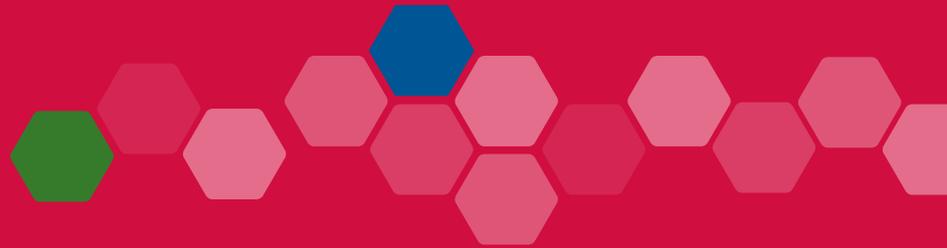




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Gender Recognition Reform (Scotland) Bill: Analysis of responses to the public consultation exercise

September 2021



EQUALITY AND WELFARE



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Executive Summary

Introduction

This summary presents the key findings from the analysis of responses to the Scottish Government's consultation on the draft Gender Recognition Reform (Scotland) Bill (the draft Bill). The draft Bill would amend the Gender Recognition Act 2004 (the 2004 Act) to introduce a new system for obtaining legal gender recognition in Scotland.

The draft Bill would introduce a number of changes. The consultation specifically sought views on two of these – the requirement for applicants to live in their acquired gender for 3 months prior to submitting an application, and for a 3-month reflection period after application before legal gender recognition is granted. Respondents were also asked whether the age at which an application for legal gender recognition can be made should be reduced from 18 to 16 and were invited to comment on draft impact assessments presented with the draft Bill.

The consultation was launched on 17 December 2019 and closed on 17 March 2020. The consultation paper is available at <https://consult.gov.scot/family-law/gender-recognition-reform-scotland-bill/>.

Profile of respondents

In total 17,058 responses were available for analysis. Most responses (16,843 of those available for analysis) were submitted by individual members of the public, with the remaining 215 submitted by organisations.

Those resident in Scotland accounted for 55% of respondents, with 32% resident in the rest of the UK and the remaining 14% resident in the rest of the world.

Overall perspectives

Most respondents to the consultation tended to take one of two overall positions on the proposals. These two groups are described as being either broadly in support of, or broadly opposed to, a statutory declaration-based system. This reflects the nature of the proposals as they are referred to within the draft Bill, although respondents generally referred to their support for, or opposition to, self-declaration or self-identification.

An analysis of comments made suggests that a small majority of organisations broadly supported changing to a statutory declaration-based system. Around 4 in 10 organisations did not support changing to a statutory declaration-based system and around 1 in 10 either did not take a view or their view was not clear.

Those broadly in support of a statutory declaration-based system

These respondents tended to see the case for change as being clear and pressing, with the current system in desperate need of reform. They often thought the draft Bill offers some improvement relative to the current approach, primarily because of the change to statutory declaration and, more generally, because it would make

acquiring a Gender Recognition Certificate (GRC) simpler. However, they generally disagreed with central elements of the proposals, including that there should be a requirement to live in the acquired gender or that there should be a reflection period. These respondents tended to agree with reducing the age at which a person can apply for legal gender recognition to 16.

This was the perspective of many individual respondents and all, or the considerable majority of Children and Young People's Groups, Lesbian, Gay, Bisexual and Transgender (LGBT) and Trans Groups, Union or Political Parties, Local Authorities, Health and Social Care Partnerships (H&SCPs) or NHS respondents and Third Sector Support Organisations.

Those broadly opposed to a statutory declaration-based system

These respondents generally thought a convincing case for change has not been made, and that the current system is broadly fit for purpose. This was often connected to a view that the draft Bill should simply be scrapped and to specific concerns about the removal of the need for a medical diagnosis of gender dysphoria before receiving a GRC. These respondents were often very concerned about the potential impact of the proposed changes on society in general, but on the safety and wellbeing of women and girls in particular. They generally disagreed with reducing the age at which a person can apply for legal gender recognition to 16.

This was the perspective of many individual respondents and the considerable majority of the Women's Groups and Religious or Belief Bodies that responded.

Overarching themes

Overarching themes raised in comments across all questions included views on the tone of the debate, the case for change and the potential impact of the changes proposed.

An area of shared concern was around the **nature and tone of the debate** and dialogue associated with trans issues more widely and the proposals in particular. There was a consensus that the debate has become highly polarised and, from some respondents' perspective, was seen as toxic and underpinned by a culture, and in particular a social media culture, in which people are being bullied and harassed by those taking a different view.

It was also suggested both that the Scottish Government has not listened to the concerns and needs of the trans community, and that the Scottish Government listens primarily to the trans community while failing to engage with those who have concerns about the impact of the proposed changes on women and girls or based on their beliefs.

Those who saw a clear and pressing **case for change** often considered that the current approach is outmoded and discriminatory. Both through their own stories and more generally, respondents spoke of the detrimental impact the current approach is having on trans peoples' health, wellbeing and life chances. Some of

these respondents cited both international law and best practice in other countries in support of their case for change.

Other respondents took a very different view, namely that the Scottish Government has not provided sufficiently robust evidence to support its case for change and that the 2004 Act does not require amendment. It was frequently argued that the existing system provides important safeguarding measures, is compliant with both international law and human rights obligations, and meets European law. Far from being a minor change, the proposed reforms were seen as a fundamental change to encompass a larger and more diverse group of people than those originally envisaged by the 2004 Act.

A serious concern expressed by many respondents broadly opposed to a statutory declaration-based system was the **likely impact on women and girls**. It was often argued that the consultation paper fails to explain how abuses of a statutory declaration-based system will be prevented. There were particular concerns that the removal of the requirement for a diagnosis of gender dysphoria will make the system open to abuse, allowing predatory men to access women's safe spaces.¹ It was also argued that women's sex-based rights will be compromised, with potential effects on women's sport, medical services, rights to equal pay and women only shortlists.

However, many of those broadly supporting a statutory declaration-based system rejected the idea that the move would be harmful to women, with some of those making this point noting that they were women and feminists.

Procedure before application for legal gender recognition

Q1: 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?

Respondents often raised questions as to what is meant by 'gender', by 'acquired gender' and, in particular, to 'living in an acquired gender'. Both those broadly in support of and those broadly opposed to a statutory declaration-based system raised these issues.

It was seen as implying a common and clear understanding of what it means to be a man or a woman, including that living as a man or women comes with an agreed and commonly understood set of lifestyle choices and behaviours. This was seen as an outmoded outlook which re-enforces the unhelpful and harmful gender stereotypes which many people now reject.

Those broadly in support of a statutory declaration-based system

Those who made general statements in support of the draft Bill often referred to the importance of creating a simple, straightforward system which treats people with

¹ Although respondents tended to refer to safe spaces, the Equality Act 2010 refers to separate services: see [Equality Act 2010 - Explanatory Notes](#).

dignity and respect. The shortening of the current 2-year timescale for receiving a GRC was often described as representing a significant improvement, although many thought the proposals could and should go further.

There was a concern that the description of a gender as being 'acquired' is in itself both wrong and offensive as it implies a degree of choice or preference that is simply not the case. Respondents also thought it was not clear whether this stipulation requires the applicant to make any change at all to their outward appearance or lifestyle and whether people would effectively be expected to perform a role in public, based on how they dressed or acted; this was seen as a demeaning and potentially very harmful imposition. It was also suggested that many trans people may not be able to live in their acquired gender because of fear of discrimination or concern for their safety.

There was also a concern about how applicants might be required to evidence having lived in their acquired gender for 3 months, with the equivalent evidence-related requirements in place for other key documents like passports, medical records or work or education-related paperwork noted. Central to these concerns was that evidence can be subjective and dependent on an individual having access to the resources necessary to gather such evidence.

Those broadly in support of a statutory declaration-based system generally thought that no period of living in an acquired gender should be required. Reasons given included that there is simply no evidence to suggest that any time period is necessary or brings any value. For many of these respondents, the 3-month period effectively equated to nothing more than an unreasonable, arbitrary and potentially damaging waiting period.

Those broadly opposed to a statutory declaration-based system

Those broadly opposed to a statutory declaration-based system objected to the proposals because they saw the proposed system as being one of self-declaration, or at least as a clear move towards a self-declaration-based approach. The concerns of many of those objecting to a self-declaration system were linked very strongly to the safety of women and girls and in particular to safe spaces.

They often argued that without a requirement for a diagnosis of gender dysphoria the process would be open to abuse from predatory men, risk leaving those transitioning without proper medical support and increase the chance that other conditions may go undiagnosed and unexplored. There were fears that, without a diagnosis of gender dysphoria, potentially vulnerable adults and adolescents may commit to a process that they will later come to regret.

While for some of those broadly supporting a statutory declaration-based system the concern was that people would be required to evidence that they had lived in their acquired gender, for those broadly opposed to a statutory declaration-based system the concern was that they would not. They tended to focus on two issues – how someone can demonstrate that they have done something that is not clearly defined in the draft Bill and, in the absence of such evidence, how the system can be policed.

These respondents also tended to think that a period of 3 months living in the acquired gender is too short a time, often much too short a time, in which to make such a life-altering decision. Respondents often queried why this should appear to be so rushed. Serious concerns were also raised with respect to the combination of reducing the time to 3 months and lowering the age limit from 18 to 16.

Respondents who argued 3 months living in the acquired gender to be too short sometimes proposed a specific alternative – most frequently that the existing 2-year period should be retained.

Procedure after application for legal gender recognition

Q2: 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?

Those broadly in support of a statutory declaration-based system

Those who did not agree with an applicant for a GRC being required to live in their acquired gender for a prescribed period, generally also did not agree with the proposal that there should be a period of reflection for at least 3 months before obtaining a GRC. Fundamental to this was the view that many trans people will have been aware of their gender, and ‘reflecting’ on their situation, for all of their lives; contrary to the implication of having a period of reflection, they have not made an ill-considered decision or come to a quick decision.

The other key reasons given for objecting to the reflection period included that there is no equivalent period in place for changing other forms of identity documentation and that it would be unnecessarily complicated and bureaucratic for no good reason or benefit. The need for a statutory declaration in front of a Notary Public was considered a sufficient requirement to underline the gravity of the decision.

As with living in an acquired gender, there were queries as to what is meant by a period of reflection, along with fundamental concerns that, as with other additional verification approaches, it implies that trans people cannot be trusted to make their own informed decisions.

Those broadly opposed to a statutory declaration-based system

Those broadly opposed to a statutory declaration-based system sometimes suggested that the inclusion of a period of reflection is a tacit acknowledgement that some people will change their minds. This was often connected to a view that the reflection period should be longer than the 3 months proposed, or that it would be unnecessary if applicants were required to spend a longer period living in their acquired gender.

There was a concern that it is not only unclear what is meant or intended by a period of reflection but also, and very much in line with comments about living in the acquired gender, that it is not clear how someone would be able to prove they had reflected.

Many argued that the 3-month period proposed is too short, sometimes much too short. They often pointed to the magnitude of a legal gender change, particularly for young people.

Reducing the minimum age for obtaining legal gender recognition to age 16

Q3: Should the minimum age at which a person can apply for legal gender recognition be reduced from 18 to 16?

A majority of respondents who answered the question – 56% – thought that the age at which a person can apply for legal gender recognition should be reduced from 18 to 16, while 42% thought it should not, and 2% did not know. Those respondents who identified themselves as resident in Scotland were evenly divided, with 49% agreeing that the age should be reduced to 16, 49% disagreeing and 3% saying they did not know.

Age should be reduced to 16

Respondents who thought the minimum age should be reduced to 16 argued that a young person in Scotland is legally an adult at 16, and that the proposed change would bring gender recognition into line with many other rights that can be exercised at 16. The United Nations Convention on the Rights of the Child (UNCRC), the European Convention on Human Rights (ECHR) and the Yogyakarta Principles were all cited by respondents as being in keeping with extending the rights of young trans people.

It was also argued that many 16-year-olds are mature, capable and responsible enough to make a decision on their legal gender identity and will have spent a long time reaching this decision.

Potential positive impacts on mental health were often raised and it was predicted that legal gender recognition at 16 could help to alleviate dysphoria and distress, improve wellbeing and quality of life, and reduce depression and suicide rates. Conversely, making young people wait longer to have their gender recognised was suggested to be cruel or unnecessary, and likely to have corresponding negative impacts on mental health.

Respondents noted that at 16 or 17 many young people are becoming independent, moving away from home, beginning full time work, or starting a university or college course. The benefits of being able to obtain legal gender recognition and amend their birth certificate before these life changes were highlighted.

Respondents noted that legal gender recognition is about documentation and were of the view that it will not impact other aspects of the transition process such as social presentation, accessing gender clinics or the waiting period for any medical treatment.

While welcoming the proposal to reduce the minimum age for legal gender recognition to 16, some respondents encouraged the Scottish Government to go further and make provision for children under 16. It was suggested that as children over 12 are deemed to have legal capacity to make decisions in certain circumstances, this principle could apply to gender recognition.

Age should not be reduced to 16

In their further comments, a large majority of those who disagreed at Question 3 made it clear that they did not think that the age should be reduced at all. Some respondents simply stated a view that a 16-year-old is still a child, while others cited the UNCRC as defining children as those under 18 years of age. Respondents frequently argued that 16 is simply too young to legally change gender, citing a lack of emotional maturity or life experience to make such an important, apparently irreversible decision.

It was argued that other rights that can be exercised at 16 (as listed in the consultation paper) are reversible in a way that legal gender recognition does not appear to be. Activities that the state has decided are *not* appropriate for those under 18 were also referenced, including getting a tattoo and buying alcohol or tobacco, and it was seen as inconsistent that 16- and 17-year-olds should be barred from these activities on safeguarding grounds while permitted to change their legal gender.

A Scottish Sentencing Council proposal that sentencing young people should take account of evidence that the brain does not mature fully until at least 25 was referenced by many respondents who argued that, in the light of this, it would be inconsistent for the Scottish Government to reduce the age at which legal gender recognition can be obtained from 18 to 16.

The many pressures on young people were referenced – for example with respect to schoolwork and exams – and it was suggested it would be wrong to introduce the possibility of legal gender change at such an important time. Respondents also noted that the teenage years can be difficult and confusing for many, and that hormonal and physical changes during puberty can lead some to feel uncomfortable with their bodies.

Although the consultation relates only to the process for legal gender recognition, many respondents argued that young people can be set on a medicalised pathway leading from puberty-blocking drugs to surgery and that, once started, this course of events may be difficult to stop or reverse. Removing the requirement for a diagnosis of gender dysphoria was often seen as leaving young people without the appropriate professional support to make a life-changing decision.

There were calls for the Scottish Government to listen to the testimonies of people who have de-transitioned before making it quicker and easier to change gender. It was argued that, collectively, the proposed changes are likely to lead to an increase in the number of young people who regret their transition.

Other Issues

Q4: Do you have any other comments on the provisions of the draft Bill?

Given this question's focus on other provisions of the draft Bill, the issues covered were most likely to have been raised by respondents who were broadly in support of a statutory declaration-based system. These respondents were more likely to comment on the detail of how any new system should work than those who opposed the changes.

Non-binary and other gender identities: A key theme of many of the comments at Question 4 was that the provisions should be extended to non-binary people. This was frequently connected to a view that the reforms cannot be considered a success, inclusive of the whole trans community or a victory for equality, unless they cover non-binary people. There were also calls for the draft Bill to be inclusive of people who are gender fluid, genderqueer, agender or with other gender identities.

Ordinarily resident in Scotland: The draft Bill sets out that in order to apply for a GRC, applicants must either (a) have been born or adopted in Scotland or (b) be ordinarily resident in Scotland. In addition to queries as to what is meant by ordinarily resident in Scotland, there was a concern that asylum seekers and refugees might not be able to apply for a GRC.

Protected information and privacy: Those who commented on this issue generally disagreed with there being an option for additional exceptions relating to when information can be disclosed. Upholding trans peoples' privacy was described as a key principle of a legal recognition process, with additional exceptions seen as having the potential to undermine this.

Spousal veto and interim GRCs: While some expressed support for there being no final requirement for spousal consent, others felt that the proposed arrangements regarding interim GRCs would leave a version of spousal veto in place and that this is unacceptable. A very different concern was that a spouse would no longer be able to prevent their trans spouse from having their new gender recognised and could find themselves, for example, trapped against their will in a same-sex marriage when they themselves are heterosexual.

Offence of making false declaration or application: The draft Bill would make it a criminal offence to make a false statutory declaration in relation to gender recognition and to make a false application for gender recognition. Those commenting on this aspect of the proposals included those who supported a move to a statutory declaration-based system and those who did not.

Those who supported a move to a statutory declaration-based system noted that it is already a criminal offence to knowingly make a false statutory declaration and there was an associated query as to why any further or specific provision would be required. Both those who supported a move to a statutory declaration-based system and those who did not queried whether the provision would effectively

criminalise a person who has been granted a GRC but who subsequently wishes to reverse their gender recognition.

Application fee: It was reported that the current £140 fee is significantly higher than for other comparable applications, such as when registering a birth, and some spoke of the challenges they themselves had experienced in raising the required fee. The consultation paper's reference to there being a consultation on the level of any fee should the draft Bill be enacted was welcomed, as was the intimation that any fee would be likely to be considerably lower than £140.

Impact Assessments

Q5: Do you have any other comments on the provisions of the draft Impact Assessments?

The comments of those who broadly supported a statutory declaration-based system tended to be brief in relation to the draft impact assessments, often simply expressing the view that allowing trans people to obtain a GRC more easily would not affect any other person or groups of people.

