trans people amongst the general population is quite low, and that many people may not have knowingly met a trans person, it is understandable that people are uncertain about their views.

All of our work is based on raising knowledge and awareness of trans people so that society, organisations, and services will proactively want to better include us. We hope to make a convincing and well-reasoned case about why people should support Scotland improving its gender recognition law. We are happy to have good faith discussions with anybody about their concerns. Some opposition to reforms, and contributions to conversations about trans equality more broadly, have displayed prejudice, or espoused stigmatising and untrue stereotypes about trans people. This is inappropriate.

What has been particularly concerning about conversations prompted by the proposed reforms is that these have sometimes served as a pretext for discussing whether existing rights long held by trans people are fair and appropriate. This has particularly been the case around access to single-sex services and spaces. As we discuss at length in our answer to question 5 when we discuss the protected characteristic of sex within the context of the partial EQIA, trans people without GRCs who have the protected characteristic of gender reassignment are able to use single-sex services. Trans people can be treated less favourably than others in single-sex services, but only in restricted and limited circumstances, where it is shown to be a proportionate means of achieving a legitimate aim. Trans people can be excluded from single-sex services that align with their gender, but only in exceptional circumstances. This has been the case in law since the Equality Act was passed in 2010, although many trans people will have been using these services and spaces in this way beforehand. Attempts to blanket restrict our access to single-sex services and spaces that align with our gender would have a massive detrimental impact on the day-to-day lives of trans people across Scotland. We oppose in the strongest terms any attempts to argue that trans people's existing rights to access such services and spaces should be rolled back. A disappointing amount of discussion about trans people's equality deliberately conflates trans people's legal rights to access services and spaces with predatory men accessing services and spaces to harm others. Violence against women and girls is endemic, and we strongly believe that more needs to be done to tackle this issue and ensure that women are safe to participate in society free from violence. We would absolutely welcome any measures designed to improve the safety, privacy, and dignity of all people using single-sex spaces and services across Scotland. We do not believe that removing existing rights of trans people to access these spaces is a necessary or reasonable step to achieve these aims. Furthermore, as the Scottish Government says throughout this consultation paper, there is no evidence from jurisdictions which have introduced self-declaration models for legal gender recognition that this leads to an increase of sexual offences committed by men in women-only spaces. Deliberately or unfairly conflating improvements in trans rights with reducing the safety of women only serves to reinforce negative stereotypes about trans people.

We also think it is unfair to characterise disagreement about reforms to the Gender Recognition Act as existing between ‘feminists’ on one side and ‘trans activists’ on the other side. Many feminists and women’s/feminist services and organisations support the Scottish Government proposals to reform the Gender Recognition Act, and include trans women in their campaigns, single-sex services, and spaces. Scottish Trans Alliance exists to try and ensure that no one faces discrimination or inequality due to their gender expression or gender identity. We don’t believe that anyone should have the options for the life they are able to lead restricted by the body they were born with, or the expectations that go with it. We consider this a fundamentally feminist goal.

We would like to state strongly our support for and solidarity with feminist movements all across Scotland, and our commitment to working for trans equality that is underpinned by feminist principles.

Finally, we would like to raise that trans people across Scotland have told us that they feel increasingly unwelcome in services, public spaces, and workplaces across the country. For some people, this is due to concerns that the current spotlight on trans issues will have a negative impact on social attitudes. For others, this is due to having experienced an increase in abuse and harassment in their day-to-day lives, which they attribute to this ongoing spotlight. Trans people have told us that they feel the most unsafe going about their daily lives that they have for years. We hope that whatever the outcome of the Scottish Government proposals to reform the Gender Recognition Act, that we can find a way forward to have more constructive and respectful conversations about trans people.

1. Do you have any comments on the proposal that applicants must live in their acquired gender for at least 3 months before applying for a GRC?

Below, we will set out why we don’t feel it is necessary for someone to have been living in their ‘acquired gender’ for three months to be eligible to apply for legal gender recognition.

As the Scottish Government acknowledges in the consultation paper when setting out its rationale for reforming the GRA, the current process has an “adverse impact on people applying for gender recognition”. The proposals would destigmatise the process, by removing the requirement for a psychiatric diagnosis. Under the current process, medical treatments are not necessary to determine a person’s eligibility for gender recognition, yet intrusive medical reports about the type of transition treatments you have chosen to have must be submitted. The proposed process would be less intrusive, by no longer requiring these reports. They would allow people to gain legal recognition of how they are living sooner, by not requiring applicants to have been living in their ‘acquired gender’ for two years. They would make the process fairer and more transparent, as applications would no longer be scrutinised by the Gender Recognition Panel who never meet the applicant. These will be important improvements to the existing process, and we strongly support these aspects of the proposals.

Support for removing the current requirements of a psychiatric diagnosis, medical evidence, and two years of living in your ‘acquired gender’

Problems with the current process

When using mental health services, 29% of trans people have had their gender identity treated as a symptom of a mental health issue, rather than their genuine identity.[1] Historically, trans identities have been conflated with mental illness, and continue in the present to be misunderstood in this way, not just by the

general public but also in parts of the medical profession. Requiring trans people to have a diagnosis of gender dysphoria in order to have their gender legally recognised reinforces this outdated assumption that being trans is a mental health problem.

The current evidence requirements are intrusive and humiliating, violate trans people's right to privacy, and further stigmatise trans identities. For trans people who do not want to access medical transition treatments, there may be no reason for them to seek a psychiatric diagnosis of gender dysphoria, effectively excluding them from the current process. Reforming the legislation is about recognising that the need for a psychiatric diagnosis pathologises trans people, and requiring medical evidence rather than simply the testimony of the individual suggests that trans people themselves are not the best placed to make decisions about their gender and lives.

Many trans people encounter problems with fulfilling the evidence requirements for the current process. This is often because the Gender Recognition Panel (GRP) requires medical reports to be worded very particularly, meaning trans people often have to return to medical practitioners several times to ensure their evidence is deemed satisfactory. This is due to a precedent set soon after the formation of the GRP around the level of detail needed for medical reports. Despite the fact that no medical treatments are required for a person to obtain a GRC, the panel still insists on knowing full details of any treatment you have had, or similarly, that you provide a medical report explaining why you haven't had any particular treatment.[2] This is an intensely intrusive and humiliating requirement, and it is unacceptable that trans people are required to provide detailed information about their bodies and medical history, even when these are not conditions to obtaining legal gender recognition.

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

The current gender recognition process, by virtue of requesting medical evidence, causes confusion about whether trans people who decide against surgery will be treated fairly by the gender recognition panel. The UK Government's National LGBT Survey found that 15% of trans respondents who didn't have a GRC incorrectly thought that surgery was a requirement of the current process[3]. In a particularly disturbing case, we were contacted by an extremely distressed young trans person in their early 20s who had been informed by the gender recognition panel that they would not grant her legal gender recognition until she decided for certain whether or not to undergo genital surgery. She had been transitioned for several years but had not yet had any sexual relationship and did not wish to make a decision about genital surgery until she was older and had the chance to explore her sexuality. She was being expected to dangerously rush her decision about irreversible major surgery purely to overcome the bureaucratic pedantry of a faceless tribunal panel.

We have been contacted by trans people who feel deeply upset and angry that, not only is a psychiatric diagnosis report required, but also the gender recognition panel rejected their diagnosis reports as inadequate unless they included information about their childhood gender expression, including what toys they played with as a child. This is a grossly offensive reinforcing of gender stereotypes and does not even relate to the ICD-10 diagnostic criteria used for trans adults before 'gender identity disorder' was reclassified from a mental health condition in ICD-11. Similarly, we have had trans people tell us that the panel expected details of their sexual orientation and current relationships to be included in the psychiatric diagnosis report, which again is completely unacceptable and irrelevant to whether or not someone has experienced gender dysphoria.

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

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

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

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

The vast majority of trans people we engage with express significant confusion and anxiety about how much evidence they need to provide to prove they have been living in their acquired gender for over two years. The UK Government's National LGBT Survey found that 38% of trans respondents who did not have a GRC had not applied for one because the process is too bureaucratic[4]. We have been informed by some trans people that they have been verbally chastised by the administrators who assist the gender recognition panel for submitting 'too much evidence'. We are aware of a trans person who had their application rejected but then when they resubmitted it immediately afterwards with the only change being that they included less evidence, it was accepted. The panel appears to be very inconsistent and unclear in terms of the degree to which it requires evidence to be spread across the entire two year time period.

