

Document 1

Extract of note

[Redacted]

Copy: Simon Stockwell

Copy: [redacted]

NATIONAL GENDER IDENTITY CLINICAL NETWORK FOR SCOTLAND

[redacted]

The Gender Recognition Act 2004

8. I was asked to speak about plans to reform the 2004 Act and duly did so. Key points in the Q&A were:

- There should be no-backtracking on recognition of non-binary people. [redacted] said that the STA considered the Manifesto commitment included non-binary people. A service user said that the First Minister had made commitments on non-binary people in the LGBTI hustings: <http://www.stonewall.org.uk/our-work/blog/scottish-parliament-lgbti-hustings>
- There should be meetings with transgender people when the consultation(s) were out.
- We should not wait for Westminster.
- Human rights and the ECHR should be fully respected.

[redacted]

10. I spoke briefly with [redacted] and [redacted] of [redacted] about interviewing them for the Impact Assessments. One possibility is to do this in the margins of the next meeting of the NGICNS on 16 November.

[redacted]

SIMON STOCKWELL
Family and Property
[redacted] 2 September 2016

Document 2

From: Stockwell SW (Simon)

Sent: 05 December 2016 14:54

To: [redacted]@gov.scot

Cc: [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot;
[redacted@gov.scot]

[redacted]

I am attending a non-binary seminar on Sunday 11th: details below.

[redacted]

Happy to meet/discuss.

Simon Stockwell
Family and Property
Justice
[redacted]

NON-BINARY SEMINAR

Hi there,

We're really looking forward to seeing you at our Equal Recognition: Non-binary seminar, which we are co-hosting with the University of Strathclyde LGBT+ Society. The day is going to be an opportunity to learn more about how non-binary legal recognition can and should work in Scotland, and to feed in to the ongoing campaign to make sure the reform of the Gender Recognition Act 2004 results in legislation that works for people of all genders.

Please find below the programme, description of the morning and afternoon sessions, travel details, accessibility, what we need to know from you and other useful info:

Time and Location:

Sunday 11th December 2016

10:00 to 16:00

Lord Hope Building (second floor)

141 Saint James Road

Glasgow

G4 0LT

Programme:

10.00 - 10.30	Arrival and Coffee
10:30 - 10:45	Introduction
10:45 - 12:45	Morning Session: Presentations
12:45 - 13:30	Lunch Break
13:30 - 15:30	Afternoon Session: Group working
15:30 - 16:00	Summary and Close

Morning Session:

In the morning session there will be a number of short five to ten minute presentations grouped around two themes.

1. What non-binary people and organisations want legal recognition to look like and why it is important:

[redacted] (Non-binary Scotland)

[redacted] (Beyond the Binary)

[redacted] (NUS Scotland)

2. International approaches to non-binary legal recognition, and legal implications of introducing non-binary legal recognition in Scotland:

[redacted] (Non-binary+ Northern Ireland) & [redacted] (Law Library)

[redacted] (Scottish Trans)

[redacted] (EHRC)

[redacted] (University of West Scotland)

After each round of presentations, there will be a chance to ask questions, and to talk as a group about some of the key things we need to be taking into consideration as we move forward with the Equal Recognition Campaign.

Afternoon Session:

In the afternoon session we will split into smaller groups to talk in greater depth about how non-binary legal recognition can and should work in practice going forward. Groups will be organised around themes, and participants are free to move in between groups throughout the session. An example of some of the themes we might use on the day are:

- The impact of non-binary legal recognition on equalities law
- The impact of non-binary legal recognition on family law
- What will be the specific language used in the legislation and on birth certificates
- What can or can't be learnt from other countries/states approaches
- How non-binary legal recognition can be translated into inclusion in services

You're free to suggest themes on the day if you have a particular question or area of interest, or if discussions from the morning session are ones you want to carry on into the afternoon!

Travel:

The seminar is taking place at the University of Strathclyde Lord Hope Building in central Glasgow, less than a 15 minute walk from Queen Street Station.

A Google Maps walking route from Queen Street Station to the Lord Hope Building can be viewed at: <http://bit.ly/2ffbKzh>

And a better view of how the building is situated on the campus is here: <http://bit.ly/1WbBaMX>

Accessibility:

The venue is wheelchair accessible. It has lifts from the ground floor to the seminar floor. Once on the seminar floor, all rooms are close together on the same level and wheelchair accessible.

There are accessible toilets on the floors above and below where the seminar is taking place, these can be accessed by lifts.

There will be gender neutral toilets.

All the workshop rooms have induction loops. If you require a BSL interpreter, please tell us when you register.

If you need any assistance during the seminar, please speak to any of the Equality Network or Scottish Trans staff or volunteers attending on the day – they will be wearing badges.

Code of Conduct:

We ask you to help us to ensure the day is really enjoyable and safe for everyone attending. Lots of people who are attending may not know anyone else at the seminar, so please be kind and welcoming to everyone. Remember that as this is a non-binary event, there are likely to be lots of attendees who use pronouns other than he or she – so please ask people if you aren't sure of their pronouns and don't make assumptions!

You can find the code of conduct for our events at: <http://www.scottishtrans.org/code-of-conduct/> - by attending this event, we expect you to follow this code of conduct throughout the day.

If you have any concerns or need any assistance during the seminar, please speak to any of the Equality Network and Scottish Trans staff or volunteers attending on the day – they will be wearing badges.

What do we need from you?

Please let us know if you have any access requirements as soon as possible.

Please let us know if you have any dietary requirements as soon as possible, as lunch will be provided on the day.

If you would like to do a short five to ten minute presentation in the morning session, please get in touch with [redacted], and they can chat to you about what might be a good topic.

If you are already presenting and would like to include a powerpoint presentation (this is not necessary and totally up to you!) please email it to [redacted] in advance at [redacted]@equality-network.org or bring it on a USB stick on the day.

If you're interested in reading the findings from our recent research around non-binary people in the UK to get you thinking in advance of the seminar, you can access all three reports at: <http://www.scottishtrans.org/non-binary>

Contact:

To let us know your access and dietary requirements, and should you have any question or concerns please let us know:

[redacted]@equality-network.org

[redacted]

Looking forward to seeing you all there!

[redacted]

Scottish Trans Alliance [redacted]

Document 3

Extracts from document dated 9 Feb 2017

REVIEW OF THE GENDER RECOGNITION ACT 2004

[redacted]

The Scottish Transgender Alliance [STA] ask

5. The three key asks in the STA campaign are attached at Annex A (an extract from the STA's website). In brief, the campaign wants:

- legal gender recognition to be self-declaratory.
- the current minimum age of 18 for obtaining legal gender recognition to be reduced.
- legal recognition for people who do not identify as men or women (ie for non-binary people).

6. The campaign originally included a fourth ask: for the Scottish Government to engage with intersex people, to understand their concerns and recognise their right to bodily autonomy and social equality. This has been separated out from the main Equal Recognition Campaign as there was concern that the issues may be confused and the different communities treated as one homogenous group.