However, many of those who broadly opposed to a statutory declaration-based system argued that the impact assessments are not thorough, comprehensive or evidence-based and that they are inadequate and not fit-for-purpose. Specific concerns included that the Scottish Government has failed to consider certain relevant evidence and that some of the research that *is* cited may not be relevant. The majority of comments at Question 4 were about the Equality Impact Assessment (EQIA) and the Child Rights and Wellbeing Impact Assessment (CRWIA).

EQIA

Those broadly supporting a statutory declaration-based system sometimes suggested that the EQIA is good, comprehensive and correctly identifies that the proposals will not have a detrimental impact on anyone's rights. With respect to **sex**, many respondents expressly stated that they did not believe the proposed changes would have a negative impact on women and girls.

However, those broadly opposed to a statutory declaration-based system often thought that the draft EQIA fails to produce any evidence to support the Scottish Government's conclusion that the proposed changes will not negatively impact women. The Government's view that there is a lack of evidence that including trans women in women-only services and spaces has negative impacts was also challenged, including with respect to the prison system. Additional concerns were raised with respect to operation of the single sex exemptions available under paragraph 28 of schedule 3 of the Equality Act 2010, including a risk that some women may self-exclude from women-only spaces and services.

Some of the comments relating to the protected characteristic of **age** focused on older people and included welcoming the EQIA's conclusion that the proposals will advance equality of opportunity for older people, in particular those who have been

living in their acquired gender for a longer period and may not have access to the evidence required to apply to the Gender Recognition Panel.

Other respondents suggested that, with respect to young people, the EQIA fails to consider the increase in the number of girls identifying as trans, why high numbers of autistic girls are identifying as trans, or the relationship between age and detransition² rates and why there is no information or research on this issue.

A number of comments on **disability** focused on mental health and included support for the draft EQIA's recognition that having legal gender recognition and consistent documentation could have a positive impact on a trans person's mental health. However, it was also noted that there are limited studies on mental health after transition.

Comments in relation to **gender reassignment** tended to focus on the coverage of regret and/or detransition. Those broadly supporting a statutory declaration-based system sometimes questioned the relevance of the evidence cited as to the level of regret associated with transitioning, particularly the evidence on regrets associated with medical interventions. However, those broadly opposed to a statutory declaration-based system were concerned either about a lack of evidence relating to detransition or that the evidence which is available has not been fully considered when developing the proposals.

It was argued that the EQIA should include a more explicit statement in relation to protection of **religion or belief** in respect of (for example) the freedom of conscience of healthcare workers and the freedom of parents and of schools to teach in accordance with their religious and ethical views. This was sometimes connected with a perception that some protected characteristics are seen as more important than others, and that the views of many people of faith, and of faith groups, have been side-lined.

CRWIA

Many of the comments relating specifically to the CRWIA covered similar themes to those raised in relation to the EQIA or returned to issues discussed in relation to whether the minimum age for legal gender recognition should be reduced to 16.

Those who broadly supported a statutory declaration-based system often thought that the evidence presented is robust and helpful and that the proposal to extend legal gender recognition to 16- and 17-year-olds can be seen as a reasoned response to the available evidence. It was also suggested that this evidence would equally well apply to extending the provision to those under 16.

² The Cambridge English Dictionary defines detransitioning as being 'the process of stopping changes, which may be social, legal, or medical, that lead to someone living as a person of a different gender to the one they were said to have at birth.'

Respondents who were broadly opposed to a statutory declaration-based system often argued that the CRWIA does not consider the impact of the proposals on children other than those seeking to change their gender legally. It was suggested that a study of the impact on all other children is required. There were also concerns that the CRWIA downplays parental rights.

1. Introduction

Background

- 1.1 This report presents analysis of responses to the Scottish Government's consultation on the draft Gender Recognition Reform (Scotland) Bill (the draft Bill) which would amend the Gender Recognition Act 2004 (the 2004 Act) to introduce a new system for obtaining legal gender recognition in Scotland. This current consultation follows on from the 2017-18 consultation on the principles of reforming the 2004 Act.³
- 1.2 The proposals set out in the draft Bill are:
- The removal of current medical requirements when applicants are seeking legal gender recognition;
 - The removal of the need to apply to the Gender Recognition Panel (GRP). Instead, applicants would apply to the Registrar General for Scotland who already has a number of existing functions under the 2004 Act;
 - Applicants must either (a) have been born or adopted in Scotland or (b) be ordinarily resident in Scotland;
 - Applicants must have lived in their acquired gender for a minimum of 3 months (rather than the current minimum of 2 years) before submitting an application for gender recognition;
 - After an application has been accepted by the Registrar General, the applicant would have to confirm after a reflection period of 3 months that they wish to proceed;
 - Applicants would have to confirm that they intend to live permanently in their acquired gender;
 - Applicants would still be required to submit statutory declarations, made in front of a notary public or a justice of the peace; and
 - It would be a criminal offence to make a false statutory declaration in relation to gender recognition and to make a false application for gender recognition.
- 1.3 The consultation specifically sought views on two of these matters – the requirement for applicants to live in their acquired gender for 3 months prior to submitting an application, and for a 3-month reflection period after application before legal gender recognition is granted. Respondents were also asked whether the age at which an application for legal gender

³ The analysis of responses to the 2017-2018 consultation on the Review of the Gender Recognition Act 2004 can be found on the Scottish Government's website at: <https://www.gov.scot/publications/review-gender-recognition-act-2004-analysis-responses-public-consultation-exercise-report/>

recognition can be made should be reduced from 18 to 16 and were invited to comment on draft impact assessments presented with the draft Bill.

- 1.4 The consultation was launched on 17 December 2019 and closed on 17 March 2020. The consultation paper is available at <https://consult.gov.scot/family-law/gender-recognition-reform-scotland-bill/>.
- 1.5 In April 2020 the Scottish Government announced that, in light of the COVID-19 pandemic, work on reform of the 2004 Act would have to be paused and, as a consequence, that the Scottish Government would not bring forward a Bill to reform the gender recognition process before the Scottish Parliamentary elections in May 2021. The analysis of responses to the consultation was carried out between December 2020 and February 2021.⁴

Profile of respondents

- 1.6 In total 17,058 responses were available for analysis.⁵
- 1.7 Most responses were received through the Scottish Government's Citizen Space consultation hub. The Scottish Government also received a number of identical, hard copy responses.
- 1.8 A small number of respondents did not make their submission on the consultation questionnaire but submitted their comments in a statement-style format. This content was analysed qualitatively under the most directly relevant consultation question.
- 1.9 All respondents were asked whether they were resident in Scotland, the rest of the UK, or the rest of the world. Those who did not answer this question have been placed in the rest of the world group.⁶ Those resident in Scotland accounted for 55% of respondents, with 32% resident in the rest of the UK and the remaining 14% resident in the rest of the world.
- 1.10 Respondents were also asked whether they were responding as an individual or on behalf of a group or organisation. Most responses (16,843 of those available for analysis) were submitted by individual members of the public. The 215 organisational respondents were allocated to one of ten groups by

⁴ Please note, therefore, that the responses analysed here were submitted prior to the UK Government's September 2020 announcement that they did not intend to proceed with reform to the gender recognition legislation for England and Wales, and prior to the December 2020 Divisional Court ruling on the judicial review of the Tavistock and Portman NHS Foundation Trust's Gender Identity Development Service (GIDS) practice of obtaining consent for administering puberty blockers to children with gender dysphoria.

⁵ 115 duplicate or empty responses were removed before analysis. A response was counted as a duplicate when both the name and email address matched. If the content of the duplicate responses were not identical, the response submitted last was used in the analysis.

⁶ An exception was made for 337 hard copy responses which were received through domestic post. These have been divided pro rata between the resident in Scotland and resident in the rest of the UK groups, according to the number of individual citizen space responses received from each location.

the analysis team and the Scottish Government although, in several cases, respondents could have been placed in more than one group. In these instances, they were placed in the group which was felt to be the most appropriate based on the focus of their submission.

1.11 A breakdown of the number of responses received by respondent type and location is set out in Table 1 below and a full list of the organisations that responded is provided at Annex 1.

Table 1: Respondents by type and location

	Scotland	Rest of the UK	Rest of the world	Total
Children or Young People's Group	4	1	-	5
LGBT Group	19	13	2	34
Local Authority, H&SCP ¹ or NHS	13	-	-	13
Public Body	4	1	-	5
Religious or Belief Body	30	3	2	35
Third Sector Support Organisation	14	1	-	15
Trans Group	10	7	3	20
Union or Political Party	16	3	2	21
Women's Group	19	13	2	34
Other	23	7	3	33
Total Organisations	152	49	14	215
<i>% Organisations²</i>	<i>71%</i>	<i>23%</i>	<i>7%</i>	
Individuals	9,173	5,330	2,340	16,843
<i>% Individuals</i>	<i>54%</i>	<i>32%</i>	<i>14%</i>	
All respondents	9,325	5,379	2,354	17,058
<i>% All respondents²</i>	<i>55%</i>	<i>32%</i>	<i>14%</i>	

¹ Health and Social Care Partnership ² Do not add to 100% due to rounding

1.12 The responses from organisations that responded to the consultation can be found on the Scottish Government's website.

1.13 In addition to submitting their own responses, a number of organisations and groups developed briefing materials for others to draw on in developing their responses. Children or Young People's Groups, LGBT, Trans and Women's Groups and Religious or Belief Bodies were among those making briefing notes available. These briefing notes often encouraged respondents to adapt or expand on the materials provided.

- 1.14 Whilst many individual respondents appear to have accessed these briefings, respondents frequently personalised their submission and some responses appeared to draw on more than one set of briefing materials.
- 1.15 It is important to note that as with any public consultation exercise, those responding generally have a particular interest in the subject area and the views they express cannot be taken to be representative of wider public opinion.

Analysis and reporting

- 1.16 The consultation paper asked five questions, each with a closed and open element. However, at Questions 1, 2, 4 and 5 the closed question simply asked if the respondent had any comments to make and, in practice, all comments were considered irrespective of the answer at the closed question.⁷
- 1.17 Question 3 asked whether respondents agreed that the minimum age for legal gender recognition should be reduced. Here the overall balance of opinion at the closed element is presented by respondent type in the main report and by location of respondents in Annex 2. Drawing on answers at the closed question, the analysis of further comments at Question 3 is divided according to whether or not respondents agreed with the age being reduced.
- 1.18 Whilst the analysis at Questions 1, 2, 3 and 5 is arranged thematically, it should be acknowledged that most respondents to the consultation tended to take one of two overall positions on the proposals, as set out below.
- 1.19 These two groups are described as being either broadly in support of, or proposed to, a statutory declaration-based system. This reflects the nature of the proposals set out within the Bill, although respondents generally referred to their support for, or opposition to, self-declaration or self-identification.
- 1.20 An analysis of comments made suggests that a small majority of organisations broadly supported changing to a statutory declaration-based system. Around 4 in 10 organisations did not support changing to a statutory declaration-based system and around 1 in 10 either did not take a view or their view was not clear.

Those broadly in support of a statutory declaration-based system

- 1.21 These respondents tended to see the case for change as being clear and pressing, with the current system in desperate need of reform. They often thought the draft Bill offers some improvement relative to the current approach, primarily because of the change to self-declaration and more generally because it would make acquiring a Gender Recognition Certificate

⁷ The answer at these questions did not always reflect whether a comment was made (for example a respondent may not have answered the question or have answered 'no' and gone on to make a comment). Hence no analysis is presented at the closed elements of these questions.

(GRC) simpler. However, they generally disagreed with central elements of the proposals, including the requirement to live in the acquired gender or that a period of reflection is required. These respondents tended to agree with reducing the age at which a person can apply for legal gender recognition to 16.

- 1.22 This was the perspective of many individual respondents and all, or the considerable majority of, Children and Young People's, LGBT and Trans Groups, Union or Political Parties, Local Authority, H&SCP or NHS respondents and Third Sector Support Organisations.

Those broadly opposed to a statutory declaration-based system

- 1.23 These respondents generally thought a convincing case for change has not been made, and that the current system is broadly fit for purpose. This was often connected to a view that the draft Bill should simply be scrapped and to specific concerns about the removal of the need for a medical diagnosis of gender dysphoria before receiving a GRC. These respondents were often very concerned about the potential impact of the proposed changes on society in general, but on the safety and wellbeing of women and girls in particular. They generally disagreed that the minimum age at which a person can apply for legal gender recognition should be reduced from 18 to 16.
- 1.24 This was the perspective of many individual respondents and the considerable majority of the Women's Groups and Religious or Belief Bodies that responded.

Report structure

- 1.25 The remainder of this report presents a question-by-question analysis of responses, but before addressing individual questions a number of overarching themes are considered. These are issues beyond the narrower focus of the questions posed in this consultation, but were raised frequently and were sometimes the main focus of respondents' comments, particularly at Question 4. They have much in common with some of the themes that emerged from the analysis of responses to the 2017-2018 consultation on the Review of the Gender Recognition Act 2004.
- 1.26 They are grouped together in Chapter 2, beginning with some common concerns with respect to the nature of the debate. As noted at the beginning of the next chapter, both the debate concerning trans issues more widely, and the proposals for reform of the 2004 Act in particular, have become highly polarised. In some cases, this extended to the language and tone used within the responses submitted to this consultation.
- 1.27 The analysis team appreciates that the language used in relation to this issue can be of particular importance and significance to respondents. Where possible, the report seeks to reflect the language used by respondents, with this language tending to vary depending on whether respondents were broadly in support of or broadly opposed to a statutory declaration-based system.

1.28 Finally, as noted above, respondents were asked to identify whether they were resident in Scotland, the rest of the UK or the rest of the world. The analysis has looked for any particular patterns or differences in the issues raised across these three groups, but no significant variations were found.

2. Overarching themes

- 2.1 This chapter draws on comments made across all five questions and focuses on overarching themes, including views on the case for change and the potential impact of the changes proposed.

Concerns about nature of the debate

- 2.2 One area of shared concern was around the nature and tone of the debate and dialogue associated with trans issues more widely and the proposals in particular. There was a consensus that the debate has become highly polarised and from some respondents' perspective was seen as toxic and underpinned by a culture, and in particular a social media culture, in which people are being, or feel, bullied and harassed by those taking a different view. A Children or Young People's Group commented that young people have the right to take part in the debate and that this means it is especially important that the discussion should be respectful, reasonable and courteous.
- 2.3 One perspective was that those identifying as trans and/or supporting and advocating for trans rights are being subjected to transphobic abuse, with any delays to changing the legislation fuelling this discriminatory narrative.
- 2.4 Others suggested that anyone who expresses concerns about the proposed changes, in particular in relation to the rights of women and girls or based on their belief system, is accused of being transphobic with any debate being shut down, including through support for no platforming.
- 2.5 These differing perspectives on the wider debate sometimes translated into concerns about the approach the Scottish Government is taking to policy development in this area. For example, it was suggested that a second consultation was not required, with the outcomes from the 2017-2018 consultation exercise clear in supporting change, and in particular a move towards self-declaration. It was suggested that the current proposals have been designed to appease those who do not support a move to self-identification or self-declaration and that the Scottish Government has not listened to the concerns and needs of the trans community.
- 2.6 An alternative view was that the Scottish Government listens primarily to the trans community, but in particular to a group of vocal organisations and individuals who may not necessarily represent the views of the wider trans community. This was sometimes associated with a view that the Scottish Government is not listening to, and engaging sufficiently with, organisations and individuals who have concerns about the impact of the changes on women and girls or who have concerns about the proposals based on their beliefs.
- 2.7 On these issues, and more widely, many respondents' strength of feeling, anxiety and sometimes hurt was clear. Whilst the remaining analysis

acknowledges this strength of feeling, it focuses primarily on the specific issues covered by the consultation and in particular on issues relating to the draft Bill.

The case for change

Those broadly in support of a statutory declaration-based system

- 2.8 Those who saw a clear and pressing case for change often considered that the current approach is outmoded and discriminatory. For example, the current system – including the minimum 2-year timescale for living in their acquired gender – was described as overly complicated and prohibitively long. The requirement to provide evidence of a medical diagnosis of gender dysphoria and to submit a medical report detailing treatment (such as hormone treatment or surgery) was described as humiliating and invasive. There were also a range of reports connected to difficulties and delays for trans people in accessing diagnostic services, as well as other services including support services.
- 2.9 There were also particular concerns about the GRP – both in terms of the inappropriateness of a panel-based system and the actual experiences of those whose cases have gone to the Panel. The latter included reports that this experience had been intimidating and/or humiliating. The administrative burden, including in relation to compiling a document-based body of proof, was described as time consuming and onerous. It was also seen as disadvantaging those trans people who may not have access to key documentation, for example because they are homeless or fleeing domestic abuse.
- 2.10 Both through their own stories and more generally, respondents who supported change spoke of the detrimental impact the current approach is having on trans peoples' health, wellbeing and life chances. Respondents spoke of their own, sometimes lengthy and difficult, experiences of going through the current system, or of their reluctance to apply for a GRC because of concerns or anxiety about the process. There were particular references to the impact on mental health and also to self-harm and risk of suicide. It was suggested that a more straightforward process, with a focus on trust and validation, could have a transformative effect on the mental health and wellbeing of individuals and the wider trans community.
- 2.11 It was noted that while at present people are able to self-identify their gender for documents such as passports and medical records, this system is not currently reflected in the process of applying for a GRC. Some explained that their own lived experience, sometimes over many years, has not been matched by their key supporting documentation, and their birth certificate in particular. In terms of the types of problems and challenges that can result when someone's birth certificate does not match their lived gender, examples given included:
- Difficulties when applying for further education or employment.

- Difficulties and delays relating to civil partnership or marriage.
- Concern and distress when seriously ill or dying about not being identified and recorded in the right gender and, in consequence, their death certificate not being in the right gender.