Furthermore, the complexity of the different kinds of evidence required causes many trans people to struggle to complete their application. When they make errors with their evidence, the tribunal panel's requests for further information are often very difficult to follow legalistic phrasings that even our Scottish Trans Alliance staff have struggled to understand. We are in contact with trans people who have abandoned their gender recognition applications due to frustration at not being able to understand the panel's requests for further information. The UK Government's National LGBT Survey found that 17% of trans women and 23%

of trans men who responded and did not have a GRC had not applied because they could not get the help they needed to make an application[5].

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

We feel strongly that these overly onerous requirements around evidence are a direct product of the current system, which pathologises trans identities and allows a panel to scrutinise individuals before granting them legal gender recognition. Built into the current process is the notion that trans people's identities are up for debate, and that their privacy and dignity is secondary to the knowledge and expertise of other professionals. This is why a move to self-declaration is so crucial, because it removes the idea that there is any external 'expert' required to verify trans people's identities, and acknowledges that trans people themselves are in fact the only experts on who they are. We feel any retention of the GRP would be entirely unacceptable, as it would serve to perpetuate the idea that trans people must somehow prove themselves to others before being recognised as who they are.

Due to the complexity, cost and indignity of the current Gender Recognition Act process, most eligible trans people have not applied for a Gender Recognition Certificate to change their birth certificate. This leaves them in a risky legal limbo, with all their day-to-day identity documents updated through self-declaration to reflect their gender identity, but their birth certificate and technical legal gender still in contradiction to how they live and identify. This can result in trans people unwittingly experiencing serious harmful errors, inconsistencies and difficulties described below.

Marriage and civil partnership:

While civil partnership remains restricted to legally same-sex couples only, trans people can find their civil partnerships invalidated due to not having changed their birth certificates. We were contacted by a couple who identify as a lesbian couple and had arranged a civil partnership in Scotland. A few days before their ceremony, the celebrant realised that as the trans woman did not have a gender recognition certificate (despite being many years transitioned), the civil partnership could not take place. The couple could not change their scheduled ceremony to a marriage because there was not sufficient notice period left. They were forced to cancel their ceremony, and lost all of the substantial money paid for venue and catering. They were left with no option but to come out as trans to all their guests in order to explain why the civil partnership ceremony had been cancelled and why it was being switched to a marriage ceremony several weeks later. This caused the couple huge distress. We are aware that such issues around eligibility to enter civil partnerships may be resolved if current proposals to reform the law to open them to mixed-sex couples are successful.

Confusion as to their legal gender can also mean a trans person may mistakenly believe they have a mixed-sex marriage when in actual fact they have a same-sex marriage or vice-versa, which can negatively affect survivor pension entitlements and international recognition of the marriage validity. This issue will also effect Civil Partnerships if the Civil Partnership Bill (Scotland) is passed as it is currently proposed, as civil partnerships will then be open to both same-sex and mixed-sex couples.

Pension entitlement and start date:

For trans people born before 6th April 1955, the gender on their birth certificate affects the age at which they can receive a state pension. We have been contacted by a number of trans people who have experienced financial hardship and distress due to miscalculating their pension entitlement and start date many years after their transition, because they do not have a gender recognition certificate. People implement plans to retire and only find out at the last minute that their pensions will not start when they thought they would. Due to the complexity of the evidence needed for the current Gender Recognition Act process, it can take many months of financial hardship before trans people affected by such pension issues can get their legal gender corrected. Public domain example: <https://www.dailyrecord.co.uk/news/real-life/sex-change-squaddie-sandra-macdougall-6703602>

Human right to privacy about their gender reassignment history:

Trans people often have to show their birth certificate to prove their right to work in the UK when starting new job, or in order to join their workplace pension scheme. If they have not received legal gender recognition, then this violates their privacy by outing their previous name and gender reassignment history to their employer. Young trans people are often required to show their birth certificate when changing to a new school and when starting college or university. We have been contacted by trans young people who have left education rather than out themselves as trans in this way, and we have been contacted by trans people who have failed to join pension schemes or even to take up an employment offer due to fear of outing themselves by showing an uncorrected birth certificate.

Exposure to discrimination and harassment:

Although changing the gender on their birth certificate is not required for a trans person to access employment and services in their gender identity, having an anomaly between their birth certificate gender and the gender on their other identity documents (in which they are living) increases the risk of trans people being subjected to transphobic discrimination and harassment. It is common for employers and financial service providers to mistakenly believe that a person must show a gender recognition certificate in order to change their gender at work or on their bank accounts. This is of course not only wrong in law but also impossible for the trans person concerned, given the requirement to prove that they have lived and worked in line with their gender identity for at least two years before applying for a gender recognition certificate. Interestingly, this is evidence that generally people anticipate that legal gender recognition should be in line with the point at which trans people start living permanently in their gender identity.

Other jurisdictions that use a self-declaration model

As the Scottish Government acknowledges in the consultation paper, a number of jurisdictions have now introduced legal gender recognition processes that are entirely de-medicalised, administrative processes. Rather than requiring evidence of any medical treatments or diagnoses, or evidence that a person has been living in their gender, instead it relies on the declaration of the individual applying.

This type of gender recognition process is commonly referred to as a 'self-declaration' system. As well as the ten countries listed in Annex E of the Government's consultation paper, we are also aware of such systems in: Australia (Tasmania)[6], Canada (Alberta[7], Newfoundland and Labrador[8], Northwest Territories[9], Nova Scotia[10], Yukon[11]), Iceland[12], Luxembourg[13], Mexico[14] (Mexico City, Michoacán, Nayarit), Portugal[15], Spain (Andalucía[16] and Community of Madrid[17]), United States of America (California[18]),

Montana[19], Nevada[20], New Jersey[21], New York City[22], New York State[23], Oregon[24], Washington State[25]), and Uruguay[26].

International developments around legal gender recognition processes

We welcome the Scottish Government's reference to Council of Europe Resolution 2048 which calls for 'quick, transparent and accessible' legal gender recognition processes[27]. The current process in Scotland does not fulfil any of these criteria. Applicants are required to have been living in their 'acquired gender' for at least two years. Because you have to be able to prove this, people who are unaware of the requirements may have to wait even longer to ensure they have collected the necessary evidence. Applicants send their application to a tribunal who they never meet, and who don't have clear, definitive or publicly accessible decision-making criteria. The application process is difficult, time-consuming and expensive. Scottish Trans Alliance often has to help trans people with their applications, as it is very easy to miss something crucial due to how complicated the process is. You also have to have a psychiatric diagnosis of gender dysphoria – which some people may be unwilling or unable to obtain. We have outlined in the above section how these current requirements cause real difficulties for trans people who wish to apply for a GRC.

The Yogyakarta Principles 2006 referenced in the Scottish Government's consultation paper state that governments should "Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity." [28] It is acknowledged in international human rights that gender identity is a deeply personal characteristic, and that only individuals are able to know their gender identity.[29] The current process requires the corroboration of medical practitioners, taking away trans people's rights to determine and define their own realities. One of the key reasons that Scotland lost its place at the top of the ILGA Rainbow Index, which it held in 2015, was the improved laws around gender recognition in other countries in Europe – such as Malta, Belgium, Luxembourg and Norway (see the two most recent indexes in 2018[30] and 2019[31]). If the Scottish Government remains committed to being a leading country internationally for LGBTI people, bringing forward legislation to introduce a self-declaratory system for legal gender recognition in line with international best practice and international human rights ideals is a vital step.

Opposition to the requirement for applicants to have been living in their acquired gender for three months before they are able to apply for a GRC

It is our view that the requirement that an applicant has been living in their 'acquired gender' for three months before being able to apply for a GRC, and that they state this in their statutory declaration, is an arbitrary requirement which is not supported by evidence.

In explaining their rationale for taking this approach, the Scottish Government states in its consultation paper:

"Obtaining legal gender recognition would remain a serious step. The Scottish Government considers that requiring people to live in their acquired gender for 3 months; to make statutory declarations; and to go through a period of reflection for 3 months is a balanced and proportionate way of replacing the current system with one that is more respectful of the rights of trans people."