[redacted]

ANNEX A: SCOTTISH TRANSGENDER ALLIANCE: EQUAL RECOGNITION CAMPAIGN [taken from STA website]

We are calling for the Scottish Government to recognise trans people's right to self-determination. We know that achieving these calls will not resolve all trans equality and human rights issues – there is other work to be done. These three calls are key strategic priorities and are all within the power of the Scottish Government to act upon.

Three calls for trans equality:

1. Introduce legal recognition for people who do not identify as men or women

The law should be improved to provide legal recognition and identity documents to people who identify as other than men or women. No one should be forced to have a gender listed on their birth certificate or passport which does not correspond to how they actually live and identify. Many countries already legally recognise that some people do not identify as men or women and provide them with legal documents, such as birth certificates and passports, which respect their non-binary gender. (Having a non-binary gender identity is not the same as being a physically intersex person.)

2. Remove the psychiatric diagnosis requirement from legal gender recognition

Trans people can change their gender on their passports and other day-to-day documents without having to see a psychiatrist. However, the process to change legal gender on a birth certificate requires an applicant to receive a psychiatric diagnosis and to provide a detailed psychiatric report about their life history, current circumstances and identity in order to prove that diagnosis. This unnecessary and intrusive requirement undermines the personal autonomy of trans people because it places psychiatrists into the inappropriate role of gatekeepers to legal rights. Psychiatry should be about helping people improve their mental health and not about deciding which trans people merit access to their human rights.

3. Reduce the age at which people can get legal recognition of the gender they live as

Currently a young person under the age of 18 cannot apply for a gender recognition certificate to correct the gender listed on their birth certificate. This undermines their self-esteem, violates their privacy and exposes them to discrimination. Significant numbers of young people are living successfully in a new gender with the full support of their parents and school teachers. Although they could easily satisfy all of the conditions required to receive gender recognition young people are discriminated against because of their age.

Document 4

Meeting attended by [redacted] ([redacted]) and [redacted] and Sarah Duncan (SG: Justice: Family and Property Law team)

At: Teacher Building, St Enoch Square, Glasgow
9 February 2017

Questions/ Discussion topics

Incidence of gender dysphoria in children and young people

1. Sarah mentioned the findings of a study/project conducted by the BPSU and [Child and Adolescent Psychiatric Surveillance System](#) (CAPSS) at the Royal College of Psychiatrists suggested an incidence of Gender dysphoria in young people under 16 of around 1:80000 and wondered whether there was any further useful information around this. [redacted] mentioned that there were some limitations on the usefulness of this data because of the limited number of returns made to the study (<140) from across the UK in a 15 month period, which is at considerable variance with numbers of referrals to the Young People's Service recently.

Level of interest/demand expressed by children and young people in obtaining gender recognition

2. Sarah asked if children/young people indicated that obtaining a change of legal gender was important to them. [redacted] suggested that young people were very knowledgeable about their lack of right to apply under our current arrangements and that the legal position seemed quite inconsistent to them, given that they could have already changed their name and their passport information to show the gender they were transitioning to/living in.

Persistence of gender dysphoria in children and young people

3. Sarah mentioned some information SG had access to (for example we had heard of a recent paper by Steensma and others), which indicates that for a significant majority (around 84%) of children diagnosed with gender dysphoria before the onset of puberty, the dysphoria did not persist into puberty. [redacted] agreed that his understanding of the research was that for around three quarters of those diagnosed with gender dysphoria prior to the onset of puberty, the dysphoria did not persist into adolescence.

[redacted]

Non-binary

6. In response to a question from Sarah as regards whether they saw patients who do not identify with the societal gender constructs of either male or female, both [redacted] and [redacted] agreed that they did and that it was not an insignificant proportion of patients. [redacted] highlighted reports from the transgender

community that some individuals who identify as non-binary feel they have to conform to a more binary construct, i.e. male or female when attending gender services to be able to access medical interventions

Age at which recognition of change of legal gender to acquired gender ought to be possible

7. Sarah mentioned that the advantages and disadvantages of various options would need to be considered as part of the review and within the expected consultation paper. A possible option for a new system of gender recognition for those under 18 might be based around the individual child/young person's ability to give 'informed consent' rather than selecting a specific age. A specific age might potentially not reflect the true maturity of a child/young person. She wonder if [redacted] or [redacted] had any views or thoughts around this issue? [redacted] mentioned that under NH'S guidelines, by 16 it was possible for cross sex hormones to be prescribed provided that two clinicians were agreed as to capability of the young person to understand and appreciate the implications for them. [redacted] also wondered whether an option based around the young person being able to give informed consent should be considered, although the question then become who would decide on whether the young person was capable of giving informed consent- would it be a clinician or clinicians?

[redacted]

10 February 2017

Document 5

Meeting with [redacted] ([redacted and TransparenTsees), Sarah Duncan, Scottish Government and [redacted], Scottish Government

Atlantic Quay on 15 March 2017

1. Possible move to a self-declaratory system in Scotland

1.1 [redacted] welcomed the possibility of a 'self-declaratory' system of gender recognition, that simplified and streamlined the process; in particular [redacted] thought that the current gender recognition process under the 2004 Act as "laborious, protracted, demeaning and degrading".

1.2 Some of the parents [redacted] had spoken to prior to this meeting were concerned that the adoption of such a process might be used to reduce or eventually withdraw the services offered in the GICs or that there was the potential for misuse of self declaratory system (for example by a person changing their gender several times) which in itself might have an adverse effect on the otherwise generally improving perception of transgender people and impact on resources element of the service.

1.3 Sarah suggested that there was the possibility that any application form initiating such a new gender recognition process could contain declaratory statements as to the intention of the applicant to live in their acquired gender for the remainder of their life. This sort of approach was being used in the Republic of Ireland. There was an option whereby the application form might be a type of statutory declaration, in which case someone who gave a false or misleading declaration might be committing an offence. [redacted] thought that this should help avoid frivolous applications being made. Sarah advised that she would send [redacted] a link to the Irish legislation and to the Irish application form which [redacted] might be interested in.

1.4 Sarah mentioned that she had read the evidence given by Mermaids to the Select Committee on Women and Equalities and was wondering if there was a reason why the Mermaids evidence to the Select Committee on Women and Equalities did not itself complain about the judicial approach in the 2004 Act. [redacted] said that it was [redacted] impression that they possibly did not think that a complete change in the system was a possibility and consequently had focussed on other matters and in particular on the current experience in England and Wales.

1.5 [redacted] was of the view that any such system should not be obtainable on payment of a fee. The cost under the 2004 Act process was currently £140 and such a significant amount was off-putting for people.

2. Age at which legal gender recognition could be sought

2.1 [redacted] took the view that any new process should apply without question to those aged 16 and 17 and [redacted] thought that where both parents consented it should be available to those under 16. [redacted] said that young people considered

it quite a disconnect that they can obtain a change of their gender as shown on their passport to their inability to change their birth certificate.

2.2 [redacted] noted that the view that around 80% of pre-pubertal children do not persist beyond puberty was subject to criticism since the pool from which the data came included gender non-conforming or questioning children rather than those who took the view that they were not the gender assigned them at birth. Also, the key study or studies did not carefully follow up all those identified pre-puberty. In [redacted] experience if a child used language such as “I am a [the opposite sex] “ that these children always persisted into adolescence.