2.12 In terms of the underlying principles underpinning any future approach, comments included that:

- The Scottish Government should listen to the views of the trans community and work with them to develop an approach which meets their needs.
- Trans people should be able to obtain legal gender recognition swiftly and in accordance with their own perceptions of gender identity.

Those broadly opposed to a statutory declaration-based system

2.13 Other respondents took the view that the Scottish Government has not provided sufficiently robust evidence to support its case for change. It was frequently argued that the existing system provides important safeguarding measures and that the 2004 Act does not require any amendment. The description in the consultation paper of the current requirements as ‘intrusive, demeaning, distressing or stressful’ was questioned, and it was reported that the available evidence suggests that the GRP works well.

2.14 Although sometimes accepting that there may be arguments for limited reform, respondents also suggested that the Scottish Government has not made a robust and sufficient case for the changes that are proposed, and it was observed that the consultation paper does not set out any alternatives that have been explored. Rather than seeking to resolve problems with the present system by moving to a declaration-based model, it was argued the Scottish Government should instead seek to improve access to specialist services.

2.15 On a fundamental level, it was argued that the Scottish Government is confusing sex and gender and that, while gender is a social construct, biological sex is an immutable characteristic that cannot be changed. While the 2004 Act was suggested to have been put in place originally as a practical measure to help a small number of people with a rare medical condition, the proposed reforms were seen as a fundamental change that will encompass a group of people that is both much larger in number and much more diverse. As a result, it was suggested that the scale of impacts on women and girls will be amplified, while removal of the requirement for a diagnosis of gender dysphoria, in particular, will leave the system open to abuse by predatory men who seek access to women’s safe spaces.

2.16 Some respondents questioned why there is now any need for the 2004 Act to exist at all, asserting that the legislation was put in place to allow trans people to marry at a time when same-sex marriage was not legal.

- 2.17 Other areas of life where application processes are lengthy or potentially difficult were also described, and it was argued that it is not possible to self-identify in many other areas, including with respect to other protected characteristics under the Equality Act 2010, such as race or disability.
- 2.18 Finally, it was suggested that, in addition to having not made a clear case for change, the Scottish Government has no mandate to proceed with change. Specifically, it was suggested that, while referring to reviewing and reforming gender recognition law, the 2016 SNP Manifesto for the Scottish Parliament elections did not outline a declaration-based process as proposed in the draft Bill.

Best practice, including legislative compliance

Those broadly in support of a statutory declaration-based system

- 2.19 Some respondents referred to both international law and practice in other countries in support of their case for change. Their comments included that the European Court of Human Rights (ECHR) has been clear that trans people have the right to legal recognition of their gender identity.⁸ There was also reference to a self-determination based approach being in line with the Yogyakarta Principles,⁹ including Principle 31, The Right to Legal Recognition,¹⁰ and that this aligns with Resolution 2048 of the Parliamentary Assembly of the Council of Europe.
- 2.20 It was also noted that over recent years a number of countries, including some Council of Europe member states, have adopted a self-determination model for gender recognition legislation, including Belgium, Denmark, Iceland, Ireland, Luxembourg, Malta, Norway and Portugal. Some respondents from overseas referred to the approach adopted in their own country, with Argentina, Ireland, Malta and Norway reported as offering models of good or best practice.

Those broadly opposed to a statutory declaration-based system

- 2.21 Other respondents noted the consultation paper's acknowledgement that the present system is compliant with both international law and human rights

⁸ Under Articles 8 (the right to respect for private and family life) and 12 (the right to marry) of the European Convention on Human Rights (ECHR).

⁹ The Yogyakarta Principles are the outcome of an international meeting of human rights groups in 2006. The Principles were expanded in 2017, including through the addition of new grounds of gender expression and sexual characteristics. Further information is available at: <http://yogyakartaprinciples.org/>.

¹⁰ Principle 31 recommends that states institute 'a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity' for which 'no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third-party opinion, shall be prerequisite to change one's name, legal sex or gender'.

obligations and there was particular reference to the consultation paper's statement that Scotland's current legislation fully meets European law.

- 2.22 Respondents argued, therefore, that there is no requirement for change on legal or human rights grounds. Further, it was suggested that the Yogyakarta Principles were compiled by lobbyists, have no standing in international law, are not endorsed by academics working in the field, and are both contentious and controversial.
- 2.23 The introduction of declaration-based systems in other countries listed in the consultation paper was argued to be recent and their success to be as yet unproven. It was suggested that, before proceeding on the premise that these systems represent best practice, the Scottish Government requires peer-reviewed comparison data from those countries. Further, no details are presented on how self-declaration operates in other jurisdictions, or the effects on women's sex-based rights.
- 2.24 The statement in the Foreword to the consultation paper that the proposals are in line with the approach of a number of other countries, where 'the impact has been positive for the trans community and without a detrimental impact on others' was also highlighted. This was described as being unsupported by evidence while, in fact, problems (for example within women's prisons) *are* now coming to light in other jurisdictions. More generally, it was suggested that the Scottish Government is mistakenly interpreting absence of evidence of negative impacts as evidence of their absence.

Impact on women and girls

Those broadly opposed to a statutory declaration-based system

- 2.25 A fundamental concern expressed by many respondents was the likely impact of the proposed reforms on women and girls. It was often argued that the Scottish Government is not listening to the voices of women and that the consultation paper fails to explain how abuses of a declaration-based system – as outlined below – will be prevented. As discussed further at Question 5, existing impact assessments were often suggested to be inadequate.
- 2.26 General comments often included that the proposals, and particularly the focus on gender, promotes out-dated stereotypes of masculine and feminine, and implies that women can or should be expected to conform to these stereotypes. Some respondents, including many who stated that they are women, gave examples of their own choices in terms of clothing, employment or division of tasks in the home, querying whether these could or should define what it means to be a woman.
- 2.27 Beyond this there were two central concerns:
- Lack of safeguarding measures, including because of the removal of the requirement for a diagnosis of gender dysphoria, will make the system open to abuse, allowing predatory men to access women's safe spaces.

Specific concerns were raised with respect to prisons, changing rooms, public toilets, school toilets and refuges. It was noted, including in some cases by respondents who cited their personal experience in this respect, that victims of male violence may feel threatened by the presence of male-bodied people, even if those concerned mean no harm.

- Women's sex-based rights will be compromised. Potential effects on women's sport, medical services, rights to equal pay and women only shortlists were all raised.

2.28 It was often argued that the consultation paper fails to address the interaction between self-declaration of gender and protection of single-sex spaces under the Equality Act (2010) and, specifically, that there is a lack of clarity on the operation of single-sex exemptions. It was also suggested that, as it would be impossible to know whether an individual has a GRC, in reality users of single-sex spaces could not challenge anyone who claims to be entitled to use them.

2.29 These broader issues and concerns were sometimes raised at several questions, albeit that because they disagreed with the fundamental principles underpinning the draft Bill, many respondents did not make further comments about the specific proposals. However, many did make further and often very substantive comments in relation to the Equality Impact Assessment (EQIA), as discussed at Question 5.

Those broadly in support of a statutory declaration-based system

2.30 It should also be recognised that others rejected the idea that a move towards a statutory declaration-based system would be harmful to women, with some of those making this point noting that they were women and feminists. This issue is also returned to at Question 5.

3. Procedure before application for legal gender recognition

- 3.1 At present the standard track for gender recognition can be used by applicants who:
- Have been diagnosed with gender dysphoria;
 - Have lived in their acquired gender throughout a period of two years immediately prior to their application; and
 - Intend to live in their acquired gender for the rest of their life.
- 3.2 Applicants must also provide two medical reports to the GRP.
- 3.3 Under the proposed system the current medical requirements would be removed. The new requirement would be that applicants must have lived in their acquired gender for a minimum of 3 months before submitting an application for gender recognition.

Q1: 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?

- 3.4 Around 14,200 respondents made a comment at Question 1.
- 3.5 While comments at Question 1 often addressed the specifics of living in an acquired gender for at least 3 months before applying for a GRC there were also broad statements of support of, or opposition to, the draft Bill overall and/or to the framing of the proposed approach.
- 3.6 For some this was articulated around support for, or opposition to, self-declaration, albeit it was not always clear whether respondents considered the approach as proposed would equate to self-declaration.

Those broadly in support of a statutory declaration-based system

- 3.7 Those who made general statements in support of the draft Bill often referred to the importance of promoting equality and creating a simple, straightforward system which treats people with dignity and respect. Some noted their support for the overall direction of the proposals, and a system based on self-declaration, including because it would be simpler.
- 3.8 The shortening of the current 2-year timescale for receiving a GRC was often described as representing a significant and very welcome improvement, although this was often caveated with the view that the proposals could and should go further. Some thought that the proposed approach would remain unnecessarily complicated, would act as a barrier to applying for and receiving a GRC and, by extension, would discriminate against trans people.
- 3.9 Respondents sometimes contrasted the proposals set out in the draft Bill with the approaches taken in some other countries which have made it easier to

change a birth certificate. Examples given included Argentina (since 2012), Ireland (since 2015), Malta (since 2015), Norway (since 2016), Belgium (since 2017) and Portugal (since 2018).

Those broadly opposed to a statutory declaration-based system

- 3.10 Others objected to the proposals precisely because they saw the proposed system as being one of self-declaration, or at least as a clear move towards a self-declaration-based approach. For some of these respondents, their objection was based on the draft Bill implying that changing sex or gender, which they regarded as impossible, can be done. These respondents sometimes explained that they considered changing sex or gender to be contrary to their belief system, and specifically to the teachings of their religion.
- 3.11 There was also a view that by allowing someone with a GRC to change their birth certificate, they are changing their legal sex. It was argued that this is unscientific, since biological sex is determined by DNA and chromosomes.
- 3.12 The concerns of many of those objecting to a declaration-based system were linked very strongly to the implications of the changes for women and girls, as summarised in the previous chapter, and a concern that these have not been taken into account sufficiently, as covered further at Question 5.

Removal of the requirement for a diagnosis of gender dysphoria

- 3.13 A key area in which views on the content of the Bill differed was around there no longer being a requirement for a medical diagnosis of gender dysphoria.

Those broadly in support of a statutory declaration-based system

- 3.14 De-medicalising the process of obtaining a GRC was warmly welcomed by many of those broadly supportive of a statutory declaration-based system, including because (as noted in the previous chapter) the need to provide evidence of a medical diagnosis of gender dysphoria to the GRP was seen as one of the main problems with the current system. It was reported that not every trans person experiences gender dysphoria, and so a diagnosis of the condition is irrelevant to a person's identity.
- 3.15 Other points raised were that having a trans gender identity is not the same as having a mental illness and that not every trans person wishes to medically transition to one or another binary gender. On this basis, any medical evidence of transition is irrelevant to a person's identity, as well as being invasive.
- 3.16 Support for removing the need for a medical diagnosis of gender dysphoria was sometimes associated with support for abolishing the GRP, including because it was seen as acting as an unnecessary gatekeeper to legal gender recognition.

Those broadly opposed to a statutory declaration-based system

- 3.17 However, those broadly opposed to a statutory declaration-based system argued the diagnosis of gender dysphoria is a key requirement that should be retained. It was suggested that removing this requirement significantly changes the nature of the 2004 Act, which was introduced to help a small group of people with the medically recognised condition of gender dysphoria. Going forward it was argued the proposed reform would extend the GRC process to a much larger and more diverse group.
- 3.18 Without a requirement for a diagnosis of dysphoria it was suggested the process would:
- Be open to abuse from predatory men.
 - Risk leaving those transitioning without proper medical support.
 - Increase the chance that other conditions may go undiagnosed and unexplored.
- 3.19 With respect to the last point, a number of potential co-morbidities were highlighted, including eating disorders, depression and anxiety, as well as the experience of previous personal trauma. There were also particular concerns in relation to the number of autistic people presenting as trans. Fears were expressed that, without a diagnosis of gender dysphoria, potentially vulnerable adults and adolescents may commit to a process they will later come to regret.

Living in the acquired gender

The concept of acquired gender

- 3.20 Respondents often raised questions as to what is meant by 'gender', by 'acquired gender' and, in particular, to 'living in an acquired gender'. Both those broadly in support of and those broadly opposed to a statutory declaration-based system raised these issues.
- 3.21 It was noted that the term 'acquired gender' is not defined in the consultation paper or the draft Bill and there was an associated suggestion that, without an adequate definition, it is essentially meaningless.
- 3.22 It was seen as implying a common and clear understanding of what it means to be a man or a woman, including that living as a man or women comes with an agreed and commonly understood set of lifestyle choices and behaviours. This was seen as an outmoded outlook which re-enforces the unhelpful and harmful gender stereotypes which many people now reject. The notion of living in a particular gender was seen as making very little sense in today's society, particularly if it is assumed that gender non-conforming is a basic right.
- 3.23 For some it was also seen as bringing worrying and offensive connotations that someone else, be it the Scottish Government or some other arbiter,

should decide upon and define what constitutes life as a woman or life as a man. In this context, it was seen as threatening people's autonomy and self-determination.

Those broadly in support of a statutory declaration-based system

- 3.24 There was also a concern, raised primarily by those broadly in support of a statutory declaration-based system, that the description of a gender as being 'acquired' is in itself both wrong and offensive. Those raising this concern commented that it implies a degree of choice or preference that is simply not the case and that trans people are simply seeking to be recognised in the gender that is already theirs and/or into which they were born. Alternative descriptors, including 'affirmed', 'correct' or 'preferred', were suggested, as well as a suggestion that no qualifier is required, and the Bill should simply refer to 'gender'.
- 3.25 It was also seen as unclear whether this stipulation requires the applicant to make any change at all to their outward appearance or lifestyle. In terms of how 'living in an acquired gender' could be expected to manifest itself, there was a concern that people would effectively be expected to perform a role in public, based on how they dressed or acted, and that this would be both demeaning and a potentially very harmful imposition.
- 3.26 There were references, including some based on trans peoples' own experiences of the current GRC approach, to: being required to 'play act'; of names not being considered masculine or feminine enough; and of being told they had put insufficient effort into acting as a man or a woman. The associated concern was that these types of requirements and judgments would remain under the proposed approach.
- 3.27 Those broadly in support of a statutory declaration-based system also raised concerns that:
- Many trans people may not be able, or feel able, to live in their acquired gender because of fear of prejudice, discrimination, or concern for their safety.
 - Any requirement to have lived in their acquired gender for a set period of time could discriminate against those who have differing levels of support to do so or who have fewer resources. For example, it was noted that making changes to how you present to the world could involve significant costs, for example relating to clothes, hairstyle or hair removal.
- 3.28 Further, it was noted that living as either a man or a woman is not an option for non-binary people and living as a man or women for a set period may not be an option for those who are gender fluid.

Those broadly opposed to a statutory declaration-based system

- 3.29 For others, and primarily those broadly opposed to a move towards a statutory declaration-based system, referring to 'acquired gender' speaks

back to a fundamental misunderstanding or confusion about the difference between sex and gender and how the proposals, and the Scottish Government more widely, understand and use these terms.

- 3.30 Their concerns very much reflected those outlined in Chapter 2, including that while gender is a social construct, biological sex is an immutable characteristic that cannot be changed.

A requirement to provide evidence?

Those broadly in support of a statutory declaration-based system

- 3.31 One of the concerns raised about the Bill as currently drafted was that, rather than simply allowing applicants to make a statutory declaration, in its current form it could be used to require applicants to provide evidence of having lived in their acquired gender for 3 months.¹¹ Those broadly in support of a statutory declaration-based system suggested that:

- A requirement to provide evidence is not in keeping with the Council of Europe Resolution 2048 which calls for quick, transparent and accessible procedures, based on self-determination.
- Equivalent evidence-related requirements are not in place for other key documents like passports, medical records or work or education-related paperwork.

- 3.32 Central to these concerns – and relating back to the previous comments about what is meant by living in an acquired gender – was a suggestion that evidence can be subjective and can be both culturally and socially specific, as well as subject to individual interpretation. The ability to provide and gather evidence was again seen as dependent on an individual having access to the resources necessary – with the need for financial resources, time and the emotional energy to gather evidence all highlighted as issues.

- 3.33 It was also reported that trans people are more likely to experience health and poverty issues that could prevent them from holding some of the key documents often used for ID purposes, such as driving licences, passports or utility bills. Specifically, it was suggested that trans people are more likely to experience homelessness or be subject to domestic abuse and that either of these circumstances can result in not having, or not having access to, key documentation.

Those broadly opposed to a statutory declaration-based system

- 3.34 While for some the concern was that people would be required to evidence that they had lived in their acquired gender, for others the concern was very much that they would not. Those broadly opposed to a statutory declaration-based system tended to focus on two issues – how someone can

¹¹ Section 8U(1)(d) would enable the Registrar General for Scotland to, by regulations, make further provisions relating to the information or evidence to be included in an application or notice of confirmation.

demonstrate that they have done something that is not clearly defined in the draft Bill and, in the absence of such evidence, how the system can be policed. It was suggested that being able to make a statutory declaration that you have lived in an acquired gender for the requisite period of time, but not being required to provide any evidence to that effect, would mean the system was open to abuse.

3.35 It was also argued that, if it is to be an offence to make a false application, it will be imperative that people are clear about what is required of them, and about any evidence they would need to provide. Equally, it was argued that if the evidence required is not clear, it will not be possible to hold someone accountable if they do not adhere to the legislation and make a false declaration.

Living for 3 months in the acquired gender

3.36 As well as commenting on the idea and practicalities of living in an acquired gender, respondents often commented on the proposal that someone would be required to do so for at least 3 months.