However, at Annex E the Scottish Government reviews ten countries which have also adopted what they call a 'self-determination model' (which we have called a self-declaration model, but which describes the same thing). They define a 'self-determination model' as:

“systems of gender recognition which are based on applicant’s own declaration as to their lived gender”

In each of the ten countries that it has reviewed that uses this model, none of them are described as requiring an applicant to have been living in their ‘acquired gender’ for a certain length of time before applying. We are also unaware of such a requirement in any of the additional 23 jurisdictions which we have highlighted that operate on a self-declaration system.

It is unclear from the information supplied in the consultation paper why the Scottish Government feels that a ‘self-determination’ model, as in the countries it has reviewed, is appropriate for Scotland, but with this additional requirement. The Scottish Government itself notes that a statutory declaration:

“is a formal statement made that something is true to the best knowledge of the person making the declaration. It is an existing offence to make a false statutory declaration. The intention is that statutory declarations under the revised GRA will be formal and will have to be made in front of someone who is authorised to administer an oath.[32] In Scotland, a statutory declaration of this nature could be made in front of a Justice of the Peace[33] or a Notary Public.[34]” (references as in original).

In fact, in the introduction to the consultation paper where the Scottish Government outlines its rationale for reforming the GRA, it states:

“In recent years, there have been moves towards systems which are similar to the system the Scottish Government is proposing to introduce for Scotland. For example, the Republic of Ireland has a system based around statutory declarations. The Scottish Government is not aware of problems arising in Ireland as a result of the introduction of a system for obtaining gender recognition based around statutory declarations.”

We would like the Scottish Government to remove the requirement that an applicant has been living in their ‘acquired gender’ for three months before they are able to apply for a GRC. It is arbitrary, and there is no evidence base for requiring it.

[1] Trans Mental Health Study (2012) McNeil, J., Bailey, L., Ellis, S., Morton, J. and Regan, M.

[2] <https://www.gov.uk/apply-gender-recognition-certificate/documents-you-must-provide>

[3]

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf

[4] Ibid.

[5] Ibid.

[6] <https://www.theguardian.com/commentisfree/2019/apr/08/how-tasmania-is-going-from-worst-to-best-on-transgender-human-rights>

[7] <https://www.alberta.ca/birth-record-sex-amendment.aspx>

[8] <https://www.gov.nl.ca/snl/birth/changing-your-sex-designation/>

[9] <https://www.hss.gov.nt.ca/en/services/changing-your-sex-designation>

[10] <https://novascotia.ca/news/release/?id=20180919003>

[11] <https://yukon.ca/en/births-marriages-and-deaths/births/change-sex-birth-registration>

[12] <https://www.icelandreview.com/news/icelands-gender-autonomy-act-is-a-step-forward-for-trans-and-intersex-rights/>

[13] <https://tgeu.org/luxembourg-adopts-self-determination-law/>

- [14] <https://www.hrw.org/news/2018/10/29/mexico-transgender-ruling-beacon-change>
- [15] <https://tgeu.org/portugual-votes-for-self-determination-keeps-medicalization-for-minors/>
- [16] https://ilga.org/downloads/TLMR_ENG.pdf (page 79)
- [17] Ibid
- [18] <https://www.cdph.ca.gov/CDPH%20Document%20Library/ControlledForms/VS24.pdf>
- [19] <https://dphhs.mt.gov/Portals/85/Statistics/documents/VitalStats/GenderDesignationForm.pdf>
- [20] <http://dpbh.nv.gov/uploadedFiles/dpbhngov/content/Programs/BirthDeath/Packet%20-%20Transgender.pdf>
- [21] https://www.njleg.state.nj.us/2018/Bills/A2000/1718_R2.PDF
- [22] <https://www1.nyc.gov/assets/doh/downloads/pdf/notice/2018/noa-amend-article207-section207-05.pdf>
- [23] https://www.lambdalegal.org/blog/20200310_victory-new-york-state-transgender-minors-birth-certificates?fbclid=IwAR2RgVlg2N37ASRmY_wmPdnrNsNgzM4WrEiI3jmycxMNKg
- [24] <https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/CHANGEVITALRECORDS/Documents/OHA-2673.pdf>
- [25] <https://www.doh.wa.gov/LicensesPermitsandCertificates/BirthDeathMarriageandDivorce/SexDesignationChangeonaBirthCertificate>
- [26] <https://www.pinknews.co.uk/2018/10/22/uruguay-trans-rights-law/>
- [27] 'Council of Europe Parliamentary Assembly Resolution 2048 on discrimination against transgender people in Europe', 2015:
<http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21736>
- [28] The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007)
- [29] See also Council of Europe Resolution 2048: 5
<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736>
- [30] https://ilga-europe.org/sites/default/files/Attachments/index_2018_small.pdf
- [31] https://ilga-europe.org/sites/default/files/Attachments/rainbowindex2019online_0_0.pdf
- [32] The person making the Statutory Declaration will have to solemnly declare that the declaration is true.
- [33] <https://www.scotcourts.gov.uk/the-courts/jp-court/signing-documents>
- [34] As at 20 November 2019, there were 8,912 Scottish notaries.

2 Do you have any comments on the proposal that applicants must go through a period of reflection for at least 3 months before obtaining a GRC?

Yes

If yes, please outline these comments.:

Opposition to the requirement that applicants must go through a period of reflection for at least 3 months before obtaining a GRC

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

Of the ten countries with a 'self-determination' model that the Scottish Government reviews in Annex E of its consultation paper, only two of these countries require a period of reflection once an application has been made. As well as not being present in eight of the ten 'self-determination' models it reviews, it is also not present in any of the additional 23 jurisdictions using such models that we listed in response to question 1.

It is unclear from the information presented in the consultation paper why the Scottish Government feels a 'self-determination' model is appropriate for Scotland, but has chosen to include a period of reflection as part of this model, when to do so is clearly an unusual approach to such a system of legal gender recognition.

Furthermore, and as included in their organisational response to this consultation, ILGA Europe informed us that of August 2019, Denmark had received 948 applications for legal gender recognition (they introduced their law in 2014). Of those applications, 22 applicants changed their minds about obtaining legal gender recognition during the reflection period – which is less than 2.5%. To require all applicants to face a delay in obtaining a GRC when such a small proportion of them will change their minds is unfair and punitive. It is more appropriate to ensure that there are also quick, accessible ways to apply to change your legal gender again in the situation that someone changes their mind. We will discuss this in more detail in our response to question 3.

As well as requiring a period of reflection seeming arbitrary and not supported by evidence, we also think that this requirement does not adhere to the principle of self-declaration, and reintroduces the idea that trans people require additional checks and balances to be sure of their identity. This perpetuates the problems that are present in the current process. Trans people that we talked with at community groups and meetings throughout the consultation period all clearly told us the same thing – that by the time they are applying for legal recognition of their gender, they have already undertaken a significant amount of reflection about who they are.

The proposals are that the statutory declaration will require a person to say that they are living as either a man or a woman and intend to do so until death. We think that the language in the statutory declaration is sufficiently robust that anyone who is uncertain about whether or not they intend to live permanently as a man or a woman would not make an application, as they would be unable to make a solemn declaration that this statement were true.

We would like the Scottish Government to remove the requirement that an applicant must go through a period of reflection of at least three months before obtaining a GRC. It is arbitrary, and there is no evidence base for requiring it.

Necessity of a mechanism for waiving the reflection period if it is retained

However, if the Bill progresses with this requirement, we would want there to be a mechanism for waiving this period of reflection for certain applicants.

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

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

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

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

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

(ii)he has been authorised to issue the Marriage Schedule on that specified date by the Registrar General;[1]”

Subsection (4ZB) makes it clear that one of the intended reasons that a notice period for a marriage could be dispensed with would be “This subsection applies if the request made under subsection (4)(a)(i) is made because a party to the referred marriage is gravely ill and not expected to recover.”[2]

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

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

[2] Ibid.

3 Should the minimum age at which a person can apply for legal gender recognition be reduced from 18 to 16?

Yes

If you wish, please give reasons for your view.:

We strongly agree with the Scottish Government’s proposal to lower the age at which a person can apply for legal gender recognition to 16. In Scotland, young people are deemed to have full legal capacity at 16 years old. They are able to vote in elections, get married, and consent to any medical, surgical or dental treatment, as well as a host of other rights. This should also extend to having their gender legally recognised. Changing the law in this way will reflect the general consensus in Scottish politics that 16 and 17 year olds are able to make decisions for themselves.