2.3 Sarah asked what [redacted] experience had been of parents who had an adolescent who was trans. Was [redacted] aware of disputes arising between parents about their child’s treatment or social transitioning? [redacted] said that a minority of parents did disagree and that sometimes this was possibly because the parental relationship had otherwise already broken down and their teenager being trans was potentially being exploited by the parent with whom the child did not reside, as a form of control. Sarah wondered whether another option, whereby it was the capacity of the child/young person to understand the nature of the decision to change their legally recognised gender, rather than the consent of one or both parents, might avoid such disputes or avoid them preventing a child or young person seeking legal gender recognition (similar to the Gillick competency test). [redacted] thought that this was a good idea and might avoid in some cases relationship breakdown occurring between parents and children by not making the parental view(s) the key determinant.

2.4 [redacted] mentioned in passing that [redacted] had sometimes heard it inferred that some parents were trying to make their children trans, though this was not in [redacted] experience, true.

[redacted]

4. General

Non-binary children and young people

4.1 [redacted] was aware of an increasing number of children and young people who were non-binary and for them it was very significant that they were not recognised at all, for medical records, passports or driving licences.

Issues in schools

4.2 [redacted] mentioned that parents and their children were experiencing difficulties in relation to schools recognised their children and their acquired gender, in particular [redacted] cases of trans young people in the [redacted] Council area who were not being recognised within their schools for example for the purposes of ensuring they were registered for exams in their correct name

Waiting lists for treatment

4.3 [redacted] also mentioned that although staffing with psychologists had increased in the GICs, the effect of this was simply to move the waiting list further down the process, typically to the endocrinology phase of the protocol and so problems remained in terms of waiting lists.

Engaging with young people for consultation

4.4 Sarah explained that an important part of the consultation process would be to seek views from children and young people, [redacted] thought that we might be better liaising with LGBT Youth, though [redacted] and other parents would be very happy to take part in a roadshow(s) over the consultation period or some of the groups met regularly each month and possibly one of these could be used to seek views of parents.

[redacted]

21 March 2017

Document 6

Extracts from draft note dated 6 Apr 2017

Review of Gender Recognition

Attendees: [redacted], [redacted] and Sarah Duncan, Scottish Government

Meeting held on 23 March 2017 [redacted]

General

1. The clinics at which they both worked saw patients in the range of late teens, 17 onwards and there was, on average, a 12 month waiting list for being seen initially at a gender identity clinic.

2. In their experience the guidance on the current system was very dense and patients found it difficult to understand. This might be exacerbated by the different routes which an applicant could take. The fee charged was definitely an issue as well. Any new system taken forward under this review should be free to access. It was very difficult to find the guidance on the gov.uk website.

3. In regard to fees, this was also a reason why in their experience most patients also chose to change their name in practice for example by statutory declaration, without using the process for changing their birth certificate too.

4. [redacted] commented that in relation to those [redacted] knew who had transitioned and obtained gender recognition, [redacted] had never encountered a person who regretted those decisions.

5. In relation to hormone treatment and children, we might wish to speak to [redacted] at [redacted].

[redacted]

The option of a self-declaratory system

7. When we discussed a potential move towards a self-declaratory system and way from the current process used under the 2004 Act involving the use of the gender recognition panel to consider whether applications met the current criteria, both took the view that the panels were at some distance from the current issues of gender identity clinics. In particular their consistent requests for additional evidence of why a particular applicant had not chosen to have surgery as part of their treatment was inappropriate. Medical members did not require to have a specialism in gender either.

8. [redacted] took the view that a robust self-declaratory system would be a good idea, since it placed emphasis on self-determination, but it needed to take account of the person's intention to live life-long in their acquired gender. If non-binary people were to be recognised under the new system, it might be necessary for self-

description to be possible rather than a single “catch all” or a list of options to choose from beyond the current binary categorisations, since in [redacted] experience, each person’s identity was very personal. [redacted] concurred.

Age at which recognition could be sought & recognition of non-binary people

9. In response to Sarah’s mentioning the potential option for those under 18’s ability to apply being centred on their personal capacity to understand the process and appreciate its consequences, [redacted] mentioned that capacity was regularly being assessed for example for those around 13 and above attending for contraceptive advice in the NHS.

10. [redacted] indicated that in [redacted] experience the main issue arising was in relation to people who did not experience gender in a binary way, as opposed to the growth in people younger than 16 seeking support and advice from the gender identity clinics. There is a very high proportion of those attending clinics that were non-binary. In their experience it was mainly in the younger age groups where people identified in a non-binary way.

11. The importance that people placed on the system of legal recognition typically depended on where they had reached in terms of the progression of their treatment, rather than their physical age.

[redacted]

6 April 2017

Document 7

Extracts from briefing

10 May, 2.00pm – 3.00pm, T3.21, Parliament

Attendees

[redacted], Equality Network
[redacted], Scottish Transgender Alliance
[redacted], LGBT Youth Scotland
[redacted] Stonewall Scotland

Official Support

Simon Stockwell
Sarah Duncan

At your meeting with officials on 2 March regarding the review of the Gender Recognition Act 2004 ('the 2004 Act'), you asked to meet with the Equality Network/ Scottish Transgender Alliance. They requested that their partner equality intermediaries, LGBT Youth and Stonewall Scotland also attend.

[redacted]

The STA calls for reform are-

- that the requirement for psychiatric diagnosis be removed from the process of gender recognition (see Item 2);
- that the age at which recognition can be sought be reduced from 18 (see Item 3);
- that there should be legal recognition of people who do not identify as either female or male (see Item 4).

Originally the campaign also asked Scottish Government to engage with intersex people, understand their concerns and recognise their right to bodily autonomy and social equality (see Item 5). This call for change has been separated out from the STA campaign.

[redacted]

- The requirement for medical evidence is considered by the STA to be 'unnecessary and intrusive'.

[redacted]

- The campaign asks that the minimum age for obtaining recognition be reduced from 18.
- Their view is that "Children under 16 should be able to access gender recognition with just the additional requirement that one parent or guardian provides their consent."

[redacted]

- The third call in the campaign is for legal recognition of people who do not identify as men or women,
- The campaign states that “Scotland is falling behind the growing number of countries who recognise that some people do not identify as men or women and provide them with a gender-neutral option for legal documents, such as birth certificates and passports, to respect their non-binary gender.”

Document 8

From: [redacted]@lgbtyouth.org.uk

Sent: 28 July 2017 09:01

To: Duncan SE (Sarah) (Justice) ; [redacted]@lgbtyouth.org.uk

Cc: Stockwell SW (Simon) ;[redacted]@gov.scot ;[redacted]@gov.scot ; [redacted]@gov.scot

Subject: RE: Review of Gender Recognition Act- Beyond Gender meeting Tuesday

Good morning Sarah,

Thank you for sending on the detailed feedback from the BG engagement.

Unfortunately, [redacted] but we will ensure that we support young people's engagement with the consultation process.