3.37 Comments about the timescales over which someone could apply for and receive a GRC sometimes referred to the two periods set out in the draft legislation - the 3-month period of living in the acquired gender that is the focus of Question 1 and the 3-month period of reflection that is the focus of Question 2. For some respondents, these two periods were distinct, for others the overall period of time between applying for and receiving a GRC was what they considered important.

3.38 In some cases, it was not clear whether respondents were referring to the overall period between applying for and receiving a GRC (effectively the 6 month period created by 3 months living in acquired gender and the 3-month reflection period) or were making a distinction between the two time periods. For example, if at Question 1 a respondent commented that 'it should be 2 years' it was not necessarily clear whether they were referring to the period for living in an acquired gender or the entirety of the period between applying for and receiving a GRC.

3.39 More generally, it was suggested that the two 3-month periods set out seem arbitrary, with no evidence presented as to why they have been chosen, either in isolation as two periods or collectively as a 6-month period.

Any period of living in an acquired gender

Those broadly in support of a statutory declaration-based system

3.40 Very much reflecting the issues covered above, those broadly in support of a statutory declaration-based system generally thought that no period of living in an acquired gender should be required. Reasons given included that there is simply no evidence to suggest that any time period is necessary or brings any value. For many of these respondents, the 3-month period effectively equated to nothing more than an unreasonable, arbitrary and potentially

damaging waiting period. Concerns raised about such an approach were both mirrored and amplified in relation to the reflection period and are covered further at Question 2.

- 3.41 The inconsistency with other circumstances under which a statutory declaration is required were highlighted. For example, it was reported that if officially recording a change of name, there are no requirements to have been using that name for any defined time period. There was a view that is unreasonable and, arguably, discriminatory to take a different approach simply because gender is involved.
- 3.42 Also with specific reference to gender, those broadly in support of a statutory declaration-based system noted that the processes for changing gender on other forms of identification, such as passports and driving licences, do not oblige applicants to have lived in the 'acquired gender' for any defined period. For example, it was explained that to update the gender marker on a driving licence, applicants without a GRC can simply provide a statutory declaration or deed poll that they have changed their gender.
- 3.43 Also in comparison with making changes to other documents, an occasional view was that any time period required should simply reflect the time needed to complete the necessary administrative process. This tended to be expressed simply as being a required time period rather than a period in which a trans person should be required to live in their acquired gender.
- 3.44 Other comments addressed whether or how any time period could or should vary depending on personal circumstances. These comments were more likely to be, but were not always, connected to living in the acquired gender (rather than the entire period from applying for to receiving a GRC), and included that:
- The time period could vary depending on the age and/or lived experience of the applicant. For example, the period could be longer if someone is younger and/or has no or limited experience of living in their acquired gender. It might be shorter if someone has experience of living in their acquired gender in the past but has not been doing so continually for the 3 months prior to making an application.
 - There could be emergency provision which allows someone to receive their GRC more quickly under certain circumstances, for example if they are seriously ill and nearing death. This was connected to the indignity for a trans person of dying with a birth certificate that does not record the right gender.

A longer period required

Those broadly opposed to a statutory declaration-based system

- 3.45 In contrast, those broadly opposed to a statutory declaration-based system generally thought a period of 3 months living in the acquired gender to be too short a time, often much too short a time, in which to make such a life-altering

decision. Respondents often queried why this should appear to be so rushed. A very small number of respondents who identified themselves as trans were among those who argued that 3 months is too short.

3.46 It was also argued that 3 months:

- Does not allow time for the diagnosis of gender dysphoria that many considered essential.
- Does not prove a commitment to permanent change in the way that 2 years does.
- Does not allow sufficient time for people to change their mind.
- Trivialises the legal gender change process and makes it much too easy to abuse.

3.47 In addition, some respondents highlighted what they saw as a risk that, in such a short period, a vulnerable individual might complete the legal transition process while suffering temporary distress, for example as a result of trauma or bereavement.

3.48 Serious concerns were also raised by those broadly opposed to a statutory declaration-based system with respect to the combination of reducing the time to 3 months and lowering the age limit from 18 to 16. It was often argued that, in the majority of cases, gender dysphoria in young people resolves naturally given time. Citing the rising number of young people who are detransitioning,¹² some respondents suggested that making the GRC process quicker and less robust will cause these numbers to rise still further.

3.49 Respondents who argued 3 months living in the acquired gender to be too short sometimes proposed a specific alternative – most frequently that the existing 2 year period should be retained. Others allowed that 2 years may be too long but argued that 6 months or 1 year would be a more appropriate alternative.

3.50 Some respondents referred to the total timeframe of 6 months over which the draft Bill would allow the application process to be completed – again suggesting that this is too short, particularly with respect to young people who may be at a confusing life stage and who may realise, if given more time, that legal gender change is not what they need.

¹² The Cambridge English Dictionary defines detransitioning as being ‘the process of stopping changes, which may be social, legal, or medical, that lead to someone living as a person of a different gender to the one they were said to have at birth.’

4. Procedure after application for legal gender recognition

- 4.1 It is proposed that an application for legal gender recognition would be submitted to the Registrar General but would not be completed until a 3-month reflection period had passed and the applicant had confirmed in writing that they wished to proceed. The draft Bill refers to this as 'notice of confirmation'. The analysis below also considers points made in relation to the requirement that applicants would have to confirm that they intend to live permanently in their acquired gender.

Q2: 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?

- 4.2 Around 13,700 respondents made a comment at Question 2.
- 4.3 As already noted at Question 1, it was not always clear whether comments relating to time referred to the overall time to complete the legal gender recognition process or were referring specifically to the 3-month period of reflection referenced in the question. Otherwise, many of the issues raised at Question 2 reflected themes already covered at Question 1, with some respondents simply referring back to their comments at the previous question.

Any reflection period

Those broadly in support of a statutory declaration-based system

- 4.4 Those who did not agree with an applicant for a GRC being required to live in their acquired gender for a prescribed period, generally also did not agree with the proposal that there should be a period of reflection for at least 3 months before obtaining a GRC. Fundamental to this the view of many of those broadly in support of a statutory declaration-based system that many trans people will have been aware of their gender, and 'reflecting' on their situation, for all of their lives; contrary to the implication of a period of reflection they have not made an ill-considered decision or come to a quick decision. They also argued that there are very few instances of people detransitioning.
- 4.5 The other key reasons given for objecting to the reflection period often reflected those raised at Question 1, including that:
- It is simply not consistent with the principle of self-determination.
 - There is no equivalent period in place for changing other forms of identity documentation or with other uses of statutory declarations.
 - It would be unnecessarily complicated and bureaucratic for no good reason or benefit. It was described as neither making things simpler for trans people nor as being in their best interests.

- It effectively equates to only an additional waiting period; someone who has not been living in their acquired gender, or cannot evidence that they have been doing so, would effectively have to wait to receive a GRC for 6 months. For some, this was seen as a concession to those who oppose a move towards self-determination, rather than a rational policy decision that can be evidenced and explained.

- 4.6 On this latter point, while it was recognised that the Scottish Government has proposed a reflection period in order to ‘enshrine in law the seriousness of the process’¹³ it was also suggested that the existing protections to guard against fraud are significant to prevent decisions around applying for a GRC from being taken lightly. The need for a statutory declaration in front of a Notary Public was considered a sufficient requirement in terms of underlining the gravity of the decision.
- 4.7 Some of those broadly in support of a statutory declaration-based system also reported that a period of reflection is not a feature of other systems that are based on self-determination, for example those of Ireland, Luxembourg, Malta, Norway or Portugal. While it was also acknowledged that some countries, including Belgium and Denmark, do have a reflection period in place, respondents were not aware of any evidence to suggest that the approach has brought added benefit.
- 4.8 As with living in an acquired gender, there were queries as to what is meant by a period of reflection, along with fundamental concerns that, as with other additional verification approaches, it implies that trans people cannot be trusted to make their own informed decisions.
- 4.9 It was also seen as implying that seeking legal gender recognition is a potentially undesirable option which needs to be guarded against. For some, including some respondents who reported that they are trans, this implication was thought to be demeaning or offensive and as having the potential to reinforce harmful myths about trans people. The particular concern was that it appears to be in line with suggestions that someone’s trans identity may be a phase or may be the result of confusion or crisis.
- 4.10 Both individuals who have transitioned and organisations that support trans people commented that any reflection period cannot be explained or justified based on their own lived experience or the experience of those they work with. Rather, it was reported that most trans people will have been aware of their gender identity, will have been considering transitioning, and may have been transitioning socially, for some time prior to applying for a GRC.

¹³ As per the consultation paper, taken from the Cabinet Secretary’s Parliamentary statement that: “Retaining the requirement for a statutory declaration, making it clear that a false declaration is a criminal offence and building in time for reflection will enshrine in law the seriousness of the process. No one should doubt that it is a significant undertaking, or that it will require the same level of commitment from the individual as the existing system does.” The full statement is available at: <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12196&mode=pdf>

4.11 Specifically, it was reported that many trans men or trans women making a GRC application are likely to have been living in the 'acquired gender' for a long period of time and should not be required to further 'reflect' on their gender and experience delays in accessing legal gender recognition.

Those broadly opposed to a statutory declaration-based system

4.12 In contrast, some respondents who argued in favour of retaining the existing system suggested that the inclusion of a period of reflection is a tacit acknowledgement that some people will change their minds. This was often connected to a view that the reflection period should be longer than the 3 months proposed, or that it would be unnecessary if applicants were required to spend a longer period living in their acquired gender.

4.13 For some of those broadly opposed to a statutory declaration-based system, there was a concern that it is not only unclear what is meant or intended by a period of reflection but also, and very much in line with comments about living in the acquired gender, it is not clear how someone would be able to prove they had reflected. If the process is not or cannot be defined, and if people are not required to provide any evidence that they have reflected, some questioned whether the period of reflection offers any value. In this respect, they agreed with some of those who disagreed with there being any reflection period that it equates to nothing more than a waiting period.

4.14 However, there was also a view that there should be a reflection period, but that some form of advice, counselling, or therapy to help applicants consider whether their decision to apply for a GRC is the right one, should be available or required. Some respondents specified that any services offered should be impartial.

Appropriateness of 3 months reflection

4.15 While some respondents did think that a 3-month reflection period was acceptable, as with the 3-month period of living in an acquired gender, others questioned why 3 months had been chosen or suggested that it appeared arbitrary and had not been explained adequately.

Those broadly in support of a statutory declaration-based system

4.16 For some, the 3-month period was unacceptably long. As at Question 1 and reflecting the issues covered above, most simply thought there should be no reflection period.

4.17 Also as at Question 1, there were concerns about the impact that a 3 month period might have, including in relation to: protecting privacy; wanting to get married; having pension and insurance policies administered correctly; and ensuring they are recognised in death in their correct gender. There was a particular concern that someone who had not already been living in their acquired gender would need to wait for 6 months (i.e. the 3 month period of

living in the acquired gender and then the 3 month period reflection period), in order to obtain a GRC.¹⁴

Those broadly opposed to a statutory declaration-based system

- 4.18 Many argued that the 3 month period proposed is too short, sometimes much too short. They often pointed to the magnitude of a legal gender change, particularly for young people.
- 4.19 Some respondents who thought 3 months too short a period for reflection, took a view that 6 months would be more appropriate, sometimes adding this to 6 months living in the acquired gender to make a gender recognition process taking a year overall.
- 4.20 Other respondents argued for a year, or at least a year. Sometimes these respondents had also suggested a year living in the acquired gender or were also looking for the current medical process to be retained.
- 4.21 A total period of 6 months in which the legal gender recognition process could be completed was also argued to be too short, including because:
- It is significantly shorter than the time it takes for an applicant to obtain a diagnosis of gender dysphoria.
 - There is a particular risk that young people may make a decision they come to regret. Some respondents referenced the possibility that young people from England and Wales might complete legal gender recognition within a single academic year while enrolled at university in Scotland. The issue of what constitutes being 'ordinarily resident' in Scotland is discussed at Question 4.
 - A period of 6 months from application to receiving a GRC sets too low a bar to deter men who are seeking a GRC in order to facilitate abusive behaviour.
- 4.22 The reduced time period, especially in combination with the removal of the need for a diagnosis of gender dysphoria, was seen as removing one of the key safeguards provided by the current approach, with women and girls identified as those most likely to be harmed by the loss of these safeguards.

Living permanently in the acquired gender

- 4.23 After the reflection period of 3 months, an applicant would have to confirm that they wish to proceed and that they intend to live permanently in their acquired gender. Applicants would be required to submit a statutory

¹⁴ Comments from respondents suggest that some of those raising these concerns may have misunderstood the proposal to be that the 3 month living in an acquired gender period would have to begin at application, and then be followed by the 3 month reflection period, meaning that they understood the minimum time from application to receiving a GRC would be 6 months. The Scottish Government proposals in the consultation state that applicants must have lived in their acquired gender for a minimum of 3 months before submitting an application for gender recognition.

declaration and it would be a criminal offence to make a false application for gender recognition or make a false statutory declaration in relation to gender recognition.

- 4.24 Concerns were raised about a possible lack of provision for having a GRC revoked. Both those supporting and opposed to a statutory declaration-based system highlighted this issue.
- 4.25 One interpretation was that as there is no proposal to introduce a cap on the number of applications, it should continue to be possible for someone who has a GRC to have it revoked by making an additional application, which would effectively then rescind the prior certificate.
- 4.26 However, others were concerned that the Bill could be interpreted as precluding multiple applications, and that this could be harmful if someone wishes to detransition or retransition. Some respondents commented that someone may simply come to feel they have made the wrong decision and wish to detransition. Others thought that someone's gender identity will not necessarily be fixed, including if they are gender fluid, and that the system should allow for changes over time.
- 4.27 There was an associated concern, covered at Question 4 below, that someone who wishes to detransition or retransition will be considered to have committed a criminal offence when making the initial statutory declaration in relation to their GRC.

5. Reducing the minimum age for obtaining legal gender recognition to age 16

- 5.1 The Scottish Government considers that the minimum age for applying for legal gender recognition should be reduced to 16. The consultation paper notes that this would be in line with a number of other areas where people obtain rights at 16 including the school leaving age, the minimum age for marrying or entering a civil partnership, and for voting in Scottish elections. It also observes that, in recent years, there have been moves to provide more rights at an earlier age.
- 5.2 The analysis of further comments at this question is presented according to responses at the closed question. Those who thought the minimum age should be reduced generally equated to those broadly supporting a move to a declaration-based system. Those who did not agree with the minimum age being reduced generally equated to the group of respondents broadly opposed to a declaration-based system.

Q3: Should the minimum age at which a person can apply for legal gender recognition be reduced from 18 to 16?

- 5.3 Responses to Question 3 by respondent type are set out in Table 2 below. A more detailed breakdown according to the location of respondents is presented in Annex 2.
- 5.4 As noted in Chapter 1, the closed element at Questions 1, 2, 4 and 5 asked only if respondents wished to make a comment. Question 3 asked if respondents agreed with a specific proposal or not.
- 5.5 Based on comments made, it appears that some respondents who answered 'yes' at Question 3 did so meaning that they wished to make a comment, with that comment making clear that they did not agree with lowering the age to 16. In other cases, the respondent's overall position (in terms of whether 'yes', 'no' or 'don't know') was not absolutely clear.
- 5.6 Based on their comments at other questions, it is also possible that some respondents who answered 'no' at Question 3 and did not make a comment may have been indicating that they did not wish to make a further comment, rather than they did not agree with lowering the age to 16.
- 5.7 Given the scale of overall response, it is not possible to identify all responses which may have been affected and as contact information may not have been available, it was not possible to contact respondents to clarify their position. However, the Scottish Government did contact a small number of organisations whose comment at Question 3 suggested very strongly that they had not answered the closed element of Question 3 as they would have intended. Five out of the six organisations contacted asked to have their

answer to the closed element of Question 3 changed. The remaining organisation did not respond to the query.

- 5.8 Although this issue is unlikely to have affected the overall balance of opinion at Question 3, it does mean that the results at the closed element of Question 3 should be viewed with a degree of caution.

Table 2: Question 3 - Should the minimum age at which a person can apply for legal gender recognition be reduced from 18 to 16?

Respondent type	Yes	No	Don't know	Not answered	Total
Children or Young People's Group	4	-	-	1	5
LGBT Group	26	4	2	2	34
Local Authority, H&SCP ¹ or NHS	10	1	-	2	13
Other	19	9	5	-	33
Public Body	3	1	-	1	5
Religious or Belief Body	2	32	-	1	35
Third Sector Support Organisation	10	3	1	1	15
Trans Group	15	2	-	3	20
Union or Political Party	15	4	-	2	21
Women's Group	3	28	1	2	34
Total Organisations	107	84	9	15	215
<i>% of organisations answering²</i>	<i>54%</i>	<i>42%</i>	<i>5%</i>		
Individuals	9,294	6,944	390	215	16,843
<i>% of Individuals</i>	<i>56%</i>	<i>42%</i>	<i>2%</i>		
All respondents	9,401	7,028	399	230	17,058
<i>% of all respondents answering</i>	<i>56%</i>	<i>42%</i>	<i>2%</i>		

¹ Health and Social Care Partnership ² Do not add to 100% due to rounding

- 5.9 Overall, a majority of respondents who answered the question – 56% – thought that the age at which a person can apply for legal gender recognition should be reduced from 18 to 16, while 42% thought it should not, and 2% did not know. Among organisations who answered the question, 54% agreed, 42% disagreed and 5% did not know.

- 5.10 Those respondents who identified themselves as resident in Scotland (see Table 3 in Annex 2) were evenly divided, with 49% agreeing that the age should be reduced to 16, 49% disagreeing and 3% saying they did not know. Individuals who are resident in Scotland were less likely to agree than all individuals (49% compared to 56% of those responding).