Furthermore, many trans young people aged 16 and 17 will be at a stage of their life where they are making new starts. This may be getting a job, starting college or going to university. Because they aren’t able to have their gender legally recognised, they often have to out themselves (disclose that they are trans) when starting these new opportunities. This can often mean that events that are supposed to be exciting and positive can be much more stressful for trans young people.

Trans young people aged 16 and 17 are also already able to update other identity documents to reflect how they are living, such as their driving licences and passports. Lowering the minimum age at which they can also change their birth certificates to reflect how they live their lives and their other identity documents will ensure that they have the same right to privacy about their trans status and history as those people over the age of 18.

Need for a mechanism for under 16s to obtain legal gender recognition

Allowing trans young people under the age of 16 to have their gender legally recognised is *not about access to medical treatments*. Decisions about the medical treatment of young trans people would continue to be made by medical professionals, and would not be affected. Instead, providing a mechanism for under 16s is about enabling consistency in people's legal documentation, to allow them the same recognition of their identity as everyone else. It's about making sure they don't face discrimination or encounter people who don't believe their gender identity is "real".

In Scotland, children and young people under 16 cannot access any irreversible treatments as part of a medical transition, such as cross sex hormones. Children and young people under 18 cannot access surgical interventions. The Scottish Government proposals will not change this. Furthermore, healthcare providers are not obliged to provide people with medical interventions as a result of them having obtained legal gender recognition. The Scottish Government proposals will have no impact on how decisions are taken about individual trans patients' medical transitions.

We think it is vital that people under 16 have access to the legal gender recognition process. An Amnesty International report into legal gender recognition processes across Europe states that

"Absolute denial of legal gender recognition to individuals under a given age is not consistent with existing international standards regarding the rights of children." [1]

Extending the right to obtain legal gender recognition to under 16s would also be in keeping with many of the principles of the United Nations Convention on the Rights of the Child, including:

- Article 2 - which says children and young people should be protected against all forms of discrimination.
- Article 3 - which says the best interests of all children and young people should be respected.
- Article 6 - the right to life.
- Article 8 – the right to identity – which includes gender identity and sexual orientation within its scope.
- Article 12 - the right to express views freely and have opinions listened to.
- Article 14 - the right to freedom of expression.
- Article 16 - the right to privacy.
- Article 28 - the right to education [2].

As the Scottish Government outlines in its draft Children's Rights and Welfare Impact Assessment, a number of jurisdictions allow those under 16 to apply for legal gender recognition. Countries operate a range of different models for allowing under 16s to do so: some with parental consent, some through a court process, some through a capacity model, and some through selecting a designated person to apply on the child's behalf. As well as those included in their table

at pages 119-123 of the consultation document, other jurisdictions that have some mechanism of recognising under 16s include: Australia (Tasmania), Canada (Alberta, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Yukon), Iceland, United States (California, Montana, New Jersey, New York State, Nevada, Oregon) and Uruguay.

Throughout the consultation paper, the Scottish Government seems to conflate trans young people under 16 with those who are 'uncertain of their gender identity' when explaining the policy rationale for not extending legal gender recognition to under 16s (see for example at pages 91 and 150).

We think it is important to clarify that under 16s are not necessarily uncertain of their gender identity – there are a small number of trans young people who are very confident and certain of their gender, who have fully socially transitioned with the support of family, peers and school. These young people should have access to legal gender recognition.

We would not think it was appropriate for anyone, regardless of their age, to obtain legal gender recognition if they were 'uncertain of their gender identity'.

However, we think that the proposed process – that someone must sign a statutory declaration in front of a notary public, which declares your intention to live in your gender until death – is a proportionate and suitable way of ensuring that anyone who is experiencing uncertainty will not apply.

We think that a statutory declaration is a fair way to ensure that applicants know that they are making a serious and important decision. Whilst we think that there should be no evidence required for a person to receive legal recognition of their gender, it is still important that an applicant knows that their declaration carries real-life consequences, and that they feel comfortable making the application in the context of it being a solemn and true declaration of their intentions. Because it would be a declaration of your intentions, we think it is appropriate that the statutory declaration includes that you intend to live in your gender until death. As you will see below, we do not think that there should be any limits to the number of times a person can apply for legal gender recognition. Making a second declaration would not mean that you would automatically be considered to have made a false declaration previously, but that circumstances change, and you should be able to apply to have your gender legally recognised again if this is the case.

It may be useful to make it clear to applicants that they are making a declaration of their current situation and future intentions, and not necessarily of unalterable permanence, so that people are not unduly concerned that they may be criminalised if they need to apply to have their gender legally recognised again in the future. Requiring a statutory declaration will also mean that the process for changing your gender legally will reflect the process used in Scotland for other changes, such as a change of name.

There are no current limits to the number of times a person can get legal gender recognition under the 2004 Act, and we don't feel that there is a need to introduce them to a new system. A factsheet from TGEU produced in October 2017 showed that in five countries that have a self-declaratory system (Argentina, Denmark, Ireland, Malta and Norway) there have only been two recorded incidents of repeat applications out of over eleven thousand[3]. Neither of the cases related to applications that were fraudulent or frivolous; both involved trans people who experienced discrimination and difficulties with their transition and whose

circumstances changed. We think that the wording of the statutory declaration, and the nature of it being criminal to deliberately make a false one, will be a suitable way of ensuring that people don't make frivolous applications.

We think that an application to have your gender recognised legally should be considered similar to a marriage. Although you would make the application with the intent of the decision being permanent, the law would allow for the possibility that circumstances change. If somebody's decision did change, they should be able to apply in the same way to have their legal gender changed again.

Importance to trans young people

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

Children and young people are less likely to have other forms of ID, so may be more reliant on showing and using a birth certificate to demonstrate who they are.

Because they are unable to update their birth certificates, this may mean having to use it despite it conflicting with their gender identity, their other identity documents and the reality of their daily life. This can mean that trans children and young people have little privacy around their trans status, and are rarely able to decide for themselves if they share this with organisations or services.

Similarly, there may be uncertainty about how they should be treated in some situations, due to a discrepancy between how they are living and their legal gender.

For example, some decisions about eligibility for welfare payments may be dependent on whether children are legally male or legally female. Because trans young people are able to socially transition, and update all other records and documents, their inability to gain legal gender recognition can leave them in an unacceptable legal limbo for years.

All children have a gender identity. Many children will talk from an early age about how they are a boy or a girl and this is considered perfectly normal if this happens to match up with what society expects of them, based on the sex they were assigned at birth. There is no reason to think that trans young people aren't equally sure of who they are. Extending the right to access the legal gender recognition process to young people under 16 will not 'encourage' anyone to be trans – it will simply allow those young people who are sure of themselves to be able to change the gender on their birth certificate to reflect who they really are.

Why do we think parental consent is the best approach?

We think that requiring applicants under 16 to have parental consent will bring the process of legal gender recognition in line with many of the other administrative changes that trans young people can make at that age, such as changing their passport, medical records, and name. This would mean that the process for under 16s would mirror the process for adults if the Scottish Government's proposals for moving to a self-declaratory system are adopted; that legal gender recognition becomes a decision subject to the same processes as those for updating your other identity documents. In the case of trans adults this would mean being able to

do so simply by self-declaration, and in the case of trans young people this would mean being able to do so with parental consent. If a trans person under 16 did not have a parent with parental rights and responsibilities, then somebody else with parental rights and responsibilities should be able to make the application. We think that a parental application should require the person making the application to sign a statutory declaration which includes that they have a solemn and true belief that the young person has an intention to live in their gender identity. We would want the application to be made with the best interests and wishes of the child having been taken into account, and the wording of the statutory declaration should make this clear.

What about parents who will not provide consent for an application?

However, we do think that there should also be a process in place for those young people who wish to obtain legal gender recognition where there is some kind of dispute about whether or not there is parental consent. This will ensure that they are able to have their gender legally recognised if this is in their best interests. It is our understanding that at the moment, if a young person under 16 did not have parental consent for their application, they could apply to the Sheriff Court for the need for parental consent to be dispensed with, under the provisions of Section 11 of the Children (Scotland) Act 1995[4].

[1] The state decides who am: Lack of legal gender recognition for transgender people in Europe (2014) Amnesty International, London

[2] UN Convention on the Rights of the Child, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

[3] TGEU: Implementation of Legal Gender Recognition Procedures based on self-determination in Malta, Norway, Denmark, Ireland, Argentina with a focus on fraudulent intent and repeated applications?