Best wishes,
[redacted]

From: Sarah Duncan

Sent: 27 July 2017 17:38

To: [redacted]@lgbtyouth.org.uk

Cc: Simon Stockwell [redacted]@gov.scot; [redacted]@gov.scot;[redacted]@gov.scot;
[redacted]@lgbtyouth.org.uk

Subject: FW: Review of Gender Recognition Act- Beyond Gender meeting Tuesday

[redacted],

Apologies for not emailing you before now. I wanted to update you

- on the position in the consultation;
- give you short resume of the some of the key messages that we picked up from our really useful meeting with the Beyond Gender groups; and
- let you know what we have done with those messages in the interim.

We indicated then that we were thinking about published two consultations and not just a single one covering both transgender people and those with intersex conditions. There will now be two consultations that should be published on the same day. Publication date is not yet decided but I am happy to add your name to an email I'll circulate containing a link to the consultations. They should be published at the end of the summer/early autumn.

Some of the key messages we took away from the discussion were-

- recognition should be available to people under 16;
- many were strongly of the view that legal recognition through a gender recognition certificate would better support their rights not to be discriminated against (in particular several people mentioned difficulties at school);
- when I discussed how the process of recognition might look for people under 16, many wanted the process to involve evidence of support from parents perhaps in the form of demonstrating parental consent to the application;
- those whom I spoke to saw requiring parental or other support in the application process saw this as a way to ensure children's safety and wellbeing because being able to change their legal gender 'on their own' might endanger them if a parent strongly disagreed with their decision; and

- my colleague who discussed whether legal recognition should be given to non-binary people found there was strong support for this, though some people thought there was a case for taking a gradualist approach to the recognition of a new gender/s.

We are working at the moment on impact assessments to be published with the consultation papers. There is a Child Rights and Well-being impact assessment process and that we had a discussion with the Beyond Gender Group is relevant to that.

Finally, as part of preparing for the consultations we advised our lead Cabinet Secretary, Angela Constance of the key messages we got about minimum age and the process for under 16s.

I would be grateful if you pass on our thanks to the people who attended and were willing to give their views for both their time and openness to expressing their thoughts and to those group supporters who helped. I'm not sure if the groups meet over the summer. We'd want to encourage people to consider responding to the consultations but they don't have to answer all the questions. We'll be considering shortly planning for some events seminars/discussion events during the consultation period as well.

Thanks again.

Sarah E Duncan
Scottish Government: Family and Property Law Team
[redacted]

Document 9

From: Stockwell SW (Simon)

Sent: 07 June 2017 13:06

To: [redacted]@gov.scot

Cc: [redacted]@gov.scot [redacted]@gov.scot [redacted]@gov.scot; Duncan SE (Sarah); [redacted]@gov.scot [redacted]@gov.scot

Subject: RE: Gender recognition - possible alternative to using tanner stages

[redacted]

1. Thanks. This is very helpful. We spoke.

2. The application form in Ireland for those over 18 is at: <https://www.welfare.ie/en/Pages/GRC1.aspx>. The current UK application form for the standard track is at: <https://formfinder.hmctsformfinder.justice.gov.uk/t450-eng.pdf>

3. As you know, the EN/STA provided us yesterday (hard copy – we asked for email versions) with their thoughts on what a Scottish self-declaratory application system might look like. In brief:

- Applications should be made to NRS (as they hold the birth certificate when the applicant was born in Scotland).
- Applications should allow people to become female, male or non-binary.
- The consultation should avoid any references to a “Gender Recognition Unit”. The concern was the view held by the STA and some trans people that the Gender Recognition Panel goes beyond its remit and asks unnecessary and intrusive questions (the GRP would say they are just complying with the detailed requirements of the 2004 Act). So the STA think the consultation should avoid the word “Unit” and just refer to applications to the Registrar General or the Scottish Ministers (and, I assume, indicate that applications to the RG/SMs would be dealt with by administrative staff working for the RG/SMs).
- The new application should include a statutory declaration (in line with the 1835 Act).
- And the new application should ask those under 16: “Are all of the people with PRRs consenting?” “if not, do you have a court order?”

[redacted]

Simon Stockwell

[redacted]

Document 10

Extracts from briefing

Where	7 th Floor, Atlantic Quay, 5 Atlantic Quay, 150 Broomielaw Glasgow G2 8LU
When	Wednesday 21 June 2017 9.30 am start, 10.30 am finish
Who	[redacted] (see Annex B for further information)
Why	At your meeting with officials on 2 March 2017, you asked to meet with clinicians working in the gender identity clinics in Scotland. [redacted]
Supporting official	Simon Stockwell, [redacted] Sarah Duncan, [redacted]

[redacted]

12. Officials met [redacted] and [redacted] in February. [redacted] pointed out that those under 16 consider it anomalous that they cannot obtain legal gender recognition. He mentioned that young patients will often have changed their UK passport, which can be done on the basis of evidence from their doctor or medical consultant confirming their change of gender was likely to be permanent.

13. Officials also met with clinicians from [redacted] in April. Those clinicians said that they have seen a noticeable rise in the numbers of their transgender patients who do not identify with either male or female genders. Their view was that this was most prevalent amongst younger people. This clinic will see patients aged 17 and over. They expressed the view that non-binary people's experience of gender was very individual and that they thought it likely that non-binary people would wish to describe their gender identity individually.

14. The Scottish Transgender Alliance estimates that there are a few thousand non-binary people in Scotland. [redacted]

15. [redacted] The STA have recently indicated when they met with officials this month that they think that non-binary people ought to have the option of adding an additional descriptor about their gender identity to their birth certificate as part of any new recognition process.

Document 11

From: Duncan SE (Sarah)
Sent: 28 August 2017 10:31
To: Stockwell SW (Simon)
Subject: RE: Review of Gender Recognition- enquiry from [redacted]

Simon,

I have only tiny changes to suggest (per attachment in red), so I'll proceed as per your email.



Thanks,

Sarah

From: Stockwell SW (Simon)
Sent: 28 August 2017 08:08
To: Duncan SE (Sarah)
Subject: RE: Review of Gender Recognition- enquiry from [redacted]

<< File: Review of the Gender Recognition Act [redacted]_ letter to [redacted] .obr
>> << File: Review of the Gender Recognition Act [redacted]_ letter to [redacted]
.docx >>

Sarah

1, Many thanks. I attach a further draft, in ERDM and word. This leans more towards the longer version, but shortens this where possible.

2. I would be grateful for comments on this draft. If you are content with it, I would be grateful if you could send to [redacted] for comment. Please copy in [redacted] [redacted] [redacted][redacted], [redacted] [redacted]. [redacted] and me. Please also, separately, send the draft letter to [redacted] for comment, copying in [redacted] and [redacted]. [redacted].

3. At one level, I think it can be argued that the review of the GRA does not affect the legislative provisions on the priesthood. Paragraph 2 of Schedule 9 to the 2010 Act rests on a definition of "transsexual people" and that covers trans people generally, and not just those with a full GRC. The draft reply above goes through paragraph 2 and mentions that the "compliance principle" is where a requirement is applied to comply with the doctrines of the religion.

4. I would assume that the requirement that Catholic priests be men and not be transsexual is in the doctrines of the Catholic faith, as opposed to being something

which is a “strongly held religious conviction of a significant number of the religion’s followers”. (The latter principle was relevant to some of the issues about religious bodies and same sex marriage: e.g. when a body opts into same sex marriage but some of its celebrants do not wish to take part).