- 5.11 The balance of views among organisations remained broadly the same – of those within Scotland, 55% agreed and 39% disagreed, as opposed to 54% and 42% respectively of all organisations that responded.
- 5.12 Among those who disagreed, a large majority made clear in their further comments that they thought the age should not be reduced at all, although a small number (including one Trans Group) disagreed because they thought it should be reduced further, to include those under 16. Small numbers of other respondents who thought the age should be reduced to below 16 did not answer the closed question (including two Trans Groups, an LGBT Group and a Third Sector Support Organisation), while an Other respondent chose ‘don’t know’ for the same reason. As noted at paragraph 5.32 onward, many respondents who agreed that the minimum age should be reduced to 16 also argued that legal gender recognition should be possible at an earlier age.
- 5.13 Among organisations, a large majority of Religious and Belief Bodies and Women’s Groups did not agree that the age should be reduced to 16, while in all other groups a majority agreed that it should be reduced.
- 5.14 Around 12,000 respondents made further comment at Question 3.
- 5.15 The analysis of further comments presented below is divided according to responses at the closed question, beginning with those who agreed that the age should be reduced to 16. Comments provided by respondents who did not know or did not answer the closed question are addressed where most appropriate.

Age should be reduced to 16

Age of legal adulthood and other age-related restrictions

- 5.16 It was argued that a young person in Scotland is legally an adult at 16, or that 16 is accepted as the age of majority. Many respondents observed that the proposed change would bring gender recognition into line with many other rights that can be exercised at 16. Among the examples given were that if a 16-year-old is considered sufficiently mature to marry, join the army, gain employment, vote in elections, or consent to medical treatment and surgery, then they should be entitled to apply for legal recognition of their gender and to change their birth certificate.
- 5.17 Age was also noted to be a protected characteristic under the Equality Act 2010,¹⁵ and it was argued that limiting legal recognition to those over the age of 18 would have a negative effect on younger trans people.
- 5.18 Various articles of the United Nations Convention on the Rights of the Child (UNCRC), the European Convention on Human Rights (ECHR) and the

¹⁵ Under the Equality Act 2010 it is against the law to discriminate against someone because of a protected characteristic. These characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Yogyakarta Principles were cited by respondents as being in keeping with extending the rights of young trans people.¹⁶ UNCRC obligations were noted to include: ensuring that the best interests of the child are a primary consideration; respecting the right of a child to be heard and taking account of their views; and protecting children against discrimination. Specifically, the scope of Article 8 – the right to identity – was noted to include characteristics such as sexual orientation and gender identity. In many cases, these points were extended to make the argument for reducing the age for legal gender recognition below 16 as discussed further below.

- 5.19 While supporting the proposed change, a small number of respondents also suggested additional safeguards could be put in place for young people or argued that vulnerability should be taken into consideration. In terms of safeguards, it was suggested that making the reversal of any gender recognition process easier for 16- and 17-year-olds could involve requiring a court process rather than self-declaration, having formal requirements around medical or psychological support, or additional notification requirements for looked after young people. However, others argued against a court order system since this would replicate much of the bureaucracy and gatekeeping they saw as problematic in the existing GRC system.

Sufficient maturity to know who they are

- 5.20 Many 16-year-olds were argued to be mature, capable and responsible enough to make a decision on their legal gender identity. Far from making such a choice on a whim, it was argued trans young people will have spent a long time reaching this decision. When young people are certain, it was suggested, delay is unnecessary and may be harmful.
- 5.21 Some respondents drew on their personal experience of having known that they were trans from an early age, or commented that the ability to obtain legal gender recognition at 16 or 17 would have made a huge difference for them, for example helping with a more positive self-image or reducing anxiety and depression.

Benefits to mental health

- 5.22 Among respondents who agreed that the age for legal gender recognition should be reduced to 16, the positive impacts this could have on mental health were frequently raised. The many challenges faced by young trans people were cited including discrimination, abuse and harassment. It was predicted that making trans teenagers feel more accepted, supported or empowered by legally recognising their gender could help to alleviate dysphoria and distress, improve wellbeing and quality of life, and reduce depression and suicide rates.

¹⁶ The UNCRC Articles that the Scottish Government considers relevant to the proposals are listed in the draft Child Rights and Wellbeing Impact Assessment provided as Annex G to the consultation paper.

- 5.23 Conversely, making young people wait longer to have their gender recognised was suggested cruel or unnecessary, and was suggested likely to have corresponding negative impacts on mental health.

Importance of consistent documentation

- 5.24 The importance of having a birth certificate that matches their identity and other documentation was identified as being of great importance to young trans people. It was observed that trans children may now transition socially at an earlier age than would have previously been the case, and therefore need legal recognition to protect their privacy and to avoid risk of outing in situations where they need to present a birth certificate as identification. This was suggested to be a more likely scenario for young people who are less likely to have alternative forms of identification such as a passport or a driving licence.

At school

- 5.25 In the school environment it was argued to be inappropriate that acknowledgement of a young person's gender identity should be left to the discretion of head teachers. It was suggested preferable to create a legal right to gender recognition that would, in turn, require investment in professional learning programmes for teachers who, it was argued, may currently be worried about doing or saying 'the wrong thing'.
- 5.26 Alongside the extension of rights and provision of support for transgender young people it was thought important that schools challenge gender stereotypes, to ensure that children and young people do not feel pressured into legally changing their gender because they do not conform to society's expectations. It was suggested that improved education on gender issues is needed.

Moving into adulthood

- 5.27 Respondents noted that at 16 or 17 many young people will be reaching a time of change in their lives – becoming independent, moving away from home, beginning full time work, or starting a university or college course. Some described this as making a new start. The benefits of being able to obtain legal gender recognition and amend their birth certificate before these life changes were highlighted. It was argued that, without this ability, events that should be positive and exciting could instead be very stressful for young trans people, or may be put off until legal recognition is available to them.
- 5.28 With respect to further and higher education it was suggested that 16- or 17-year-old students without a GRC may have to register for their studies as the wrong gender, causing potential difficulties after graduation if the qualification is in a different name to the one being used.
- 5.29 It was noted that if the age of 16 is implemented, colleges and universities will need to ensure that their safeguarding provisions adequately consider younger students transitioning.

5.30 For those moving into the workplace, the importance of a birth certificate as proof of an individual's right to work in the United Kingdom was noted, and it was argued that this may be of particular importance to a person of 16 or 17 who is less likely to have a valid passport. Similarly, someone applying for their first job will not have a P45 or P60 from a previous employer, and so is more likely to have to use their birth certificate to prove their identity.

Legal recognition will not impact medical treatment

5.31 Many respondents emphasised their view that legal gender recognition is about documentation and will not impact other aspects of the transition process such as social presentation, accessing gender clinics or the waiting period for any medical treatment. It was argued that decisions about medical treatment for young trans people would continue to be made by medical professionals who would not be obliged to provide people with interventions because they have legal gender recognition.

5.32 Further, it was reported that in Scotland, children and young people under 16 cannot access any irreversible treatments as part of a medical transition, such as cross-sex hormones and that those under 18 cannot access surgical interventions.

5.33 Although the proposals relate only to legal gender recognition, some respondents did connect a reduction in the age at which a trans young person could apply for a GRC with earlier or easier access to some treatments, such as puberty blockers. This was seen as positive if it would mean more young people can avoid going through puberty in their birth gender. Some respondents referred to the importance of allowing young people to access puberty blockers, which were seen as both safe and reversible.

5.34 On a legal matter, it was observed that the NHS Scotland Gender Reassignment Protocol allows that a person of 16 or 17 can consent to treatment and it was suggested to be anomalous that consent could be provided for gender reassignment treatment at an age when legal gender recognition is not possible.

5.35 However, the absence within the proposals of any mechanism for setting out how an individual child's understanding of the process and its consequences would be assessed was noted.

Legal recognition for those under 16

5.36 While welcoming the proposal to reduce the minimum age for legal gender recognition to 16, many respondents encouraged the Scottish Government to go further and make provision for children under 16. This was argued to be in keeping with many of the principles of the UNCRC as referenced above. It was also suggested that as children over 12 are deemed to have legal capacity to make decisions in certain circumstances, this principle could apply to gender recognition.

- 5.37 It was also argued that, although the consultation paper suggests young people under 16 are likely to be uncertain of their gender identity, this is not necessarily the case. A small number of trans children who are very confident and certain of their gender were reported to have fully socially transitioned with the support of family, peers and school and it was suggested these young people should have access to legal gender recognition.
- 5.38 The majority of those who argued in favour of legal gender change for under 16s suggested this should be made possible with parental approval, sometimes noting precedents for this in other countries. Other respondents proposed such a right should be irrespective of parental agreement or did not reference such agreement.
- 5.39 With reference to a mechanism for those who do not have parental support, there were suggestions that it would be preferable for this to be an administrative process, although the possibility that a court process might be required was also acknowledged. A specific suggestion was that mediation and assessment of capacity¹⁷ should be made to determine if the young person understands the implications of their decision if they wish to legally change gender without parental consent.
- 5.40 Provision for under 16s to change their legal gender and amend their birth certificate was also argued to be in line with existing rights for this age group to change their sex on school records, medical records, and passports. Under 16s were argued to be particularly dependent on their birth certificate as proof of identity.

Providing information and support

- 5.41 It was suggested that accessible information on the meaning of legal gender recognition and the legal consequences of the statutory declaration must be made available to applicants, and that professionals involved in the process must explain the process to 16- and 17-years-old making a declaration. Signposting to areas of additional support was also suggested to be important.
- 5.42 Specialist Third Sector organisations were argued to be crucial in providing both practical and emotional support to young people – for example in relation to understanding their rights, making an application and managing

¹⁷ The capacity of a young person under 16 to consent to treatment 'if it is thought that they have enough intelligence, competence and understanding to fully appreciate what is involved in their treatment' is often described as being 'Gillick Competent'. The term refers to a House of Lords decision in [Gillick v West Norfolk & Wisbech Area Health Authority](#) which is binding in England and Wales. In Scotland, capacity to consent to medical, dental or surgical treatment is a matter for the Age of Legal Capacity (Scotland) Act 1991 section 2(4) - "A person under the age of 16 years shall have legal capacity to consent on his own behalf to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment."

the impacts of the application, and the Scottish Government was urged to ensure they are provided with funding.

Age should not be reduced to 16

5.43 In their further comments, a large majority of those who disagreed at Question 3 made it clear that they did not think that the age should be reduced at all. A small number who disagreed did so because they thought the age should be reduced to below 16 – a view which, as noted above, was also expressed by many of those who agreed the age should be reduced from 18 to 16.

Age of legal adulthood and other age-related restrictions

5.44 Some respondents simply stated a view that a 16-year-old is still a child, while others cited the UNCRC as defining children as those under 18 years of age. Statutory guidance supporting the Children and Young People (Scotland) Act 2014 was also noted to include children and young people up to the age of 18, as was the Named Person Scheme. Other situations where 16- and 17-year-olds would not be treated as adults were suggested to include NHS Paediatric Services and forthcoming Child Protection guidance.

5.45 As noted in paragraph 5.1, the consultation paper argues that reducing the threshold for legal gender recognition to 16 would be in line with a number of other areas where young people obtain rights at 16. However, many respondents who opposed an age reduction argued that the other decisions cited are reversible in a way that legal gender recognition does not appear to be.

5.46 Numerous activities that the state has decided are *not* appropriate for those under 18 were also reported by respondents including: getting a tattoo; buying alcohol or tobacco; signing a contract; placing a bet; getting a credit card; or hiring a sunbed. It was argued to be inconsistent that 16- and 17-year-olds should be barred from these activities on safeguarding grounds while permitted to change their legal gender and potentially set out on a pathway to life-long medication and body-altering surgery. Rather, legal recognition was argued to equate to legal 'affirmation' by the government. Other issues relating to affirmation are discussed further below.

Life stage

5.47 Respondents frequently argued that 16 is simply too young to legally change gender. Some of those taking this view referred to a lack of sufficient emotional maturity or life experience to support making such an important, apparently irreversible decision.

5.48 Some respondents commented that they were parents and that their own children do not have (or would not have had) the maturity to make such an important decision at 16. They pointed to the many pressures on young people – for example with respect to schoolwork and exams – arguing that it

would be wrong to introduce the possibility of legal gender change at such an important time.

- 5.49 An associated view was that young people may be susceptible to external pressures, from their peers, social media, pressure groups, or in school and that, while 16- and 17-year-olds may have sincere and strongly held views, they may also be at a life stage when those views might change.

Challenging gender stereotypes

- 5.50 Echoing comments at earlier questions, some respondents argued that the Scottish Government should be doing more to challenge gender stereotypes and that children and young people should be able to present as they wish, without needing or being encouraged to legally change their gender. Some of those taking this view extended their argument to suggest that materials relating to gender identity used in Scottish schools may be contributing to an increase in the number of children expressing a desire to change gender.

Possible consequences of an affirmation-based approach

- 5.51 It was reported that the UK Government has ordered an inquiry into a steep rise in the number of young girls expressing a desire to change gender¹⁸ and there were calls for the Scottish Government to investigate this phenomenon before proceeding with reforms to the 2004 Act. Respondents often suggested factors they thought to be contributing to the observed increase in presentations including:

- Social pressures (particularly on girls) from the internet and via social media, that may lead some to feel they would be happier as males.
- Homophobia – from society and sometimes internalised.
- Materials used for teaching on gender identity in schools, including the idea that gender change can be easy. Furthermore, young people are not being exposed to other perspectives about gender through such teaching materials.

- 5.52 It was also suggested that guidance provided to Scottish schools promotes unquestioning affirmation of the view of a child who thinks they are transgender, and that similar affirmation may come from clinicians.

¹⁸ In September 2018 it was reported that the Minister for Women and Equalities had ordered an inquiry into a steep rise in the number of young people being referred to gender identity clinics. It does not appear to have reported to date.

5.53 Some people who have detransitioned were reported to have felt let down by such an approach, and the judicial review case being brought against the Tavistock Clinic was often referenced,¹⁹ with a suggestion that this should give the Scottish Government pause for thought.

Ongoing physical and mental development

5.54 Respondents also noted that the teenage years can be difficult and confusing for many, and that hormonal and physical changes during puberty can lead some to feel uncomfortable with their bodies. Anxiety about body image or failure to conform to gender stereotypes was also suggested to be common. A small number of respondents described their own unhappiness as gender non-conforming teenagers, arguing that they might well have chosen to transition had the option been open to them, but are now sure they would have regretted such a decision.

5.55 A review of evidence on the development of cognitive and emotional maturity in adolescents carried out for the Scottish Sentencing Council²⁰ was highlighted by many respondents, as were associated proposals that sentencing young people should take account of evidence that the brain does not mature fully until at least 25.²¹ There were particular references to findings that:

- Areas of the brain controlling emotion develop before those determining cognitive ability and self-control, explaining increased risk-taking and emotionally driven behaviour in young people.
- Mental disorders and distress, adverse childhood experiences, traumatic brain injury and alcohol and substance use can also delay brain development.

5.56 In the light of these findings and a related Scottish Sentencing Council consultation on revised sentencing guidelines for young people,²² it was argued to be inconsistent for the Scottish Government to reduce the age at which legal gender recognition can be obtained from 18 to 16. Indeed, some

¹⁹ At the time of the consultation, permission had been given for a judicial review against the Tavistock and Portman NHS trust, which runs the UK's main gender identity development service for children. One of those bringing the action, Keira Bell, argued she should have been challenged more by medical staff over her decision to transition as a teenager. In Scotland the NHS Gender service for Children and Young People is the Young People's Gender Service at Sandyford, Glasgow - <https://www.ngicns.scot.nhs.uk/nhsservices/children-and-young-people/>

²⁰ The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts. Available at: <https://www.scottishsentencingcouncil.org.uk/media/2044/20200219-ssc-cognitive-maturity-literature-review.pdf>.

²¹ Available at: <https://www.scottishsentencingcouncil.org.uk/news-and-media/news/research-indicates-the-brain-does-not-fully-mature-until-you-are-at-least-25>

²² A Scottish Sentencing Council consultation on 'Sentencing young people' opened on 28 February 2020 and closed on 21 August 2020. The consultation paper is available at: https://consultations.scottishsentencingcouncil.org.uk/ssc/young-people/supporting_documents/Sentencing%20young%20people%20%20public%20consultation%20paper.pdf

respondents argued that the evidence on brain development would support raising rather than lowering the age.

Starting on a medicalised pathway

- 5.57 As noted previously, the consultation relates only to the process for legal gender recognition and, at Question 3, the age at which someone can do this. However, many respondents argued that young people can be set on a medicalised pathway leading from puberty-blocking drugs to surgery and that, once started, this course of events may be difficult to stop or reverse. Furthermore, some of the treatments used to delay puberty were reported as being experimental and there were also references to potentially harmful side effects in later life including on fertility and bone density. For some, this raised questions around the ability of a young person to give informed consent, as discussed below.
- 5.58 It was also argued that legal gender recognition at 16 will encourage some children to start to 'get ready' at an earlier age, pushing still younger children into making a decision about their gender identity. There was an associated concern about the potential for hormones to be taken at a younger age and for the increased use of chest binders.
- 5.59 Although the consultation paper notes that the draft Bill 'does not affect the professional responsibilities of those offering treatment and support to those distressed or concerned about their gender identity' some respondents argued that, in reality, the proposals could have a significant impact on clinicians and medical professionals. It was suggested clinicians may feel pressurised into prescribing medical treatment for a young person once they have a GRC when they might not otherwise feel that treatment is appropriate. It was also reported that former staff at the Tavistock Clinic have raised concerns that, under the existing system, teenagers are being given puberty blockers without adequate assessment.
- 5.60 Removing the requirement for a diagnosis of gender dysphoria was often seen as leaving young people without the appropriate professional support to make a life-changing decision. It was reported, for example, that a high but unexplained frequency of autistic young people, and particularly girls, are being referred to NHS gender clinics. The associated concern was that without being assessed for gender dysphoria, these young people may not get the specialist support they need.
- 5.61 As discussed more generally at Question 1, there was also a concern that if young people are not accessing the necessary services and/or are not having their needs fully assessed, physical or particularly mental health conditions, including eating disorders or depression, might not be picked up. There was also a concern that an opportunity to identify and provide support relating to trauma and abuse, including having been bullied or sexually abused, could be missed. Without all the factors that may be contributing to a young person presenting as trans being taken into account, it was argued that they will not

receive the help and support which should accompany such a significant change.