[4] Children (Scotland) Act 1995

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

4 Do you have any other comments on the provisions of the draft Bill?

Yes

If yes, please outline these comments.:

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

All trans, including non-binary, people, are able to socially transition, by taking steps such as changing their names, updating other identity documents (such as a passport, driving licence, and NHS medical records) and coming out to friends, family and at work, before obtaining legal gender recognition. They are also able to use single-sex services and spaces that correspond with how they are living in the vast majority of circumstances, regardless of whether or not they have obtained a gender recognition certificate[1]. For those trans, including non-binary, people, who want to access trans specific healthcare, and undergo medical

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

That legal gender recognition is about recognising how someone is already living in society, rather than granting them permission to do so, is clear from the requirements that exist in the current process. It is also clear from the original ruling of the European Court of Human Rights that required the UK to implement a legal gender recognition process for trans men and trans women, which stated: "the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost." [2]

A process of legally recognising trans men and trans women has existed in Scotland since 2005, following the passing of the Gender Recognition Act 2004 on a UK-wide basis. We welcome that the Scottish Government is proposing to reform the process by which this recognition is possible, and that it acknowledges that: "some provisions of the GRA will remain unchanged. For example, section 9(1) of the GRA will continue to provide that, where a full GRC is issued to a person, the person's gender becomes for all purposes the acquired gender. *This reflects the fact that, although the Bill changes the way in which gender recognition can be obtained, it does not change rights and responsibilities after gender recognition has been obtained.*" (emphasis added).

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

We would like to reiterate our strong support for the proposals in the Bill that would introduce significant improvements to the process of obtaining legal gender recognition for trans men and trans women. These are outlined in detail in questions one and three, and relate to the Scottish Government's plans to remove the requirement for a psychiatric diagnosis, for intrusive medical evidence, and for a person to have been living in their 'acquired gender' for two years, and for applications to be scrutinised by the Gender Recognition Panel, as well as lowering the age at which people can apply to 16.

We also support the Scottish Government's plans to automatically recognise legal gender recognition obtained overseas, unless this is "contrary to public policy".

At the moment, only those who have obtained legal gender recognition from a place listed on the "Approved Countries or Territories" list are able to have their legal gender recognition automatically recognised here, otherwise they have to apply via the overseas track. [3]

In other areas of law, "contrary to public policy" doesn't necessarily mean that Scots Law does not recognise any types of legal status acquired outwith Scotland that would not have been granted here. For example, Scots Law recognises overseas polygamous marriages as marriages for some purposes. We assume that the law will approach overseas legal gender recognition using the same principles. Some further clarification on what "contrary to public policy" may mean for those moving to Scotland who have had their gender legally recognised elsewhere would be useful. For example, there are a number of jurisdictions that recognise trans young people who are under 16, and non-binary people. We are often contacted by trans people around the world who are planning to move to Scotland, with requests for information about their ability to be legally recognised when

they are living here. It would be useful to be able to provide them with accurate information about whether legal gender recognition from their country of origin will be recognised on their arrival in Scotland.

Legal recognition for non-binary people

On March 31st 2016, we ran an LGBTI Hustings event jointly with Stonewall Scotland and LGBT Youth Scotland, for the leaders of all of the political parties during that year's Scottish Parliament election campaign. During the event, one audience member asked:

"When do you plan on recognising non-binary gender identities in law?"

In response, First Minister Nicola Sturgeon said:

"I think we should, and I think we should do it in the next Parliament, and that's one of the specific things I think we should look to take forward in terms of reviewing the gender recognition law. I think it is no longer, in this day and age, appropriate for people not to have their perfectly legitimate identity recognised legally, because from that lack of legal recognition comes many of the other problems that we're talking about; a lack of general recognition in the population, a lack of understanding of the issues and the barriers that people face. I don't believe, and not just in this issue, I don't believe this generally, that change in the law, very often, in and of itself, solves the problem. Often, most problems take much more to solve than simply changing what's on the statute book, but very often, you cannot solve the other problems until you take that step of recognising something very clearly in law. So just as we went into the last Parliament, I think many of us hoping, that there would be Equal Marriage by the end of that Parliament, I hope that this is one of the achievements that the next Parliament, by the time we're sitting here in five years, can boast about as well."^[4]

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

We are very disappointed that the Scottish Government, in reforming the Gender Recognition Act, "does not intend at this stage to provide legal gender recognition to non-binary people". The reasons given for this are:

"The Scottish Government considers that legal recognition of non-binary people would raise a number of issues in relation to areas such as registration, data, rights and responsibilities, changes to legislation, service delivery and costs."

The process to obtain legal gender recognition currently available to trans men and trans women was introduced in the UK as a consequence of a ruling by the European Court of Human Rights. This ruling stated that not being able to have your gender legally recognised is a breach of your Article 8 right to a private life^[5]. In making that decision, part of the court's ruling was:

"The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance... No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to

enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”[6]

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

The Yogyakarta Principles 2006, as referenced by the Scottish Government in their rationale for reforming the GRA in the consultation paper, also assert how crucial a right to gender identity is for all individuals:

“Everyone has *the right to recognition everywhere as a person before the law*...Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.”[7] – Yogyakarta Principles (emphasis added)

Furthermore, the World Professional Association for Transgender Health updated its statement on legal gender recognition in 2017, where it called for numerous best practice approaches to be taken, including recognising non-binary people:

“WPATH recognizes that there is a spectrum of gender identities, and that choices of identity limited to Male or Female may be inadequate to reflect all gender identities. An option of X, NB (non-binary), or Other (as examples) should be available for individuals who so choose.” – World Professional Association for Transgender Health Identity Statement[8]

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

Iceland, Malta, Alberta, British Columbia, Newfoundland and Labrador, Northwest Territories, Nova Scotia (Canada), California, Nevada, New Jersey, New York City, Oregon, and Washington State (USA), Tasmania (Australia) and Uruguay all allow non-binary people to be recognised legally on their birth certificates. The Scottish Government is committed to gender recognition legislation “in line with international best practice”[9]. This now clearly includes legal gender recognition for non-binary people.

The Scottish Government has indicated that it accepts that non-binary people are living in Scotland, and that they may face particular issues and inequalities – this can be seen by the formation of a Scottish Government working group on this topic[10], and the Cabinet Secretary for Social Security and Older People’s statements at various events over 2019 (see for example talking points from her speech at Dundee Pride[11]). The Scottish Government has also indicated it has reached a position where it is firmly behind the rights of trans men and trans women to have their gender identity recognised legally by a self-declaratory system, underpinned by its understanding of human rights principles and international best practice. We feel that in using these principles, it follows that the government

should equally support this right for non-binary people, as all of the human rights arguments apply equally.

When consulting on this topic previously, more than 60% of respondents were in favour of introducing full legal gender recognition for non-binary people. Whilst we warmly welcome the formation of the non-binary working group, and look forward to contributing to the important work that we hope it can achieve, we urge the Scottish Government to rethink this decision, and to amend the bill to provide legal recognition to non-binary people.

Proposals for additional exceptions to Section 22 of the GRA

In the consultation paper, the Scottish Government states that it will consider whether any additional exceptions to Section 22 of the GRA are required. The specific example that the consultation paper gives is:

“One point which might arise when using the general occupational requirements exception is that some people in an organisation (eg people in its HR department) may know about a person’s trans history but those actually taking the decisions on staff deployment (eg line managers) may not. In these circumstances, and when there is a legitimate case to use the general occupational requirements exception, the Scottish Government considers that it would be appropriate for information about a person’s trans history to be shared in a strictly limited, proportionate and legitimate way.”

In the example given by the Scottish Government in their consultation paper, we see no reason why a line manager would need to be informed of a person’s trans history. If there was a job with a genuine occupational requirement (GOR) for the holder ‘not to be a transsexual person’^[12] (this is the language used in Schedule 9, paragraph 1(3)(a) of the Equality Act 2010) HR could simply inform colleagues that the person was not to be deployed in the role they were being considered for. In a situation where there are specific duties within a job role that an employer felt it would not be suitable for a trans employee to undertake, this decision should be made at senior level and with legal advice. As with a job that had a GOR that the holder not be trans, a line manager and colleagues could simply be informed that an employee was excused from specific duties due to occupational health reasons.