5. I think para 5 of Schedule 9 and para 4 of Schedule 12 make similar provision and so I’ve grouped them together in the draft reply.

6. I think the Explanatory Notes to the 2010 Act are good (they often are - the example approach is helpful and we followed that when amending the 2010 Act as a consequence of same sex marriage). I’ve just web-linked to them in the draft reply above,

6. My view is that the SG would not seek to amend these provisions of the 2010 Act. The requirements that ministers of religion be male and not trans is likely to be doctrine for a number of religious bodies – eg Roman Catholic; Orthodox Judaism; the Islamic Faith; a number of Presbyterian churches etc. The EN/STA accept the provisions in the 2010 Act that a celebrant can refuse to marry a trans person. I **think** they would accept religious bodies can choose (at their discretion) not to allow women or trans people to become ministers of religion. We might ask them on Monday.

7. Clearly, a further issue is non-binary people. I think it clear that the Roman Catholic Church would refuse to accept a non-binary person in the priesthood. There are, perhaps, potential issues here at the moment for the Church, even if we do nothing at all. If a Priest says “I am no longer a man; I am non-binary”, that priest may not be in the protected characteristic of “gender reassignment”. However, as the civil law stands, I think the Church could say “There are only two sexes. We regard this priest as a male”. If we change the law to recognise non-binary as a gender and as a sex, that does suggest to me that the protected characteristic of “gender reassignment” would need to be changed to protect the Church, as well as non-binary people.

8. I have not gone into this in the draft reply. If we need to say anything (and I am not sure we do at this stage), we could add something like: “The Scottish Government has also received representations arguing that legal recognition should be given to non-binary people, who do not identify as either men or women. In considering changes of this nature, the Scottish Government would consider all relevant issues, including issues in relation to the beliefs of religious bodies.”

Simon Stockwell
[redacted]

From: Duncan SE (Sarah)
Sent: 25 August 2017 12:22
To: Stockwell SW (Simon)
Subject: FW: Review of Gender Recognition- enquiry from [redacted]

Simon,

Subject to our discussion earlier today, and [redacted] yesterday, I attach for your consideration and comments before I take this further-

- 'long version' of proposed response to [redacted]; and
- 'short version' of the proposed response;

<< File: Short version- [redacted] docx >> << File: Equality Act- exceptions relevant [redacted] 2.docx >>

As further background, the Select Committee Transgender Equality report does not discuss the religious exemption in para 2 of that Schedule. The Report does discuss the exemption for single-sex/separate sex services and the "genuine occupational requirement" exemption. In relation to Para 1 of Schedule 99 (religious requirements) they recommended that where a person had a GRC it should cease to be possible to apply a requirement that an employee/appointee not be a transsexual as defined in section 7 (discussion is at paras 125-132), so that this would become unlawful discrimination. The UK Government response to this and to the similar Committee recommendation around restricting services (single-sex/separate sex), is at page 12 and ends-

"We understand the concerns being raised by some transgender people about the provisions. The Government is keen to ensure that that law in this area operates fairly and is not abused, therefore we are keen to receive further representations and evidence on the availability and use of the exceptions in the Equality Act 2010 from all affected parties to take into account for future policy discussions."

Sarah

From: Duncan SE (Sarah)
Sent: 05 July 2017 17:46
To: [redacted]@gov.scot
Cc: Stockwell SW (Simon)
Subject: Review of Gender Recognition- enquiry from [redacted]



T: [redacted]
E: [redacted]

[redacted]

By email: [redacted]

Your ref: [redacted]

XX September 2017

Dear [redacted]

REVIEW OF THE GENDER RECOGNITION ACT 2004 [redacted]

1. You asked us earlier this year about the potential implications of changes to the Gender Recognition Act 2004 (“the 2004 Act”) [redacted]. I apologise for our delay in getting back to you: we have been considering the question you have raised.

2. It may be helpful to make some general background points:

- As you will be aware, and as outlined in more detail below, there is relevant provision in the Equality Act 2010 (“the 2010 Act”). The 2010 Act is largely a reserved matter for the UK Government (the Scottish Government did obtain more powers in relation to Equal Opportunities in the Scotland Act 2016 <http://www.legislation.gov.uk/ukpga/2016/11/section/37> but these do not seem relevant to the particular question you have raised). Therefore, any changes to the 2010 Act would have to be agreed with the UK Government.
- The protected characteristic of gender reassignment in the 2010 Act does not depend on a person having a full Gender Recognition Certificate. Section 7 of the 2010 Act refers: <http://www.legislation.gov.uk/ukpga/2010/15/section/7> Section 7 also provides that “A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.”
- The key focus of the Scottish Government’s current work in relation to the 2004 Act is to review the legislation in order to change the process for obtaining a full Gender Recognition Certificate.

3. Schedule 9 of the 2010 Act contains a number of exceptions to provisions in the 2010 Act relating to work. <http://www.legislation.gov.uk/ukpga/2010/15/schedule/9> In particular, paragraph 2 of Schedule 9 is relevant. This has an exception on applying in relation to employment a number of requirements including “a requirement not to be a transsexual person”. To be covered by this exception, the employment has to be for the purposes of an organised religion and the “compliance or non-conflict” principle has to be engaged. Paragraph 2(5) of Schedule 9 provides that “the application of a requirement engages the compliance principle if the requirement is applied so as to comply with the doctrines of the religion”.

4. The Explanatory Notes for Schedule 9 of the 2010 Act are at <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/16/26>.

5. Paragraph 5 of Schedule 9 makes provision so that employment service providers can, in relation to training, impose requirements (such as not being a transsexual person) where the training is for work the offer of which could be refused by relying on paragraph 2 of Schedule 9. Paragraph 4 of Schedule 12 makes similar provision for higher and further education institutions. The Explanatory Notes for Schedule 12 of the 2010 Act are at <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/16/29>.

6. As indicated above, the relevant provisions of the 2010 Act relate to “transsexual persons” and do not depend on a person having a full Gender Recognition Certificate. Any changes to the 2010 Act would need to be agreed with the UK Government, given that the 2010 Act is generally a reserved matter.

Yours sincerely

SARAH DUNCAN

Document 12

From: [redacted]
Sent: 28 July 2017 09:48
To: Duncan SE (Sarah) (Justice)
Cc: Stockwell SW (Simon); [redacted]@gov.scot
Subject: RE: Review of Gender Recognition- proposed meeting

Hi Sarah,

Thanks – I've put it in the diary.

[redacted]



Equality Network
30 Bernard Street
Edinburgh
EH6 6PR
Telephone: 0131 467 6039
www.equality-network.org

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Registered Scottish Charity: SC037852

From: Sarah Duncan
Sent: 28 July 2017 09:30
To: [redacted]@equality-network.org
Cc: Simon Stockwell; [redacted]@gov.scot
Subject: RE: Review of Gender Recognition- proposed meeting

[redacted]

Thanks for this.

Shall we say starting 2pm then at Bernard Street? I expect it will be Simon, me and possibly [redacted] coming.