- 5.62 It was also argued that removal of the requirement for a medical diagnosis may enable or encourage young people to access cross-sex hormones from online sources, and take them without medical supervision.

Desistance and detransition

- 5.63 It was often stated that many young people who experience gender dysphoria as adolescents find that, given time, their dysphoria resolves without medical intervention. Some respondents argued this to be true in 'the vast majority' of cases, with figures of 80% and 80-90% also commonly reported.
- 5.64 Many of those desisting after earlier confusion regarding their gender were suggested to be gay or lesbian as adults, with an associated argument that setting such young people on a pathway to transition equates to a kind of conversion therapy.
- 5.65 There were calls for the Scottish Government to listen to the testimonies of people who have detransitioned before making it quicker and easier to change gender. Some respondents expressed frustration that the experience of this group of (predominantly) young people who have physically transitioned then decided to return to their 'natal sex' is apparently not being considered. It was argued that, collectively, the proposed changes are likely to lead to an increase in the number of young people who regret their transition.
- 5.66 Research from Sweden cited in the draft EQIA as showing low rates of detransition was argued to be out of date since it applies to the years from 1960-2010, before the current increase in the number of young women identifying as male and before the rise of social media.
- 5.67 The apparent lack of provision for detransition in the draft Bill is discussed at Question 4. This omission was seen as particularly significant for young people who, it was suggested, may be more likely than older people to apply for a GRC.

Informed consent

- 5.68 Although, as noted above, the draft Bill relates to obtaining a GRC and not to medical treatment, some respondents did raise issues relating to informed consent to treatment.
- 5.69 A number of respondents questioned the ability of children to give truly informed consent to medical treatments associated with gender change. This was suggested to be the case both because of the relative immaturity of the young people involved and because some of the drugs used to delay puberty have not been tested fully.

- 5.70 It was argued that, for many of the reasons discussed above, a young person of 16 or 17 may find it difficult to fully comprehend the implications of reduced bone density or infertility in later life, and that they should therefore be protected from making a decision they may come to regret. With respect to fertility, several respondents highlighted a contrast with reports that the NHS refuses requests for sterilisation from women in their twenties and thirties who have not had children because of the risk they may change their minds and regret the decision.
- 5.71 It was noted that the case against the Tavistock Clinic referenced above centres on the assertion that children and young people cannot consent to the life altering consequences of powerful and experimental hormone drugs.²³
- 5.72 Concerns were also raised with respect to the absence of any provision for parental consent for children aged 16 and 17 in the draft Bill and it was asserted that every other country mentioned in the consultation document makes additional requirements for young people seeking legal sex change, such as parental authorisation.

Rights of girls in schools

- 5.73 It was suggested that making it possible for a 16- or 17-year-old to legally change their gender will create practical problems for schools with respect to changing rooms, and in particular will create social pressure on girls to accept boys who identify as female in single-sex spaces.

Alternative proposals

- 5.74 A small number of respondents who opposed reduction in the age at which legal gender recognition can be sought suggested alternative arrangements that might be implemented. These included:
- Reducing either the age, or the time living in the acquired gender, but not both.
 - Reducing the age but retaining the requirement for a medical diagnosis.
 - Starting the process at 17 and reducing the total time to 12 months.
 - Counting the required period living in the acquired gender prior to application from the age of 16 and extending the period of reflection until 18.

²³ In December 2020 the High Court of England and Wales found against the Tavistock Clinic, concluding that it is highly unlikely that a child aged 13 or under would ever be Gillick competent to give consent to being treated with puberty blockers and that it is also very doubtful that 14- and 15-year-old children could understand the long-term risks and consequences of treatment in such a way as to have sufficient understanding to give consent. The judgement is available at <https://www.judiciary.uk/wp-content/uploads/2020/12/Bell-v-Tavistock-Judgment.pdf>. On 19 January 2021, the Tavistock and Portman NHS trust was granted leave to appeal the decision. It should be noted that the High Court decision does not extend to Scotland.

5.75 Among some respondents, particularly those who answered 'Don't know' at the closed question, there was a view that the age at which gender recognition can be sought should depend on the individual, or should be made on a case-by-case basis, including because the maturity of 16- and 17-year-olds can be very variable.

6. Other Issues

- 6.1 Respondents raised a diverse range of issues at Question 4, with the focus often on the case for changing or not changing the current system and the potential impact of the proposed changes on different groups of people. These overarching themes have been covered in Chapter 2.
- 6.2 It should be noted that, given this question's focus on other provisions of the draft Bill, the issues covered were most likely to have been raised by respondents who either supported the general principles underpinning the draft Gender Recognition Reform (Scotland) Bill or who supported change but thought that the draft Bill falls short in terms of creating a simpler, more inclusive approach. These respondents were more likely to comment on the detail of how any new system should work than those who opposed the changes.

Q4: Do you have any other comments on the provisions of the draft Bill?

- 6.3 Around 11,900 respondents made a comment at Question 4.

Non-binary and other gender identities

- 6.4 A key theme of many of the comments at Question 4 was that the provisions should be extended to non-binary people. This was frequently connected to a view that the reforms cannot be considered a success, inclusive of the whole trans community or a victory for equality, unless it covers non-binary people. There were also calls for the draft Bill to be inclusive of people who are gender fluid, genderqueer, agender or with other gender identities.
- 6.5 In support of those who are non-binary or who have other gender identities being covered by the reforms, it was suggested that the same principles apply to improving legislative equality for this population, including around safeguarding their wellbeing, and improving social acceptance and understanding. There were reports of some challenges faced currently by those who are non-binary, with a number of these coming from respondents who explained that they identify as non-binary. These challenges included in relation to accessing health, education and other public services and having to submit documentation, including birth certificates and other official documents, that are inconsistent with their lived identity.
- 6.6 Some noted that they were particularly disappointed that the current proposals do not cover non-binary identities since a clear majority of respondents to the 2018 consultation on Review of the Gender Recognition Act 2004 thought that Scotland should take action to recognise non-binary people.²⁴

²⁴ The consultation analysis is available at: <https://www.gov.scot/publications/review-gender-recognition-act-2004-analysis-responses-public-consultation-exercise-report/>

- 6.7 It was also suggested that extending the provision of the draft Bill to include non-binary people would be in keeping with the Council of Europe Resolution 2048 which called on member states to ‘consider including a third gender option in identity documents for those who seek it.’ It was noted that many other countries already allow for the legal recognition of non-binary identities through ‘X’ markers in official documentation, with Australia, Canada, Denmark, India, Nepal, New Zealand and Pakistan among the countries cited.
- 6.8 Whilst it was acknowledged that introducing non-binary recognition would be more complex than the proposed reforms covering binary trans people, it was also suggested that wider and more comprehensive measures to recognise non-binary people need to be supported by full legal gender recognition.

Ordinarily resident in Scotland

- 6.9 The draft Bill sets out that in order to apply for a GRC, applicants must either (a) have been born or adopted in Scotland or (b) be ordinarily resident in Scotland.
- 6.10 In addition to queries as to what is meant by ordinarily resident in Scotland, there were also concerns about who might be prevented from applying for a GRC because of this requirement. Particular groups identified, and who those raising this issue generally felt should be able to apply for a GRC, included:
- Asylum seekers and refugees. It was suggested that trans refugees or those seeking asylum in Scotland may be doing so to escape transphobic discrimination and violence in their country of origin, where they may not have had access to legal gender recognition. Clarification was sought as to whether asylum seekers and refugees would meet the conditions, including while their application for the right to remain is ongoing.
 - Those who have come to Scotland to study.
- 6.11 It was also suggested that those moving to Scotland may wish to have their gender legally recognised upon their arrival, and therefore wish to apply before they have become resident in Scotland and that the removal of the 3 month reflection period (as discussed at Question 2) would help facilitate this.
- 6.12 However, there was also a concern that if it were possible to apply for a GRC without having been resident for a period of time, some people, and particularly younger people, could make a hasty decision, potentially without thinking through the implications of that decision in the longer term. This included a concern about how any decision, for example when in Scotland to study, could affect their future if they move away from Scotland.
- 6.13 There were also occasional concerns that without appropriate restrictions being in place, Scotland could become a gender tourism destination, particularly for residents of England, Wales or Northern Ireland. The concern

was that people might visit and stay in Scotland for a short while only in order to obtain a GRC.

Other jurisdictions

- 6.14 On a similar theme, there were questions about whether sufficient consideration has been given to potential UK-wide effects of the proposed legislation.²⁵ It was reported, for example, that different cross-border arrangements could mean that people born in Scotland and living in other parts of the UK could obtain a Scottish GRC based on declaration, or that people could also qualify by moving to Scotland for a relatively short period.
- 6.15 There was support for the provisions that have been made within the draft Bill for those who have obtained overseas gender recognition and it was suggested that a statutory declaration-based system would enable a proportion of those who have obtained gender recognition outwith the UK to have their gender identity automatically recognised in Scotland. However, there was some disappointment at the suggestion that recognising trans young people under 16 and non-binary people who had obtained legal gender recognition overseas might be deemed 'manifestly contrary to public policy'.²⁶

Protected information and privacy

- 6.16 Section 22(1) of the draft Bill makes it a criminal offence for a person who has acquired 'protected information' in an 'official capacity' to disclose the information to any other person.²⁷ There are a variety of exceptions in section 22 and the Scottish Government have suggested that they may introduce additional exceptions.
- 6.17 Those who commented on this issue generally thought that additional exceptions to section 22 are not needed. Upholding trans peoples' privacy was described as a key principle of a legal recognition process, with additional exceptions having the potential to undermine this.
- 6.18 The Human Resources-related example given in the consultation paper²⁸ was a cause of some concern and was seen as green-lighting a serious

²⁵ As noted in Chapter 1, responses were submitted prior to the UK Government's September 2020 announcement that it would not be proceeding with reforms to the gender recognition legislation that applies in England and Wales.

²⁶ As per section 8N(2) of the Bill.

²⁷ 'Protected information' means information which relates to a person who has made an application for a GRC and which concerns that application or, if the application is granted, 'otherwise concerns the person's gender before it becomes the acquired gender'.

²⁸ The example was that some people in an organisation, such as in its HR department, may know about a person's trans history but those taking the decisions on staff deployment, such as line managers, may not. The consultation paper suggested that 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.

invasion of privacy. It was described as unnecessary and unjustifiable, as representing the type of situation which could lead to a trans person being harassed and humiliated in the workplace, and as an example of why many trans people experience difficulties in securing and sustaining employment.

- 6.19 However, there was also a concern that consideration may not have been given to whether the section 22 privacy provisions might be attractive to anyone wishing to conceal aspects of their past, including in relation to criminal convictions, and whether the provision could actually provide an incentive to apply for a GRC.
- 6.20 Another concern was that the proposed changes would be likely to result in trans people whose birth sex remains recognisable receiving a GRC, along with people who do not intend to undergo any physical change as part of their transition. It was argued that the section 22 provisions were put in place to protect the privacy of those whose transition would otherwise not be obvious and there was a query as to how they would be expected to operate when this was not the case.

Spousal veto and interim GRCs

- 6.21 The draft Bill provides that an application for a GRC must include a statutory declaration by the applicant as to whether the applicant is married or in a civil partnership.²⁹ As per amendments set out in the Marriage and Civil Partnership (Scotland) Act 2014, there would be no requirement for spousal consent to an application, and applicants in Scotland could not ultimately be blocked by their partner from obtaining gender recognition.
- 6.22 However, as at present, the Registrar General would be required to grant an interim gender recognition certificate, as opposed to a full certificate, to applicants who are parties to a marriage or civil partnership but where the spouse or civil partner does not wish the marriage or civil partnership to continue after the issue of a full certificate. Within 6 months of the issue of the interim certificate, the applicant would be able to apply to the sheriff for a full certificate, which the sheriff would be required to issue so long as circumstances had not changed.
- 6.23 While some expressed support for there being no final requirement for spousal consent, others felt that the proposed arrangements regarding interim GRCs would leave a version of spousal veto in place and that this is unacceptable.
- 6.24 Others had a very different perspective and were concerned that under the existing and, based on the current proposals, continuing arrangements a

²⁹ Where the applicant is married or in a civil partnership, they must include a statutory declaration as to whether or not they wish the marriage or the civil partnership to continue after the issue of a full GRC and either a statutory declaration by their spouse or civil partner that they wish the marriage or civil partnership to continue after the issue of a full GRC or a statutory declaration by the applicant that no such declaration by the spouse or civil partner is included.

spouse would no longer be able to prevent their trans spouse from having their new gender recognised and could find themselves, for example, trapped against their will in a same-sex marriage when they themselves are heterosexual.

‘A person who has an interest in a gender recognition certificate’

- 6.25 Section 8 of the draft Bill enables a ‘person who has an interest in a gender recognition certificate’ to apply to the sheriff to have the certificate revoked on the grounds of the applicant being incapable of understanding the effect of obtaining the certificate or incapable of making the application.
- 6.26 There was a call for greater clarity about who ‘a person who has an interest’ might be, sometimes connected to a concern that the provision could be used to make frivolous or vexatious applications to the sheriff to revoke a trans person’s GRC. Examples given included that of an unsupportive family member, or former spouse, who might seek to cause difficulties for a trans person who they would prefer had not obtained legal gender recognition.

Offence of making false declaration or application

- 6.27 The draft Bill would make it a criminal offence to make a false statutory declaration in relation to gender recognition and to make a false application for gender recognition.³⁰ Those commenting on this aspect of the proposals included those who supported a move to a statutory declaration-based system and those who did not, with these comments sometimes connected with whether an individual with a GRC would be able to have it revoked under certain circumstances (as discussed at Question 2).
- 6.28 It was noted that it is already a criminal offence to knowingly make a false statutory declaration³¹ and there was an associated query as to why any further or specific provision – as presented at section 22A(1) of the draft Bill – would be required.
- 6.29 However, there was some support for the provision at section 22A(2) which creates an offence of including any other information that is false in a material particular in an application for a GRC.³² This was because, unlike for the statutory declaration, there may not otherwise be a broader offence that would apply.
- 6.30 For others the focus was on whether the provision would effectively criminalise a person who has been granted a GRC but who subsequently wishes to reverse their gender recognition. There was also a concern that the creation of a new offence would have a stigmatising effect on those who are

³⁰ Section 22A(1) of the Bill would create an additional offence for knowingly making a statutory declaration in relation to an application for gender recognition that is false in a material particular.

³¹ Under the Criminal Law (Consolidation) (Scotland) Act 1995.

³² Something may be considered to be a material particular if it is a matter of significance and not trivial or inconsequential to the outcome of a case.

already a marginalised community and that the threat of, or anxiety about, being criminalised could act as a considerable deterrent, particularly to young people, who wish to legally change their gender. Other concerns raised included that:

- It is unclear how it can be proven that someone has abused the process and equally who is harmed in the event that someone wishes to reverse their gender recognition.
- Having an additional offence may facilitate harassment of trans people, with a significant risk of trans people being accused maliciously by anti-trans individuals or groups.
- It would be particularly inappropriate to criminalise non-binary people who have no malicious intent but are simply trying to find a more bearable way of living whilst waiting for legal non-binary recognition.

Application fee

6.31 The Bill makes provision for the Registrar General to charge fees for applications.

6.32 Concerns raised about the financial resources required to go through the current GRC application process were noted at Chapter 3. In addition to these more general concerns, there were also references specifically to the current £140 fee.³³ It was reported that the current fee is significantly higher than for other comparable applications, such as when registering a birth, and some spoke of the challenges they themselves had experienced in raising the required fee or explained that the current fee was a barrier to them being able to apply for a GRC.

6.33 The consultation paper's reference to there being a consultation on the level of any fee should the draft Bill be enacted was welcomed, as was the intimation that any fee would be likely to be considerably lower than £140, as the proposed system does not require there to be a tribunal.

6.34 Further comments included that it will be important that any fee is set at a level where it does not become a barrier to application, particularly for those from socio-economically disadvantaged backgrounds and it was suggested that any proposed fee structure should be Equality Impact Assessed. Others were clear that no fee should be payable, including to ensure that trans people cannot be priced out of accessing legal gender recognition.

³³ As previously stated, the responses analysed here were submitted prior to the UK Government's September 2020 announcement on gender recognition reform. From 4 May 2021, the fee for applying for gender recognition was reduced from £140 to £5 in terms of the [Civil Proceedings and Gender Recognition Application Fees \(Amendment\) Order 2021](#).

7. Impact Assessments

- 7.1 The fifth and final question covered the draft Impact Assessments. In line with its usual practice, the Scottish Government would produce final versions of these impact assessments for the Bill once it is introduced into Parliament.
- 7.2 The draft impact assessments that have been produced are:
- Business and Regulatory Impact Assessment (BRIA);
 - Child Rights and Wellbeing Impact Assessment (CRWIA);
 - Fairer Scotland Duty Assessment (FSDA);
 - Data Protection Impact Assessment (DPIA); and
 - Equality Impact Assessment (EQIA).