There would be no need to inform a colleague that the reason for this was due to the person’s trans history. Just as HR would not disclose other occupational health information that may mean that someone was unable to take up a particular role in an organisation, it would not be proportionate or legitimate for the person’s trans history to be disclosed in this situation.

We think that there are already a significant number of exemptions contained within section 22 of the Gender Recognition Act 2004 and The Gender Recognition (Disclosure of Information) (Scotland) Order 2005. We cannot think of any other exemptions that would reasonably need to be added to the requirement to not disclose protected information that has been obtained in an official capacity.

One of the fundamental principles of the Gender Recognition Act 2004 is to protect trans people’s privacy. The ruling of the European Court of Human Rights which led to the introduction of the 2004 Act was based on the fact that not having access to a birth certificate which reflected your gender was a breach of the European Convention on Human Rights Article 8 right to a private life^[13]. Having your gender legally recognised is primarily about ensuring that your deeply held personal identity is reflected in law, and that you are able to live in accordance with your identity without people having access to information about your gender

history. We think that any additions to section 22 would undermine this foundational principle of creating a legal gender recognition process.

However, we do think that there is widespread misunderstanding of how section 22 operates, and we would support the development of guidance on this, to ensure that it is implemented as intended in the 2004 Act. Two particular areas where this would be of use are around trans people in the courts and data collection. We think that training for the judiciary and greater use of reporting restrictions would ensure that fewer trans people were outed in court proceedings, and this would improve their access to and satisfaction with the criminal justice process. We also know that a number of public bodies don't think that they can collect data about trans people because of section 22, despite the fact that as long as the person isn't identifiable this is clearly permitted. We think that these sorts of issues are around implementation and understanding of this section though, rather than any fault with the legislation itself.

A "person who has an interest"

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

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

(a) the Registrar General for Scotland issued the wrong type of gender recognition certificate under section 8E,

(b) the application for the certificate was fraudulent, or

(c) the person to whom the certificate was issued was incapable of—

(i) understanding the effect of obtaining the certificate, or

(ii) validly making the application for the certificate.

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

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

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

(a) where the question arises in the course of civil proceedings before the court, or

(b) on an application being made to the court by a person who has an interest in the question."

It is not clearly defined in the information provided by the Scottish Government in the consultation paper who a 'person who has an interest' would include in each of these situations.

We agree that it should be possible for the court to revoke a GRC, and that the grounds outlined in section 8S would all be fair and reasonable ones on which to do so. We also agree that there may be limited circumstances in which a court needs to come to a decision about whether overseas legal gender recognition should be recognised in Scotland. However, we would urge the Scottish Government to provide greater clarity about who "a person who has an interest" might be. It is important that new section 8S cannot be used by individuals to make frivolous or vexatious applications to the sheriff to revoke a trans person's GRC. Such a process might be used by an unsupportive family member, or an ex-spouse, to cause greater difficulty and distress for a trans person whom they would prefer had not obtained legal gender recognition. It is important that any process by which an individual could apply to have another person's GRC revoked is

sensible and limited in who would be considered “a person who has an interest in a gender recognition certificate”.

In the draft explanatory notes to new section 8S, the line “This new section enables a person who has a genuine interest (such as the Registrar General) in a GRC to apply to a sheriff to revoke the GRC on various grounds (subsection (1)).” (emphasis added) is included. We would agree that the Registrar General could be considered a suitable “person who has an interest” but still feel that additional clarity is required in this area.

New offences included in the Bill

Section 14 of the draft Bill would insert new section 22A, including:

“A person commits an offence if the person knowingly makes a statutory declaration in accordance with this Act or regulations made under it which is false in a material particular.”

Whilst we agree that knowingly making a false statutory declaration to obtain a GRC should be a criminal offence, we don't think that this new offence is necessary. As the Scottish Government acknowledges in its consultation paper, it is already an offence in Scots law to knowingly make a false statutory declaration. Any false statutory declaration made to apply for a GRC would be covered by this existing offence. The penalties that are proposed for the new offence are identical to those for the existing offence.

Creating a specific offence for making a false declaration in order to obtain a Gender Recognition Certificate, when doing so is already criminal under existing law, is pointless and introduces unnecessary confusion. The Scottish Government acknowledges throughout the consultation document that there is no evidence from any of the jurisdictions around the world that have introduced similar laws, or laws with even lower evidential burden, of non-trans people applying to obtain legal gender recognition for fraudulent purposes.

This new offence is unnecessary, and stigmatises the gender recognition process, and thus trans people, unfairly. Therefore, we think that new section 22A(1) should be removed from the Bill.

We support the additional offence contained in new section 22A(2), around knowingly including false information within an application for a GRC, when converting an interim GRC to a GRC, or when applying for a confirmatory GRC of overseas gender recognition, as there is no existing offence in relation to this. The requirement that applicants for a GRC must be ‘ordinarily resident’ in Scotland New Section 8A(2)(b) in Section 2 of the draft Bill requires that a person be “ordinarily resident” in Scotland if they are not the subject of a birth register entry. Asylum seekers are not considered to be legally resident in Scotland when awaiting a decision on their application for refugee status or for some other form of leave to remain. This is likely to mean that they would not pass the threshold of being considered ‘ordinarily resident’ in Scotland.

Many trans asylum seekers have left a country of origin where they were unable to access any legal gender recognition process^[14] and indeed may have suffered persecution on account of their gender identity. Trans asylum seekers may be housed in asylum support accommodation or detention centres that don't match their gender identity, due to arriving in Scotland with identity documents from their country of origin that reflect their assigned sex at birth^[15]. They may have been unable to change their documents due to a process not existing, or because they would have faced discrimination and harassment for doing so. They

may have status as an asylum seeker for several years in Scotland, while they are awaiting a decision about their right to remain. It is therefore vital that asylum seekers in Scotland are able to access the legal gender recognition process, as this may assist them in being housed correctly and in obtaining documents in Scotland that reflect their identity and not the information on their documents from their country of origin.

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

Of course, it should never be a requirement that a trans asylum seeker has legal gender recognition to be housed in a facility that corresponds with their gender identity. Many trans asylum seekers will arrive without legal gender recognition from their country of origin, and it may take weeks for them to access a legal gender recognition process, during which time they may face discrimination and violence in asylum support accommodation or detention centres[16]. However, the policy on the housing of trans asylum seekers is outside of the scope of this consultation. Despite the fact that we would strongly oppose legal gender recognition being a requirement for trans asylum seekers arriving in Scotland, we think it is important that the Scottish Government considers how the use of a requirement that people be 'ordinarily resident' in Scotland if they do not have a Scottish birth or adoption certificate may exclude certain groups from being able to apply for legal gender recognition.

We would ask the Scottish Government to introduce specific provisions to the Bill to ensure that trans asylum seekers, refugees, and other people awaiting a decision for some form of leave to remain can apply for legal gender recognition. An example of this sort of provision in existing legal gender recognition legislation around the world is in section 8 of the Maltese Gender Identity, Gender Expression and Sex Characteristic Act 2015:

“(8) A person who was granted international protection in terms of the Refugees Act, and in terms of any other subsidiary legislation issued under the Refugees Act, and who wants to change the recorded gender and first name, if the person so wishes to change the first name, shall make a declaration confirmed on oath before the Commissioner for Refugees declaring the person’s self-determined gender and first name. The Commissioner for Refugees shall record such amendment in their asylum application form and protection certificate within fifteen days.”[17]

Although legal gender recognition in Malta is generally only open to citizens, this provision was included to ensure that refugees and asylum seekers could access it as well. We would recommend that the Scottish Government work with organisations who specialise in the law in this area to ensure that similar provisions could be included in the proposed reforms to the GRA.

Lack of requirement for spousal consent

We note that there are no changes proposed to the mechanism for converting interim GRCs to full GRCs. This means that it will continue to be the case that a spouse cannot unreasonably veto a trans person’s application for a gender recognition certificate.

Fees

There is currently a £140 fee to apply for a gender recognition certificate, which we think is prohibitively expensive. The UK Government National LGBT Survey found that 34% of trans respondents who had not yet obtained a GRC had not done so because they felt it was too expensive[18]. Although there is limited research in this area, some evidence suggests that trans people are likely to have lower than average incomes. The National Transgender Discrimination Survey, conducted in the US, found that respondents were four times more likely to have an income below \$10,000 than the general population[19]. There is also some evidence that trans people are less likely to have a job than the general population. The UK Government National LGBT Survey found that only 63% of 16-64 year old trans respondents had been in employment in the previous 12 months, compared to 80% of non-trans LGB respondents, and 75% of the general population[20].