Sarah E Duncan
Scottish Government: Family and Property Law Team



From: [redacted]
Sent: 28 July 2017 09:09
To: Duncan SE (Sarah)
Subject: RE: Review of Gender Recognition- proposed meeting

Hi Sarah,

Thanks! It looks like 28th August would be best for us.

[redacted]



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www.equality-network.org

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Registered Scottish Charity: SC037852

From: Sarah Duncan
Sent: 27 July 2017 12:03
To: [redacted]@equality-network.org; [redacted]@equality-network.org
Cc: Simon Stockwell ; [redacted]@gov.scot ; [redacted]@gov.scot
Subject: Review of Gender Recognition- proposed meeting

[redacted],

I understand Simon has already suggested to you that we were likely to want to meet you in August to discuss the consultations.

We'd like to take forward a meeting to update you on and discuss-

- the progress of the consultations;
- their launch; and
- roadshow/seminar events during the consultation period

Happy to come to you. As a starting point, would any of the following options suit you?

- morning of 18 August;
- 21 August;
- late morning and afternoon of 25 August; or
- 28 August?

Thanks,

Sarah E Duncan
Scottish Government: Family and Property Law Team
[redacted]

Document 13

From: Duncan SE (Sarah)
Sent: 28 July 2017 18:10
To: Stockwell SW (Simon)
Cc: [redacted]@gov.scot
Subject: Review of Gender Recognition

As discussed, here is a note on present position and some ERDM links as appropriate

[redacted]

Other interviews

13. Interview notes with [redacted] and [redacted], [redacted] in ERDM.

[redacted] enquiry

14. Draft response with [redacted] for comment. My email to him dated

[redacted]

My mobile number in case of questions or otherwise is [redacted]

Sarah

Document 14

From: [redacted]

Sent: 31 July 2017 09:37

To: Stockwell SW (Simon) ; Duncan SE (Sarah) (Justice)

Cc: [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot;
[redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot;
[redacted]@gov.scot

Subject: RE: BBC article on trans identity and women

Thanks for this Simon. The following point is one which we've raised with the STA before but they were of the opinion that there had been no such abuses to date and that the change in legislation was unlikely to effect this:

The concern is that the greater ease with which gender could be legally changed would give a tiny minority with nefarious motives greater opportunity.

If no-one is required to carry/present their GRC, if they presented as a woman, used a women's name, etc, they would be able to access single-sex facilities. This issue will be something for us to consider alongside the issue of frivolous applications as it's obviously an area of great concern to the general public.

The Gender vs Sex section is interesting. The STA would also argue that the number of trans women in relation to the number of cis women is extremely small, so would have very little impact – if at all – on gender equality. Copying in [redacted] and [redacted] for their information.

Thanks,
[redacted]

From: Stockwell SW (Simon)

Sent: 31 July 2017 08:58

To: Duncan SE (Sarah)

Cc: [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot;
[redacted]@gov.scot

Subject: BBC article on trans identity and women

<http://www.bbc.co.uk/news/uk-40713645>

For info. Quite a thoughtful article.

Document 15

From: Equality Network [redacted] On Behalf Of Equality Network

Sent: 31 July 2017 12:37

To: Stockwell SW (Simon)

Subject: Ask your MP to sign EDM 175 calling for X passports for non-binary people

[View this email in your browser](#)



1. Contact your MP and ask them to sign Early Day Motion 175 - calling for the introduction of X passports for non-binary people

A new Early Day Motion has been submitted to the UK Parliament by Norman Lamb, calling on MPs to support his call for the introduction of gender neutral 'X' passports.

[Click here to find your MP and ask them to support the motion!](#)

During the recent election campaign, 49 of the 59 MPs for Westminster who were elected in Scotland signed up to our LGBTI Equality Pledge - the first call of which was to extend trans equality, including by introducing gender X passports. Lets make sure all of those MPs follow through! (You can find out if your MP signed up to our pledge here: <http://www.equality-network.org/.../scotlands-new-mps-june-2.../>)

The poster features a large, colorful rainbow ribbon on the left side. The text 'Scottish LGBTI Equality Pledge' is prominently displayed in white on a blue background. Below the title, a numbered list contains one item: '1. Amend equality law to cover all trans people, and recognise non-binary people on UK Government records including passports'. To the right of the list is a white transgender symbol icon. At the bottom of the blue section, it says 'General Election 2017'. The footer includes the text 'Creating change together @LGBTIScotland' and logos for 'Equality Network' and 'Scottish Trans'.

Scottish LGBTI Equality Pledge

1. Amend equality law to cover all trans people, and recognise non-binary people on UK Government records including passports

General Election 2017

Creating change together
@LGBTIScotland

Equality Network

Scottish Trans

“I would feel far more comfortable if my passport, driver’s licence, etc., said my actual gender rather than the one I was assigned at birth. The gender on them currently feels wrong, and I feel like having my real gender on those items would be a big step in making myself and others feel more comfortable with our identities, and in making sure people in general know about and acknowledge non-binary people.” – respondent to our 2015 non-binary survey (read at www.scottishtrans.org/non-binary)

Get in touch with your MP - email asking them to sign Early Day Motion 175, and tweet them reminding them of their support for our Equality Pledge. You can find out their contact details by entering your postcode at: <https://www.parliament.uk/mps-lords-and-offices/mps/>

(To find out if your MP has supported the motion already, you can look here: <http://www.parliament.uk/edm/2017-19/175>)

Yours for equality,

[redacted]

Scottish Trans Alliance [redacted]



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Document 16

From: Duncan SE (Sarah)
Sent: 25 August 2017 11:56
To: [redacted]
Subject: RE: Review of Gender Recognition Act 2004- meeting between SG/EN on 28 October

Thanks [redacted] .

From: [redacted]
Sent: 25 August 2017 11:56
To: Duncan SE (Sarah)
Cc: Stockwell SW (Simon); [redacted]@equality-network.org; [redacted]@gov.scot;
[redacted]@equality-network.org
Subject: RE: Review of Gender Recognition Act 2004- meeting between SG/EN on 28 October

Hi Sarah,

Yes that's no problem – see you all on Monday at 1pm.

Best Wishes

[redacted]



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www.scottishtrans.org



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From: Sarah Duncan
Sent: 25 August 2017 11:53
To: [redacted]@equality-network.org

Cc: Simon Stockwell; [redacted]@equality-network.org; [redacted]@gov.scot; [redacted]@ @equality-network.org

Subject: Review of Gender Recognition Act 2004- meeting between SG/EN on 28 October

[redacted],

Further to our telephone conversation on Wednesday when we discussed bringing forward the meeting at 2pm to 1pm, I now want to confirm that change with you. I hope this remains convenient for you all. The attendees from our end will be Simon, [redacted] and me.

Many thanks for your help.

Sarah E Duncan
Scottish Government: Family and Property Law Team
[redacted]



Document 17

From: [redacted]@gov.scot

Sent: 30 August 2017 15:15

To: [redacted]@gov.scot ;[redacted]@gov.scot; Duncan SE (Sarah)

Cc: [redacted]@gov.scot; [redacted]@gov.scot [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot; Stockwell SW (Simon)

Subject: RE: MACCS: New case 2017/[redacted] allocated

Hi [redacted],

Thanks very much for your, and Sarah's, changes to this draft.