Q5: Do you have any other comments on the provisions of the draft Impact Assessments?

- 7.3 Around 8,600 respondents made a comment at Question 5.
- 7.4 It should be noted that some respondents submitted extensive and detailed answers at Question 5 and that these can only be summarised briefly in a report of this nature. However, all responses are available in their entirety to the policy team at the Scottish Government.
- 7.5 Most respondents either made broad, general observations about the impact of the proposals or on the suite of assessments. More specific comments tended to be focused either on the EQIA and/or the CRWIA, or the impacts on people with characteristics covered by those assessments.

General observations

Those broadly in support of a statutory declaration-based system

- 7.6 The comments of those who broadly supported a statutory declaration-based system tended to be brief, often simply expressing the view that allowing trans people to obtain a GRC more easily would not affect any other person or groups of people.
- 7.7 This was sometimes connected with general statements that they agreed with the draft impact assessments or that they considered them to be good and/or comprehensive.

Those broadly opposed to a statutory declaration-based system

- 7.8 Many respondents who were broadly opposed to a statutory declaration-based system argued that the impact assessments are not thorough, comprehensive or evidence-based and that they are inadequate and not fit-for-purpose.

- 7.9 Concerns were raised in respect of evidence that the Scottish Government has failed to consider during the impact assessment process. This was sometimes voiced in terms of specific information that respondents felt had been overlooked or excluded, and sometimes a more general sense that one side of the debate is being listened to while the other is not.
- 7.10 Specific suggestions were that the Scottish Government is:
- Not listening to Women's Groups that have voiced specific concerns with respect to proposed reforms to the 2004 Act.
 - Relying on the opinions of a small number of women's sector charities to inform policy.
 - Failing to consider differing views within the trans community.
- 7.11 It was suggested that the impact assessments include a large number of studies referencing groups that are supportive of GRA reform, without similar weight being given to studies offering alternative perspectives. On a related point it was argued there is no acknowledgment that much of the academic literature arises from the work of researchers who support self-declaration in principle, while funding opportunities for work coming from other perspectives are much more limited. It was also suggested that the Scottish Government should commission independent research into trans issues.
- 7.12 Specifically, it was suggested the EQIA overlooks evidence produced by grassroots women's groups, documenting the fears of women who have experienced domestic and sexual violence at the hands of men, about sharing space with trans women, and the potential for women's self-exclusion from women-only spaces that include trans women.
- 7.13 One Women's Group respondent reported an FOI request which showed that, although a literature search carried out by the Scottish Government Library listed a number of their own publications under a heading 'The following results may be particularly relevant', none of these were quoted in the EQIA or listed in the references.
- 7.14 Other evidence that respondents thought had been overlooked included:
- Contributions of a former prison governor with respect to the presence of trans women in women's prisons.
 - Cases in Scotland, the UK and elsewhere in the world where self-identified trans women who retain male anatomy have sought to abuse single-sex spaces.
- 7.15 The nature of some of the research that *is* cited in the impact assessments was also highlighted, with two papers suggested to draw analogies that many found to be offensive.³⁴ In addition, a paper addressing harm done to female

³⁴ Dunne, P., 2017. (Trans)forming single gender services and communal accommodations. *Social and Legal Studies*, 26(5): 537- 561 and Eckes, S., 2017. The restroom and locker room wars: Where to pee or not to pee. *Journal of LGBT Youth*, 14(3): 247-265.

survivors of male violence when they are denied a female-only therapeutic environment was argued to have been misrepresented.

EQIA

Those broadly in support of a statutory declaration-based system

- 7.16 Those broadly supporting a statutory declaration-based system tended not to make wider observations on the EQIA beyond those made about the impact assessments overall; they sometimes suggested that the EQIA is good, comprehensive and correctly identifies that the proposals will not have a detrimental impact on anyone's rights.
- 7.17 It was also reported that, according to the Equality and Human Rights Commission, the regulatory body responsible for enforcing the Equality Act, the proposed changes will not affect the operation of the Equality Act 2010, including in relation to single-sex and separate-sex services (discussed further below).

Those broadly opposed to a statutory declaration-based system

- 7.18 However, those broadly opposed to a statutory declaration-based system raised particular concerns about the assessment of impact on the protected characteristics of sex and sexual orientation in respect of women and girls, with many respondents disputing the EQIA's conclusion that women will not be affected negatively by the proposed changes. In addition to women's physical and psychological safety, it was argued that privacy and dignity must also be protected.
- 7.19 It was suggested that the EQIA does not engage systematically with questions on the implications of reform of the 2004 Act for operation of the Equality Act and does not clearly set out the evidence that the Scottish Government has considered in coming to the conclusion that there is no negative impact on women's equality and rights.
- 7.20 One perspective was that in the absence of the further information set out in Chapter 5 of the consultation paper, the draft EQIA would be insufficient.

Sex

Those broadly in support of a statutory declaration-based system

- 7.21 Very much in line with more general observations that the reforms would not have a negative impact on any groups of people, many respondents who broadly supported a statutory declaration-based system expressly stated that they did not believe the proposed changes would have a negative impact on women and girls. This was sometimes connected with welcoming the conclusion of the draft EQIA that the policy is not expected to impact on men and women in different ways.
- 7.22 Some of those taking this view highlighted that they were women, sometimes also commenting that they were feminists, cis women, lesbians, or mothers

for example, and that they had no concerns that the proposals would have a negative impact on them. They sometimes referred specifically to not being concerned with regard to single-sex spaces, including having no concerns that trans women in single-sex spaces would present a threat to their safety. Some referred to their own experiences of having shared workplaces, changing rooms or public toilets with trans women, and having never felt anything other than comfortable. It was suggested that any suggestion that trans people, and trans women in particular, are a threat to cis women is absurd and not supported by robust evidence.

- 7.23 Further comments on access to single-sex spaces and facilities, such as toilets, changing rooms, and women-only services, included that nobody is currently required to show a birth certificate to prove their eligibility for these spaces or services. It was suggested that this will not change and that much of the women's sector in Scotland has been including trans women in their women's services for a decade, with no reported difficulties. It was reported that these services operate under what is, in effect, a self-identification model and have stated that the proposed reforms will not mean they have to alter their services.
- 7.24 It was also noted that the Equality Act 2010 allows organisations to apply exemptions from their services on the grounds of 'proportionate risk' to these services. Risks that women and children's safety might be compromised, for example, could continue to be addressed using Equality Act exemption provisions, where these organisations consider it necessary.
- 7.25 The Scottish Government's commitment to develop guidelines for policymakers and service providers to ensure that the rights of women and trans people can be collectively realised was welcomed. It was requested that guidance should be provided on how to comply with the Equality Act 2010, and how to apply the exemption rule in practical terms on the day-to-day running of services. One suggestion was that the expertise of women's organisations is used to develop and lead on guidance and information dissemination on the application of the Gender Recognition Act and Equality Act provisions in creating safe spaces for children and women, using the model of self-identification that has worked effectively for many years.
- 7.26 Finally, and reflecting the views expressed at Question 4, it was considered that there will be a significant negative impact on non-binary people if they are not covered by the reforms.

Those broadly opposed to a statutory declaration-based system

- 7.27 Those broadly opposed to a statutory declaration-based system tended very strongly to a different view. With respect to sex in particular it was suggested that the draft EQIA:
- Fails to produce any evidence to support the Scottish Government's view that the proposed changes will not have a negative impact on women and girls, women-only spaces and services. If the Scottish

Government wishes to weaken existing protections for single-sex spaces and services, it was argued that the burden of proof is on the Government to produce robust evidence that the change will not reduce privacy, dignity and safety for women.

- Fails to analyse potential impacts arising from the likelihood that a GRC will enhance a person's legal rights of access to single-sex provision and the likely increase in both the number and the range of people who have a GRC.
- Fails to consider psychological harm perpetrated on women by the presence of someone who is male-bodied.
- Fails to consider impacts on lesbians and gay men, including by the erosion of understandings and provisions based on same-sex, not same-gender, attraction.

7.28 The Scottish Government's view that there is lack of evidence that including trans women in women-only services and spaces has negative impacts was challenged. Points raised included that:

- There is a lack of any evidence around the actual experienced impacts of trans inclusion in services.
- Absence of evidence is taken to mean evidence of absence and there is no acknowledgement that data is not gathered in a way which would allow the issues it raises to be examined.
- The suggestion that 'lack of evidence around the actual experienced impacts of trans inclusion' is supported by the Gottschalk paper mentioned in the EQIA was disputed since, it was suggested, the author draws the opposite conclusion to that reached by the Scottish Government.³⁵

7.29 With respect to crime and the potential impact on the prison system it was argued that, since any crimes committed by trans women are now recorded as women's crime, it is impossible to find evidence within available data that trans women still pose a male level of risk towards women and girls. Under a declaration-based system, it was suggested crimes committed by non-trans men masquerading as being trans would also be recorded as women's crime.

7.30 It was argued that the EQIA:

- Offers no evidence to support the assertion that trans women who have undergone no physical changes depart from male pattern offending.
- Fails to reference a large-scale Swedish study that compares levels of criminal convictions, including for violent offending, for women, men, fully surgically transitioned trans women and fully surgically transitioned trans men.

³⁵ Gottschalk, L., 2009. Transgendering women's space: A feminist analysis of perspectives from Australian women's services. *Women's Studies International Forum*, 32(3): 167-178.

- Overlooks cases in Scotland, the UK and elsewhere where males have self-identified as women and sought to abuse single-sex spaces. Several specific examples were cited.
- Ignores the contributions of a former prison governor, as noted above.

7.31 With respect to operation of the single-sex exemptions available under paragraph 28 of schedule 3 of the Equality Act it was argued that, once a person has changed their birth certificate, there is no way for an organisation to distinguish between those who were or were not born female. Further, it was suggested that organisations may worry about their right to ask if a person holds a GRC, and it was noted that it will not be an offence for a person to make a misleading statement about their own GRC status.

7.32 A requirement that organisations in receipt of Government funding (for example through the Equally Safe Fund) must have trans inclusion policies in place was suggested to have implications in that:

- It may fetter the discretion of funding recipients to invoke single-sex exceptions under the Equality Act 2010.
- A requirement to provide evidence of trans inclusion policies does not require corresponding evidence of how providers will seek to implement those policies without harming female service users.

7.33 It was also argued that the EQIA should include evidence from both front-line workers and users of women's facilities – such as rape crisis centres – not just from those who run such services.

7.34 There was a concern that leaving the decision on admission to women's refuges to an individual operator to 'risk assess' risks failing to protect vulnerable women.

7.35 There was also a concern that evidence from several Women's Organisations about the potential for women's self-exclusion from specialist and mainstream women-only spaces and services, should they include trans women, has been overlooked. While it was acknowledged that the type of survey approach used to gather this evidence is not statistically representative, the same point was made with respect to Government consultations.

7.36 A number of examples were given of situations where women may self-exclude rather than share a space with a male bodied person. These included:

- Female survivors of male sexual violence who feel forced to self-exclude when a rape crisis service cannot guarantee a female-only therapeutic environment.
- Effects on minority groups – for example Muslim women who do not feel comfortable in certain spaces where biological males are present.
- Self-exclusion from gyms and from lesbian groups.

- 7.37 Difficulties in using disaggregated data to distinguish offences committed by women and trans women were noted above. It was also noted that the EQIA makes no mention of other potential consequences of collecting gender-sensitive sex-disaggregated data, including with reference to the gender pay gap.
- 7.38 Given that the Scottish Government has established a working group on sex and gender in data, it was suggested the remit of that group and any relevant findings should have been published before consulting on gender recognition.

Age

Those broadly in support of a statutory declaration-based system

- 7.39 Some of the comments relating to the protected characteristic of age focused on older people, including welcoming the EQIA's conclusion that the proposals will advance equality of opportunity for older people, in particular those who have been living in their acquired gender for a longer period and may not have access to the evidence required to apply to the GRP. Specifically, it was reported that people who transitioned before the 2004 Act was passed may not have kept records of their medical treatment and so would not be able to provide the record of diagnosis of gender dysphoria required under the current system.
- 7.40 Other comments included that trans people who are approaching end of life may wish to obtain legal gender recognition to ensure their gender is correctly recorded on their death certificate and this could be considered to be of particular benefit to older trans people.
- 7.41 Issues that were raised with specific reference to the EQIA included that younger people, in particular 16-18 year olds, may face particular barriers when applying for legal gender recognition because they feel constrained by their engagement with the education system.
- 7.42 Also in relation to younger people, and as covered at Question 3, there were calls to extend legal gender recognition to under 16s.

Those broadly opposed to a statutory declaration-based system

- 7.43 However, a concern was raised that the evidence cited in the EQIA (regarding a Swedish sample of six older trans people) is so small as to be unrepresentative and therefore unhelpful in informing large-scale policy decisions.
- 7.44 It was also reported that figures show that trans men are over-represented in middle age and trans women are over-represented in younger age groups; there was a query as to why this is the case and whether any research is being carried out.
- 7.45 Also with regard to younger people, it was suggested that the EQIA does not consider:

- Why high numbers of autistic girls are identifying as trans.
- Why there has been a significant increase in the number of girls identifying as trans.
- The relationship between age and detransition rates and why there is no information or research on this issue.

7.46 Finally, any suggestion that the proposed reforms will promote good relations among and between different age groups was seen as unconvincing.

Disability

7.47 A general comment was that the impact assessment has failed to make any reference to non-trans people with disabilities. The associated concern was that this means the impact on disability provision, for example if the reforms result in an increased user base of unisex disabled facilities such as changing rooms and public toilets, has been ignored.

Those broadly in support of a statutory declaration-based system

7.48 A number of the other disability-related comments focused on mental health and included support for the draft EQIA's recognition that having legal gender recognition with consistent documentation could have a positive impact on a trans person's mental health. An LGBT group respondent suggested that this is consistent with findings from their own research that trans people were disproportionately affected by mental health issues. It was suggested that, while the mental health inequalities faced by the trans population are not solely related to legal gender recognition, being able to access this without being subject to a distressing, humiliating process should boost wellbeing.

7.49 With regard to learning disabilities, the EQIA's reference to considering the need for clear and straightforward guidance for people with learning disabilities was welcomed and more generally it was suggested that the information given by the Registrar General should be made available in an accessible format for all applicants.

7.50 In relation to autism, the relevance of the evidence that has been cited in the EQIA with regards to the prevalence of autistic spectrum conditions within the trans population was questioned.

Those broadly opposed to a statutory declaration-based system

7.51 Other comments addressing mental health raised concerns or queries about the wider body of evidence available, or the coverage in the EQIA including that:

- There are limited studies on mental health after transition. There was a query at why this is the case, and it was reported that a former member of staff from the Tavistock clinic has stated that the data and studies do not show that a child who transitions can expect higher levels of psychological health and life satisfaction.

- Very much reflecting some of the concerns raised in relation to age, the ‘data gaps identified’ section does not cover the absence of evidence relating to young women and co-morbidities and specifically in relation to depression/anxiety, anorexia and autism.

7.52 Other comments about autism included that the coverage in the EQIA is not fit for purpose. It was suggested that the evidence reported seems thin, with weak conclusions being drawn from a lack of evidence, rather than leading to a conclusion that further research is needed.

7.53 There was a specific suggestion that the Gender Identity Development Service holds information on a higher prevalence of autistic spectrum conditions in clinically referred gender dysphoric adolescents than in the general adolescent population. This clinical observation was reported to have been reiterated in the wider international literature and it was argued to require further study.

Gender reassignment

There were relatively few comments which directly addressed the coverage of gender reassignment within the EQIA.

Those broadly in support of a statutory declaration-based system

7.54 Points raised in relation to the EQIA’s coverage of gender reassignment included that:

- As noted in relation to the protected characteristic of sex, non-binary people will continue to be unable to access legal recognition of their gender. As at Question 4, it was suggested that without their inclusion, the policy cannot be said to have a positive impact in advancing equality of opportunity for the whole trans community.
- Similarly, and as covered at Question 3, there were calls to extend legal gender recognition to under 16s.

Those broadly opposed to a statutory declaration-based system

7.55 Those broadly opposed to a statutory declaration-based system tended to focus on regret and/or detransition.

7.56 There was a query as to the relevance of the evidence cited as to the level of regret associated with transitioning, particularly the evidence on regrets associated with medical interventions.

7.57 Others were concerned either about a lack of evidence, or that the evidence which is available has not been fully considered when developing the proposals. Issues raised were sometimes similar to those covered above in relation to mental health and included that the draft EQIA cites a large study in which 12% of transgender people who had undergone physical changes related to transitioning regretted them, while 43% regretted social changes

they had made. It was also noted that suicide among transgender individuals is substantially elevated and regrets are a commonly cited reason for suicide.

- 7.58 There was an associated concern that the draft EQIA gives minimal coverage to regret and detransition and that, as suggested previously, insufficient research has been done, including in relation to the impact a change to a statutory declaration-based system may have.
- 7.59 It was also suggested that there has been a lack of engagement with people who have detransitioned in the impact assessments and that their views should be acknowledged and considered.

Race

- 7.60 Comments in relation to race were very limited but included that the provisions relating to being 'ordinarily resident' in Scotland in order to apply for legal gender recognition need to be considered in the context of race being a protected characteristic.
- 7.61 It was also noted that the 'data gaps identified' section is blank and that this seems surprising.

Pregnancy and maternity

- 7.62 The limited number of comments that were made tended to focus on the need to consider the impact of the proposals on pregnancy and maternity and a perception and concern that the Scottish Government has not done so.