Trans people also often find themselves faced with additional financial burdens as part of transitioning. In particular, scarcity of resourcing for NHS trans specific treatments can mean trans people paying for medical interventions. Long waiting times for first appointments at NHS Gender Identity Clinics, which are around 24 months for every GIC in Scotland, mean that many pay to see a gender specialist privately. Furthermore, the current NHS Gender Reassignment protocol caps the amount of hair removal that will be provided by the NHS for trans women or non-binary people pursuing a feminising transition, and it is often limited to laser hair removal. This means that many people pay either to have additional hair removal sessions, or to access different methods of hair removal, such as electrolysis. Trans people also have to cover up front costs of travel and accommodation for surgery, even if this will be refunded by the NHS.

Furthermore, there can be costs associated with social and legal aspects of transition too. Trans people may have to pay for new clothes once they have come out, to better reflect their gender identity or gender expression. Many trans people buy 'dysphoria aids' to alter the appearance of their bodies, such as chest binders or bra fillers. Trans people may also require the use of large amounts of makeup, either to conceal or create the appearance of facial hair to help them be perceived as their gender identity. Updating other identity documents once you have changed your name and to update the gender marker, such as on a driving licence or passport, creates an additional financial burden. Furthermore, some trans people will need to request new copies of old documents reflecting their new name, such as exam certificates, which organisations may charge a fee for.

The combination of lower average incomes, being less likely to work, and having specific and particular financial burdens as a community can make the current fee prohibitively expensive for trans people. We think it should be free to apply for a GRC, to ensure that there is fair and equal access for everyone. Legal recognition of your gender identity is a human right. We do not think that anyone should incur a fee for accessing their human rights.

[1] See the Services, public functions and associations Statutory Code of Practice guidance on trans people and single-sex services, pages 197–199:

https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf

[2] European Court of Human Rights “Case of Christine Goodwin v. United Kingdom” accessed at [http://hudoc.echr.coe.int/eng#{"fulltext":\["CASE OF](http://hudoc.echr.coe.int/eng#{)

CHRISTINE GOODWIN v. THE UNITED

KINGDOM""], "documentcollectionid2":["GRANDCHAMBER", "CHAMBER"], "itemid":["001-60596"]}

- [3] <https://www.legislation.gov.uk/ukdsi/2011/9780111510810>
- [4] LGBTI Hustings: <https://www.youtube.com/watch?v=FFykwvKg1lo>
- [5] European Court of Human Rights “Case of Christine Goodwin v. United Kingdom” accessed at [http://hudoc.echr.coe.int/eng#{"fulltext":\["CASE OF CHRISTINE GOODWIN v. THE UNITED KINGDOM"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-60596"\]}](http://hudoc.echr.coe.int/eng#{)
- [6] European Court of Human Rights “Case of Christine Goodwin v. United Kingdom” accessed at [http://hudoc.echr.coe.int/eng#{"fulltext":\["CASE OF CHRISTINE GOODWIN v. THE UNITED KINGDOM"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-60596"\]}](http://hudoc.echr.coe.int/eng#{)
- [7] The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity
- [8] <http://www.wpath.org/>
- [9] Fairer Scotland Action Plan: <http://www.gov.scot/Publications/2016/10/9964/7>
- [10] <https://news.gov.scot/speeches-and-briefings/statement-on-gender-recognition>
- [11] <https://www.gov.scot/publications/foi-19-02300/>
- [12] <http://www.legislation.gov.uk/ukpga/2010/15/schedule/9/part/1>
- [13] European Court of Human Rights “Case of Christine Goodwin v. United Kingdom” accessed at [http://hudoc.echr.coe.int/eng#{"fulltext":\["CASE OF CHRISTINE GOODWIN v. THE UNITED KINGDOM"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-60596"\]}](http://hudoc.echr.coe.int/eng#{)
- [14] TGEU “Legal Recognition Toolkit” <https://tgeu.org/wp-content/uploads/2017/02/Toolkit16LR.pdf>
- [15] UKLGIG and Stonewall “No Safe Refuge” https://uklgig.org.uk/wp-content/uploads/2017/03/no_safe_refuge.pdf
- [16] UKLGIG and Stonewall “No Safe Refuge” https://uklgig.org.uk/wp-content/uploads/2017/03/no_safe_refuge.pdf
- [17] https://tgeu.org/wp-content/uploads/2015/04/Malta_GIGESC_trans_law_2015.pdf
- [18] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf
- [19] https://transequality.org/sites/default/files/docs/resources/NTDS_Exec_Summary.pdf
- [20] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf

5 Do you have any comments on the draft Impact Assessments?

Yes

If yes, please outline these comments.:

Child Rights and Wellbeing Impact Assessment

We think that the evidence included in the CRWIA to support why the Scottish Government has proposed to lower the age at which a person can apply for legal gender recognition to 16 is robust and helpful.

However, we think that it is unclear from the information included in the impact assessment why the decision has been taken to not extend legal gender

recognition to those under 16. The framework in which a CRWIA is undertaken is one that looks at the rights of all those under 18 as a whole. Included in the Scottish Government's draft assessment is consideration of all of the relevant articles of the UNCRC that may be engaged by lowering the age at which trans young people can apply for a GRC. As we mentioned in our response to question 3, these rights based arguments apply equally to under 16s. This is why we think it is important to ensure there is also a mechanism through which under 16s can obtain legal gender recognition.

Data Protection Impact Assessment

In the DPIA, the Scottish Government states that by removing the evidence requirements of the existing process, the new system of obtaining a GRC will not collect "special category data" about applicants.

We are uncertain whether the fact that a person is trans, or indeed that they have made an application for a GRC, may itself be considered "special category data", and would suggest that this be reviewed when the full DPIA is published.

Equality Impact Assessment

Sex

We welcome that the Scottish Government has found in both the EQIA, and in Chapter 5 of its consultation paper, that the draft Bill will have no negative impact on the rights of women.

Equality Act 2010 and trans people's rights to use single-sex services

The Equality Act 2010 exceptions allows single-sex and separate-sex service providers, and people who provide services differently to people of different sexes, to treat people with the protected characteristic of gender reassignment less favourably if it is a 'proportionate means of achieving a legitimate aim'. The protected characteristic of gender reassignment is defined as:

"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."^[1]

People with the protected characteristic of gender reassignment would clearly include all trans people with a gender recognition certificate, as they will have 'undergone a process...for the purpose of reassigning the person's sex by changing...other attributes of sex.' It would also include many trans people without GRCs. Those people who would be eligible to apply for a GRC under an improved process of self-declaration, but who are not currently eligible, would all be people who already have the protected characteristic of gender reassignment. This is because the statutory declaration would require you to say you are living in your gender, so those people who would be eligible would also be those who had "undergone a process...". There is no distinction made within gender reassignment equality legislation about people with the protected characteristic of gender reassignment who have obtained legal gender recognition, and people with the protected characteristic of gender reassignment who have not.

The EHRC Statutory Code of Practice outlines how single-sex and separate-sex service providers, and people who provide services differently to people of different sexes, should understand and implement the exceptions relating to people with the protected characteristic of gender reassignment^[2]. These clearly outline that the expectation is that trans people should be able to access single-sex services that align with their self-identified sex (emphasis added):

“If a service provider provides single- or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people *according to the gender role in which they present*. However, the Act does permit the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate aim.” [3] (p. 197 paragraph 13.57)

It then goes on to describe how a service should come to a decision about whether it is appropriate to use the gender reassignment exemption (emphasis added):

“As stated at the beginning of this chapter, *any exception to the prohibition of discrimination must be applied as restrictively as possible and the denial of a service to a transsexual person should only occur in exceptional circumstances.* A service provider can have a policy on provision of the service to transsexual users but should apply this policy on a *case-by-case basis* in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances. Service providers will need to balance the need of the transsexual person for the service and the detriment to them if they are denied access, against the needs of other service users and any detriment that may affect them if the transsexual person has access to the service. To do this will often require discussion with service users (maintaining confidentiality for the transsexual service user). *Care should be taken in each case to avoid a decision based on ignorance or prejudice. Also, the provider will need to show that a less discriminatory way to achieve the objective was not available.*”[4] (p. 198 paragraph 13.60)

Throughout both the Equality Act 2010 and the Statutory Code of Practice, no reference is made to whether or not a person is a GRC holder with regards to who the exceptions apply to and how decisions on implementing them should be taken. Because the protected characteristic of ‘gender reassignment’ in the Equality Act is defined quite broadly, it would include all trans people who are GRC holders, and many trans people without GRCs. It is therefore our understanding that this means the highly restricted ability to exclude trans people from single-sex services that align with their identities applies to GRC holders. We cannot see why changing the process by which you are able to obtain a gender recognition certificate would impact on the operation of the gender reassignment exceptions in relation to single and separate-sex services. The people who would be able to apply for a GRC under an improved process, who are currently unable to have legal recognition of their gender, would already be considered to have the protected characteristic of gender reassignment.