In terms of the suggestion you made to remove non-binary from the paragraph on data collection, the EN/STA did advise that, although trans is an umbrella term, it's not always the case that wherever trans is mentioned, non-binary applies. The very strong steer we got on Monday was that we should explicitly say "trans people, including non-binary people", unless we are talking about them separately, and then it's fine to say "trans men, trans women and non-binary people".

I appreciate non-binary hasn't appeared in the response before this, but I think using the form of words EN/STA suggested helps address this. I would therefore be inclined to re-word the paragraph as follows:

On data, gender, as opposed to sex, is the concept measured in the Scottish Government's household surveys. In these surveys, gender is self-identified by the respondent. Given the relatively small number of trans people, including non-binary people, we consider that the impact of collecting data on a person's gender identity rather than their sex will be low.

Thoughts?

Thanks,
[redacted]

From: Stockwell SW (Simon)

Sent: 28 August 2017 08:11

To: [redacted]@gov.scot

Cc: [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot; Duncan SE (Sarah); [redacted]@gov.scot

Subject: RE: MACCS: New case 2017 [redacted] allocated

<< File: Gender Recognition_ draft reply to MACCS case 2017_[redacted].obr File: Gender Recognition_ draft reply to MACCS case 2017_[redacted].doc >>

[redacted]

2. Sarah will circulate shortly a draft reply to [redacted]. Although that is about a different issue to the points raised by [redacted], it does also raise points on the 2010 Act.

[redacted]

4. I have slimmed down the discussion in the draft reply on the distinction between sex and gender. We can discuss further with the EN/STA on Monday (and in the consultation) but my view is that section 9 of the GRA takes the right approach:

- We do not require people seeking a GRC to have surgery. That is appropriate – requiring surgery would be intrusive (and might require the GRP to consider the quality of the surgery carried out) and surgery may not be available to all (eg the person may have a medical condition preventing such surgery or there may be technical or funding or logistical constraints).
- Part of the point of acquiring a full GRC is not so much legal as acceptance – it shows that a trans person is accepted in society.
- When it does come to legal rights, it may be hard to distinguish between those obtained through a person's gender and those obtained through a person's sex.

[redacted]

6. On single sex services (and sport) and the 2010 Act, do we have a policy view on whether changes are needed? We don't need that for the reply and, of course, changes would be for the UK Government anyway. In relation to the draft reply [redacted] which Sarah is going to circulate, my policy view is that the SG should not seek changes to the 2010 Act. In other words, I think, as a matter of policy, that it should remain possible for religious bodies to require, if they wish, that their ministers of religion be men and not be trans. To do otherwise would be the state interfering with religious doctrines. (Similarly, I would retain the 2010 Act provisions laying down that it is not discrimination for a celebrant to refuse to marry or register the civil partnership of a person who the celebrant reasonably believes has a full GRC). I **think** the EN/STA would probably accept that: we can ask on Monday. Clearly, there is more of a debate on UK provisions which exclude trans women from services provided for women. It appears the EN/STA are opposed to these whereas I assume [redacted], and others, would keep them.

[redacted]

Simon Stockwell
Family and Property
[redacted]

From: [redacted]@gov.scot
Sent: 24 August 2017 18:12
To: [redacted]@gov.scot; Duncan SE (Sarah); [redacted]@gov.scot; [redacted]@gov.scot
Cc: [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot
Subject: RE: MACCS: New case 2017/[redacted] allocated
Importance: High

Hi Sarah and [redacted]

[redacted]

It would also seem, from the points in the correspondence, that the correspondent was familiar with the Women and Equalities Committee Transgender Equality Report (see extract below).

Thanks again for your assistance with this.

[redacted extract of the Women and Equalities Select Committee Report. This is available publicly at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2015/transgender-equality/>]

From: Duncan SE (Sarah)

Sent: 18 August 2017 11:33

To: [redacted]@gov.scot

Cc: Stockwell SW (Simon); [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot

Subject: RE: MACCS: New case 2017/00[redacted] allocated.

[redacted],

This MACCs enquiry is very wide ranging.

I have added some a comment (and suggested some text) into [redacted]'s version concerning whether we allude to the content of the SPS policy addressing the action to be taken where there is clear evidence that a trans woman in custody poses a sexual offence risk.

<< File: F201700[redacted].doc >>

I noted that the correspondent also refers in their point 9 to the recommendation in the Women and Equalities Select Committee Report on Transgender Equality that the "genuine occupational requirement" exception in Schedule 9 paragraph 1 should not apply where a trans person had a GRC. Simon and I have discussed an enquiry from [redacted] about whether SG have any intention to seek the existing related EA exemptions for religious requirements. We reached the position that SG had no intention to seek change in that area. That response has yet to go out. However, given the complexity of this area, that equal opportunities is generally reserved and that the matter may come up in the UK government's consultation on the 2004 Act later this year, it may be best to say nothing in the response. (The STA had called for the exception to be removed in their evidence to the Select Committee.)

Sarah

Document 18

From: [redacted]@gov.scot
Sent: 13 September 2017 14:18
To: Stockwell SW (Simon); [redacted]@gov.scot; Duncan SE (Sarah) (Justice)
Cc: [redacted]@gov.scot
Subject: FW: Sex and gender

Hi,

This isn't about a response to [redacted] email, but I've been sent a copy of LGBT Youth's guidance for supporting trans young people in schools which was developed in partnership with the STA. In it, they use the following definitions:

The terms 'sex' and 'gender' are often used interchangeably but they mean different things.

Sex – describes physical differences between bodies, and biological characteristics such as the reproductive system.

Sex is typically categorised as 'male' or 'female' but 'biological sex' (our anatomy including sex organs, chromosomes and hormones) is more diverse than that. Some people are 'intersex': an umbrella term used for people who are born with variations of sex characteristics, which do not always fit society's perception of male or female bodies. Intersex is not the same as gender identity or sexual orientation.

Gender – describes the attitudes, feelings and behaviours which a given culture associates with a person's biological sex.

The terms girl/woman, boy/man are assigned at birth on the basis of biological sex. They come with cultural expectations and 'norms' about what it means to be a girl or boy, man or woman. These expectations can vary across cultures and over time.

This acknowledges the interchangeable use of 'sex' and 'gender', but states that they mean different things.

Thanks,
[redacted]

From: [redacted@equality-network.org]
Sent: 13 September 2017 11:17
To: [redacted]@gov.scot; [redacted]@equality-network.org; [redacted]@equality-network.org; [redacted]@equality-network.org
Cc: Stockwell SW (Simon); Duncan SE (Sarah); [redacted]@gov.scot
Subject: RE: Sex and gender

Hi [redacted],

Thanks for the clarification!

After our discussion about pieces of legislation that currently don't quite work for trans people, when we met with you and Simon and Sarah

recently, [redacted] and [redacted] have been looking at the HFEA 2008 in more detail, to prepare suggestions for what might need to change to make it work fully. It would be great at some point to discuss that, and the other two Acts you mentioned, more.