Those broadly in support of a statutory declaration-based system

- 7.63 Further comments included the suggestion that the existing position of designating the birth parent as a 'mother' could have a negative impact on people originally assigned female. The associated concern was that they may delay attempting to gestate a child and / or applying for legal gender recognition due to the lack of opportunity to register as 'parent' instead of 'mother'.
- 7.64 It was suggested that the Cross-Party Group on Sexual Health and Blood Borne Viruses should be consulted, including with reference to recently carried out research into trans healthcare and reproductive health.

Those broadly opposed to a statutory declaration-based system

- 7.65 From an alternative perspective, there were concerns that a trend whereby female-to-male trans people are keeping their wombs and declaring themselves to be 'pregnant men', and campaigning to be recognised as 'fathers', could be enshrined in policy and legislation; this was seen as automatically opening the door to discrimination against pregnant women and mothers. It was also suggested that the proposals would be very likely to lead to public sector bodies in Scotland changing their language to talk of 'pregnant people' so as to avoid litigation from trans activists.

Religion or Belief

Those broadly opposed to a statutory declaration-based system

- 7.66 It was argued that the EQIA should include a more explicit statement in relation to the protection of religion in respect of (for example) the freedom of conscience of healthcare workers and the freedom of parents and of schools to teach in accordance with their religious and ethical views.
- 7.67 It was suggested that the Scottish Government's proposals would enshrine belief in a person's right to self-determination in the public sector, setting up conflict with anybody whose religion or belief opposes this.
- 7.68 This was sometimes connected with a perception that some protected characteristics are seen as more important than others, and that the views of many people of faith, and of faith groups, have been side-lined.
- 7.69 There was disappointment that fuller consideration has not been given to the effect of a declaration-based system on communities of faith, including the evangelical community who, it was reported, would not recognise the term 'gender identity' as it is used in the consultation.
- 7.70 It was suggested the EQIA fails to recognise the potential impacts in respect of:
- Religious gatherings, meetings, trips and holidays that currently segregate on the basis of sex.
 - Ministers of religion and the administration of religious services and/or rites; and
 - The potential impact of these proposals upon the efficacy of existing religious exemptions.

CRWIA

- 7.71 Many of the comments relating specifically to the CRWIA covered similar themes to those already raised in relation to the EQIA, and in relation to the protected characteristics of sex, age, disability and gender reassignment in particular. Many of the comments also returned to issues already set out in the analysis at Question 3.

Those broadly in support of a statutory declaration-based system

- 7.72 Comments by those broadly supporting a statutory declaration-based system included that the evidence presented is robust and helpful and that the proposal to extend legal gender recognition to 16- and 17-year olds can be seen as a reasoned response to the available evidence.

- 7.73 Another theme, as at Question 3, was in relation to under 16s. Comments included that, based on the information included in the CRWIA, it is unclear why a decision to extend legal gender recognition to those under 16 has not been taken. Specifically, it was noted that:
- In making the case for reducing the minimum age to 16, consideration is given to 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; these rights based arguments apply equally to under 16s.
 - The current impact assessment references evidence within the partial CRWIA completed for the 2018 consultation, but this evidence largely focuses on whether children experiencing some incongruence with their assigned gender would continue to experience this into adulthood, rather than focusing on children and young people who are confident of their gender.
- 7.74 The assertion that, due to puberty, children and young people may not be 'clear' about gender or sexuality was challenged. It was noted, for example, that young people going through puberty are already able to make significant decisions under Scots Law including instructing a lawyer from age 12. Further, it was suggested that sexuality is not a factor that should be considered in relation to legal recognition of gender.
- 7.75 Finally, it was suggested that the CRWIA does not sufficiently address the impact that lack of legal gender recognition will continue to have on under 16s. It was reported that children and young people sometimes have to present their birth certificate as proof of identification, and that being required to produce their unchanged birth certificate would mean they are placed at unnecessary risk of transphobic discrimination.

Those broadly opposed to a statutory declaration-based system

- 7.76 Additional issues raised by those broadly opposed to a statutory declaration-based system included that the CRWIA does not consider the impact of the proposals on children other than those seeking to change their gender legally. It was suggested that a study of the impact on all other children is required.
- 7.77 There were also queries as to the relevance of some of the research that has been cited. These included that:
- Rebeca Robles et al "Removing transgender identity from the classification of mental disorders: a Mexican field study for ICD-11 is a study of adult transsexuals in Mexico City, mostly born male, mostly sex workers. It has no relevance to Scottish children who identify as trans, many of whom are female.
 - Dhejne C et al "Mental Health and gender dysphoria: A review of the literature (2016) is not a review of research about children or adolescents, it is about adults.

- 7.78 It was suggested that only research relevant to children and young people in Scotland should have been cited.
- 7.79 Other issues included that:
- There seems to be an assumption that mental health issues are related to discrimination, but no evidence is presented to support this. More research is needed into the causes of mental health problems, especially among young people.
 - The CRWIA implies that puberty, rather than gender dysphoria, is a disorder. This needs to be corrected.
 - Accepting that there will not yet be a big pool of experience of those who have transitioned as children, it is nevertheless important to consider the impact on those who transitioned or began transitioning as children, and in particular the impact of medical and especially surgical treatment.
- 7.80 There were also concerns that the CRWIA downplays parental rights and that Gillick Competence³⁶ is not covered explicitly, which was seen as an omission.
- 7.81 The inclusion of references to Article 8 of the UNCRC, framed to suggest that the ‘right to an identity’ applies to the right to a gender identity, was considered highly controversial. It was reported to be clear that the original drafting (about name and nationality, religion, culture and language for example) had no such provision in mind.

Other assessments

- 7.82 There were only very limited comments about the other draft impact assessments.
- 7.83 On the draft FSDA, these included that it is welcome that the assessment recognises that the trans population may experience greater socio-economic disadvantage when compared with the general population, and that a reduction in the application fee would have a broadly positive impact. There was an associated recommendation that the Scottish Government should proceed with the option (Option A) for the Registrar General not to charge a fee.
- 7.84 The lack of robust data on trans people in the workplace in Scotland was noted, with the introduction of a ‘trans status’ question for the 2021 Census welcomed.³⁷ It was suggested that the Scottish Government should gather

³⁶ ‘Gillick Competence’ is a test of capacity in English and Welsh law. In Scotland, capacity to consider to medical, dental or surgical treatment is a matter for the Age of Legal Capacity (Scotland) Act 1991 section 2(4)- “A person under the age of 16 years shall have legal capacity to consent on his own behalf to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment.”

³⁷ Scotland’s next census is to be moved to March 2022 due to the impact of COVID-19.

evidence on harassment and discrimination of trans people and transphobic hate crime.

7.85 Comments relating to the draft DPIA included that:

- It is crucial that the privacy and dignity of trans people is protected and that such personal and sensitive information as an applicant's trans status and history is not compromised.
- Section 22 exists to protect trans people's privacy and additional exceptions could jeopardise that privacy and could contravene ECHR Article 8 – the right to respect for a private and family life.

7.86 It was noted that the draft DPIA 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. A query was raised as to whether the fact that a person is trans, or that they have made an application for a GRC, may itself be considered 'special category data'. It was suggested that this issue is reviewed before the final DPIA is published.

7.87 Other suggestions included that:

- Consideration should be given to research, since the relatively small numbers of trans people increases the potential identifiability of individuals following linkage of supposedly anonymous data sets. Under the 2004 Act, this could constitute non-permitted disclosure.
- The draft Bill may be the only piece of legislation that removes a legal document – in this case a birth certificate – from the record. A process similar to that covering adoption should be followed, with a new certificate issued but the original retained and available to the appropriate authorities in future should they require it.
- Given that awareness of the provisions of section 22 may be limited, practical guidance for employers, employees, public services and service users, in addition to prosecutors, may be useful.

7.88 With reference to the BRIA, it was reported that it does not discuss the cost of the current system.

7.89 It was noted that the BRIA says that a sheriff may revoke a GRC due to incapacity. This power was described as unnecessary and it was suggested that a GRC does not need to be revoked during a period of incapacity.

Annex 1 – Organisations responding to the consultation

Children’s or Young People’s Group or Body (n = 5)
Allsorts Youth Project
Children and Young People’s Commissioner Scotland
Children in Scotland
The Scottish Youth Parliament
YWCA Scotland - The Young Women’s Movement
LGBT Group (n = 34)
CILIA-LGBTQI+: ‘Comparing Intersectional Lifecourse Inequalities among LGBTQI+ Citizens in four European countries’
Edinburgh Frontrunners
Free2B Alliance
Galop
Glasgow LGBTQI+ Substance Use Working Group
Glasgow University Lesbian Gay Bisexual Transgender and Queer + Society (GULGBTQ+)
Here NI
Highland Pride (run by the Highland LGBT Forum)
ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association)
Intersectional GLAM CIC
Lancaster Pride UK
LEAP Sports Scotland
Lesbian Rights Alliance
Lesbian Strength Scotland
LGB Alliance
LGBT Health and Wellbeing
LGBT Youth Scotland
LGBT+ Liberal Democrats
Mosaic LGBT Youth Centre
New Family Social
OneBodyOneFaith
OurStory Scotland
Out In Edinburgh
Outskirtsocial (Informal social group for Lesbian Bisexual & Trans women)
Pink Saltire
Saints LGBT+

Scottish Bi+ Network
Staff Pride Network: University of Edinburgh
Stonewall Scotland
Suffolk LGBT+ network (community group)
The Gathering Space
The Proud Trust
Time for Inclusive Education (TIE)
Unicorn Nights
Local Authority, Health and Social Care Partnership or NHS (n = 13)
Aberdeenshire Council
Argyll and Bute Health & Social Care Partnership
Department of Public Health NHS Lanarkshire
Glasgow Council Family
Health Improvement Team, Children and Young People, Sandyford Sexual Health Service, NHS GG&C
Healthy Respect team, NHS Lothian
Midlothian Council
National Gender Identity Clinical Network Scotland (NGICNS)
NHS Greater Glasgow and Clyde
NHS Lothian - Sexual Health, Blood Borne Virus and Substance Use team
Perth & Kinross Council
The City of Edinburgh Council
West Dunbartonshire Council
Other (n = 33)
A New Normal Ltd
Advance HE
Amnesty International UK
Arika Heavy Industries CIC
Chronic Sex
Colin Cooper Photography
Délégation interministérielle à la lutte contre le racisme, l'antisémitisme et la haine anti-LGBT - Prime minister Services
EDI Scotland
End Deportations Belfast
Family Education Trust
Fringe of Colour

Gold Flake Paint
Hands Off Scotland
Howard League Scotland
Law Society of Scotland
Lighthouse - Edinburgh's Radical Bookshop
MacRoberts LLP
Men At Work C.I.C
Men Supporting Women's Rights
Ministry of Justice (Belgium)
MurrayBlackburnMackenzie
Our Duty Parent Support Group for children and young people with Gender Dysphoria.
Performance Collective Stranraer
Recyke-a-bike
Scottish Child Law Centre
Scottish Council on Human Bioethics
Scottish Parents Against the Gender Reform Bill
SIAA
That looks queer
The Diversity Trust
The University of Glasgow
The Write Angle
White Flowers Alba
Public Body (n = 5)
Community Justice Scotland
Equality and Human Rights Commission
Nursing and Midwifery Council
Scottish Human Rights Commission
The Scottish Children's Reporter Administration
Religious or Belief Body (n = 35)
Archdiocese of St. Andrews & Edinburgh
African Caribbean Christian Fellowship, Aberdeen Branch.
Airdrie Reformed Presbyterian Church
Anscombe Bioethics Centre
Archdiocesan Secondary Head Teacher Association
Bishops' Conference of Scotland

Board of Reformed Christian Education Scotland
Catholic Head Teachers of the Diocese of Motherwell
Catholic Truth
Central Evangelical Church
Christian Concern
Christian Medical Fellowship
Covenant Fellowship Scotland
East Dunbartonshire Catholic Schools Group
Evangelical Alliance
Free Church of Scotland
Free Church of Scotland (Continuing)
Glasgow Archdiocesan Primary Head Teacher Association
Humanist Society Scotland
Maryburgh Free Church
North Edinburgh Reformed Presbyterian Church
Reformed Baptist Church Anniesland
Reformed Presbyterian Church of Scotland
SCES Parents - The Scottish Catholic Education Service's National Parent Group
Scottish Catholic Education Service
Scottish Catholics for Labour
Springburn Assemblies of God Church, Glasgow
Stornoway Free Church Kirk Session
Stornoway Reformed Presbyterian Church
Stranraer Reformed Presbyterian Church
The Christian Institute
The Church and Society Committee of the United Free Church of Scotland
The Guild of Spiritual Doctors of the Almighty Triune God
The RE Department of the Archdiocese of Glasgow
Western Isles Presbytery of the Free Church of Scotland
Third sector support organisation (n = 15)
dsdfamilies
Edinburgh Rape Crisis Centre
Enable Scotland
Forth Valley Rape Crisis Centre
Glasgow and Clyde Rape Crisis

HIV Scotland and National AIDS Trust
Marie Curie
Terrence Higgins Trust Scotland
The Action Group
The Kite Trust
The National Autistic Society Scotland
Victim Support Scotland
Waverley Care
Ypeople
Zero Tolerance
Trans Group (n = 20)
Anent Transphobia (Fetter Together Ltd)
Argyll & Bute Trans Youth chat
AUSA Trans Students' Forum
Be: Transgender Support and Community
Beyond Gender (an LGBT Youth Scotland youth group)
Consortium's Trans Organisation Network
Equality Network and Scottish Trans Alliance
equalrecognition.scot
Foreningen for kjønns- og seksualitetsmangfold and the Norwegian Patient Group for Gender Incongruence
Gender Recognition Youth Commission
Gendered Intelligence
Mermaids
Not Alone Plymouth
Trans Masculine Scotland
Trans Masculine Support and Advice UK
TransActualUK
TransForMotion
Transgender Europe
Transgender Trend
Transparentsees
Union or Political Party (n = 21)
Annan&District Branch, Scottish National Party
Edinburgh University Students' Association
Fife College Students association

Forth Valley Student Association
Glasgow University Students' Representative Council
Haddington & Lammermuir SNP Branch
Heriot-Watt University Student Union
Highlands and Islands Student Association
NASUWT The Teachers' Union
NUS Scotland
Queen Margaret Union
Scottish Green Party
Scottish Trades Union Congress (STUC)
SNP Alyth Branch
Solidarity Party
The Educational Institute of Scotland
UNISON SCOTLAND
Unite Scotland
University and College Union (UCU)
USDAW
Young Scots for Independence
Women's Group (n = 34)
Audacious Women Festival
Authentic Equity Alliance
Brighton ReSisters
Broadsheet, New Zealand's Feminist Magazine
Calderdale ReSisters
Canadian Women's Declaration
Close the Gap
Dundee Labour Women's Group
Engender
Equate Scotland
Fair Play For Women
Feisty Women
Feminist Think Tank UK
Fife Women's Aid
FiLiA
For Women Scotland

Greater Manchester Resisters
Green Party Women - Green Party of England & Wales
HEAL
Hull & East Riding ReSisters
Labour Women's Declaration Steering Group
Portobello Against Misogyny
Resisters United
Scottish Women's Aid
Skeabost Ladies Group
SNP Women's Pledge
South Edinburgh Against Misogyny
Wise Women Glasgow
Woman's Place UK
Women and Girls in Scotland
Women Matter
Women Uniting
Women's Human Rights Campaign
XX

Annex 2 – Responses to Question 3 by geographical area

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

Type of respondent	Yes				No				Don't know				Not answered				Total
	Scotland	Rest of the UK	Rest of the World	Total	Scotland	Rest of the UK	Rest of the World	Total	Scotland	Rest of the UK	Rest of the World	Total	Scotland	Rest of the UK	Rest of the World	Total	
Organisations																	
Children or Young People	3	1	-	4	-	-	-	-	-	-	-	-	1	-	-	1	5
LGBT Group	15	10	1	26	1	2	1	4	2	-	-	2	1	1	-	2	34
Local Authority, H&SCP or NHS	10	-	-	10	1	-	-	1	-	-	-	-	2	-	-	2	13
Public Body	3	-	-	3	1	-	-	1	-	-	-	-	-	1	-	1	5
Religious or Belief Body	2	-	-	2	27	3	2	32	-	-	-	-	1	-	-	1	35
Third Sector Support	9	1	-	10	3	-	-	3	1	-	-	1	1	-	-	1	15
Trans Group	9	4	2	15	-	2	-	2	-	-	-	-	1	1	1	3	20
Union or Political Party	12	2	1	15	3	1	-	4	-	-	-	-	1	-	1	2	21
Women's Group	3	-	-	3	14	12	2	28	1	-	-	1	1	1	-	2	34
Other	13	4	2	19	6	3	-	9	4	-	1	5	-	-	-	-	33
Total organisations	79	22	6	107	56	23	5	84	8	-	1	9	9	4	2	15	215
% of organisations answering	55%	48%	50%	54%	39%	51%	42%	42%	6%	-	8%	5%					
Individuals																	
Individuals	4,386	3,069	1,839	9,294	4,418	2,101	425	6,944	223	114	53	390	146	46	23	215	16,843
% of individuals answering	49%	58%	79%	56%	49%	40%	18%	42%	3%	2%	2%	2%					
All respondents																	
All respondents	4,465	3,091	1,845	9,401	4,474	2,124	430	7,028	231	114	54	399	155	50	25	230	17,058
% of all respondents	48%	57%	78%	55%	48%	39%	18%	41%	2%	2%	2%	2%	2%	1%	1%	1%	
% of all those answering	49%	58%	79%	56%	49%	40%	18%	42%	3%	2%	2%	2%					

Please note that in some cases values do not sum to 100% due to rounding.



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