Given that both the protected characteristic covers a larger group of trans people than just GRC holders, and that references to whether or not a person holds a GRC are not made at any point in the legislation or the statutory code of practice, it is unclear that the Gender Recognition Act interacts in any way with how the gender reassignment exceptions can be applied to people with the protected characteristic of gender reassignment in single-sex services.

We feel that concerns about this have largely come from a misunderstanding about the rights trans people already have to access single-sex services that align with their self-identified sex. This misunderstanding and misinformation has often been communicated in large mainstream news sources, only increasing the

confusion around the topic. The nature of this misinformation has mostly converged around two misunderstandings.

Firstly, much recent news coverage has falsely depicted the reforms as potentially leading to an increase in trans people's rights to access single-sex spaces that in fact describes the current status quo. As is clear from the Statutory Code of Practice above, the expectation is that trans people should be treated by single-sex services as the gender they are living in unless there are 'exceptional circumstances' which mean the exceptions can be used to treat them differently. Reporting that indicates that trans people may be able to use facilities such as changing rooms and toilets as a result of upcoming legislative reform seems unaware that this is currently standard practice across the UK, at least since the passing of the Equality Act in 2010. The reason that this has largely gone unnoticed by the general public is because trans people are a very small percentage of the population, who want to use single-sex services for the same reasons as everyone else; because they are the best suited to meet their needs. That the vast majority of the general public is totally unaware that trans people have been sharing single-sex spaces with them for the last ten years or more demonstrates that trans people being entitled to access those spaces does not pose problems. Even with an improved process for obtaining legal gender recognition, we would still expect the number of people applying for a GRC to remain low. Even though visibility and awareness of trans people and issues has increased, we remain a tiny proportion of the population – with estimates placing the percentage of people who are trans at around 0.6%^[5]. Of course, not every trans person would apply for legal gender recognition even under a new process. The UK Government will have figures on the number of people who have applied to update the gender on their passports and driving licences, and there is no reason to suppose that a fairer legal gender recognition process based on self-determination would be used by any more people than this.

Secondly, much of the misinformation has been down to a fundamental lack of knowledge about what the Gender Recognition Act is and what it does. Trans people's ability to access single-sex services, and be treated appropriately by those services, is laid out in the Equality Act 2010, not the Gender Recognition Act 2004. The combination of lack of knowledge of the current situation, and misunderstanding about the scope of the law that reforms are proposed to, has led to a situation where trans people's rights to use single-sex spaces has been under attack, with some suggesting solutions that would be a demonstrable regression of trans people's current rights.

Access to women-only spaces

Many services in Scotland already operate on a self-declaratory system for deciding who to include in their service provision^[6]. In particular, large organisations in the gender based violence/women's sector have been including trans women in women-only services for many years, including those trans women who may still be labelled as male on their birth certificates. This is because the sector has long recognised that only trans people themselves are experts on their own identities, and that it would be unfair to require people to have obtained legal gender recognition given the difficult and onerous nature of the current process. In Scotland, no women's service requires seeing a service user's birth certificate in order to grant her access to a service. People are already able to update the gender on their driving licences and change their names by self-declaration – and we have never heard of any man doing either of these things in an attempt to

access a women's service, in over ten years of working closely with many gender-based violence services in Scotland. The proposed changes will have no impact on who is able to use women's services in Scotland. Instead, it will simply ensure that trans people are recognised legally as who they are without having to submit intrusive medical reports, a psychiatric diagnosis, and two years' worth of evidence that they have been living in accordance with their gender identity. This is exactly the approach to inclusion that the women's sector, along with many others, are already taking in Scotland.

Violence Against Women services, such as Rape Crisis Scotland and Scottish Women's Aid, have existing robust risk-management and safeguarding policies in place to ensure that, before any potential service user is accepted, their needs and risk factors are individually assessed. This results in various potential service users being refused inclusion in group work and/or shared refuge accommodation, due to risk factors such as antisocial behaviour, convictions for violent or sexual offences, or drug addiction. This individualised service provision decision-making can be safely carried out regardless of whether or not the person is trans. Possession of a gender recognition certificate does not circumvent in any way these existing risk management procedures.

Existing practice in the Scottish Prison Service is that trans people are allowed to self-declare their gender identity, but all placement issues are subject to a robust risk-assessment process. This process takes into account the prisoner's offence and behavioural history, and ultimately placement decisions are based on the best interest of safety for both the trans prisoner and the people with whom they will be housed. Provision exists for a legal female (whether trans or not) to be kept within the male estate if necessary to manage the specific risks relating to that individual. Because of these provisions, it will continue to be the case that obtaining a GRC will not give any person in custody an absolute right to be held in the estate that corresponds with their legal sex.

Similarly, people are able to use public toilet facilities without having to produce a birth certificate. There is no law that dictates who uses which bathroom in the UK – it is simply custom. Furthermore, it is already established in case law that trans people have the right to access the bathroom facilities that correspond with their gender identity[7]. We share people's concerns that safety and privacy are upheld in public toilet facilities, and our research shows that trans people often avoid using public toilets, out of fear that they will face discrimination or harassment when doing so[8].

Adopting a self-declaratory system for legal gender recognition will have no impact on privacy and safety in public toilet facilities; it will not change who has access to single-sex public toilet facilities. Any criminal behaviour will continue to be prosecutable, as now, regardless of the gender of the perpetrator.

Gender reassignment

We note that the EQIA states that the proposals will advance equality of opportunity for people with the protected characteristic of gender reassignment through 'introducing a revised system for obtaining legal gender recognition...to obtain legal rights without having to go through an overly intrusive system established by the current GRA'.

Whilst we agree that the proposals would certainly do this for trans men and trans women aged over 16, it would not do so for non-binary people, or for trans people under the age of 16 – many of whom are likely to also have the protected characteristic of gender reassignment. In line with our response to question 3,

and the section on non-binary people at question 4, we would like to see all people with the protected characteristic of gender reassignment positively impacted by this bill, by extending legal gender recognition to non-binary people and under 16s.

Race

In line with our comments regarding the requirement to be 'ordinarily resident' in Scotland in order to apply for legal gender recognition, we think that some asylum seekers, refugees, and those awaiting a decision on some other form of leave to remain, may not be included in the proposed bill.

Age

In line with our response to question 3, and our comments on the CRWIA, we think that trans children and young people under 16 should also be able to obtain legal gender recognition, with parental consent. The current proposals would fail to have a positive impact on trans children and young people under 16.

We do think that the proposals will have a positive impact for some older trans people. Some older trans people may have transitioned before the Gender Recognition Act 2004 was passed, and therefore not kept records of their medical treatment as they were unaware that this would be necessary. They may also have been treated by doctors who have now retired or died. This would mean that they are unable to provide a psychiatric diagnosis of gender dysphoria to the Gender Recognition Panel from their approved gender specialists list, without having to join lengthy GIC waiting lists. This would further overload a system that is under-resourced unnecessarily. The proposed reforms would help older trans people in this situation.

[1] <http://www.legislation.gov.uk/ukpga/2010/15/section/7>

[2] https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf

[3] Ibid.

[4] Ibid.

[5] <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>

[6] To see a list of women's/gender based violence organisations that support reform of the Gender Recognition Act, go to:

<http://equalrecognition.scot/supporters/>

[7] <http://www.lawcentres.org.uk/policy/news/news/kirklees-law-centre-wins-landmark-transgender-discrimination-case>

[8] 54% of people said they avoided public toilet facilities due to fear of being harassed, being outed or being read as trans Trans Mental Health Study (2012)

McNeil, J., Bailey, L., Ellis, S., Morton, J. and Regan, M.