I think, overall, we'd agree with you that those pieces of legislation are each, in part, about providing two different sets of rules, that it was originally assumed would apply only to people of male sex/gender, and female sex/gender, respectively, and which don't always work properly for trans people. The Acts do not define or directly mention sex or gender, so do not themselves create a legal distinction between sex and gender.

The Children (Scotland) Act 1995 confers parental rights and responsibilities on a child's mother, but does not define mother. The natural definition, and in fact the definition that seems to be used in practice in Scotland, is that the person who gave birth to the child is treated as the mother, regardless of their sex/gender. We know, because it has happened, that that includes trans men who give birth, and we assume that they would be listed as the mother on the birth certificate, and treated as such for purposes of the 1995 Act, whether or not they had a GRC at the time of the birth (although the law would benefit from clarification of course, and trans men who give birth would prefer to be called parent, rather than mother, on the birth certificate). It would certainly be counter to common sense to apply the law in a way that gave the status of mother, together with PRRs, to a trans man who gave birth the day before he got his GRC as a man, but not to a trans man whose GRC arrived two days earlier – that would certainly not be in the best interests of the child.

So we would say that it's not that the 1995 Act makes any distinction between sex and gender, but that it was originally drafted on an assumed definition of mother (ie person who gives birth) that (no doubt to the surprise of the people who drafted the Act in the days before understanding of trans) turns out to include some people of male sex/gender. I think the same is true of the 1986 Act.

The situation with the HFEA 2008 is slightly different, because it uses the term "woman" as well as "mother", making the assumption (eg, in section 33) that only a woman can give birth and become a mother under the Act. But it does not define woman. It would ultimately be up to a court to decide for sure whether the HFEA would apply to a trans man who gave birth following donor insemination for example, and clearly,

like the other two Acts, the HFEA could do with amendment to clarify this.

It might be a little harder for a court to decide that trans men who give birth are currently included in the “mother” provisions of the HFEA, than it is for the other two Acts, because of the explicit use in the HFEA of the word “woman” as part of the definition of “mother”. However, again, we would say that the HFEA does not make any distinction between sex and gender; it is just that it was drafted in the incorrect expectation that only women (that is, people of female sex/gender) could give birth. I would suggest that the principle of the paramountcy of the best interests of the child would indicate that a court should decide that a trans man who gives birth after donor insemination is the child’s mother for the purposes of the HFEA, and that the other provisions of the Act apply, despite the use of the term woman in the Act.

Not surprisingly, these three examples all relate to parenting, and they all relate to the fact that the ability to give birth, and the ability provide sperm to fertilise an egg, do not exactly match up with female and male sex/gender respectively.

However, we don’t think the solution is to introduce a new legal concept of sex (different from the legal concept of gender) which would need to be defined as ability to give birth, or ability to provide sperm (where would that leave people who for various reasons can’t do either?), but rather the solution is to amend the three Acts to clarify that they cover cases where a person of male or non-binary sex/gender gives birth, and cases where a person of female or non-binary sex/gender provides sperm.

I hope that makes sense!

[redacted]

From: [redacted]@gov.scot

Sent: 06 September 2017 14:02

To: [redacted]@equality-network.org; [redacted]@equality-network.org; [redacted]@equality-network.org; [redacted]@equality-network.org

Cc: Simon Stockwell; [Sarah Duncan](#); [redacted]@gov.scot

Subject: RE: Sex and gender

Hi [redacted],

Sorry for the delay in getting back to you. I suppose it might be the way in which terms such as “mother” and “father” are interpreted rather than defined in, for example, the Children (Scotland) Act 1995, or “man” and “woman” in other legislation, such as the Law Reform (Parent and Child) (Scotland) Act 1986 and Human Fertilisation and Embryology Act 2008.

I’m aware that you have already given great consideration to this issue and appreciate you pointing out that you aren’t aware of any evidence that supports the view that these terms have different legal meanings.

Thank you,
[redacted]

From: [redacted]@equality-network.org
Sent: 01 September 2017 16:27
To: [redacted]@gov.scot; [redacted]@equality-network.org; [redacted]@equality-network.org; [redacted]@equality-network.org
Cc: Stockwell SW (Simon); Duncan SE (Sarah); [redacted]@gov.scot
Subject: RE: Sex and gender

Hi [redacted],

Thanks for your email. Exactly which pieces of legislation do you believe define sex and gender as having different legal meanings? It’s very important that we examine in detail any such claim that legislation, as opposed to academia, legally differentiates sex and gender and, if it does (which we have not to date seen any evidence supporting), exactly what legal definitions are used.

Cheers,

[redacted]

From: [redacted]@gov.scot
Sent: 01 September 2017 11:18
To: [redacted]@equality-network.org; [redacted]@equality-network.org; [redacted]@equality-network.org; [redacted] @equality-network.org
Cc: Simon Stockwell; Sarah Duncan; [redacted]@gov.scot
Subject: RE: Sex and gender

Hi [redacted],

Thanks very much for your email, I appreciate your prompt response. It’s really useful to have this clarification, and our discussion on Monday also helped.

You have made the argument for using sex and gender interchangeably well and this will be at the forefront of our mind when developing the consultation and legislation. However, we are also conscious that these words have different legal meaning. Whilst the GRA uses these terms interchangeably, there is other

legislation which only uses one of these terms and that there is a particular reason for doing so. That's why we were keen to have a discussion about terminology to help inform our understanding of the terms and the way in which these should be used.

It is going to be very helpful to draw on the STA/EN's experience of engagement with those with a less well developed understanding of LGBTI equality issues in order to aid comprehension of the issues. Whilst the primary aim of this legislation is to improve legal recognition for trans people, including non-binary people, and intersex people, it would be helpful if it could also inform the wider public's understanding of these issues. Not being clear about what we mean by sex and gender may be difficult and is likely to attract criticism around an issue that some people will consider controversial, however, we are also mindful of the points you have made below. With stakeholder support, we will strive to make policy and legislation that is as inclusive as possible balanced with aiding the wider public's understanding of some quite complicated issues.

Thank you,
[redacted]

From: [redacted]@equality-network.org
Sent: 29 August 2017 14:19
To: [redacted]@gov.scot; [redacted]@equality-network.org; [redacted]@equality-network.org; [redacted]@equality-network.org
Cc: Stockwell SW (Simon); Duncan SE (Sarah)
Subject: RE: Sex and gender

Hi [redacted],

Thanks for coming back to us about this – I appreciate that it's quite a complicated area, so I'll try and answer as simply as possible.

The reason that we use sex and gender interchangeably is that the two ideas have a lot of overlap, and often when you try to separate them you end up with a situation that doesn't really work for either trans or intersex people.

We would think of your "sex" as including both your physical body **and** your gender identity – so for most people these two things correspond in the way we expect (cisgender people) and for some people they don't (trans including non-binary people). We wouldn't explain it as sex = physical, and gender = social, as is sometimes the most commonly used simplification of the difference. A big reason for this is that lots of the time, if sex and gender are separated this simply, you get situations where someone might explain a trans person as having a "male" gender identity but a "female" sex, (and female sex here is normally read as equal to a "female" body). This isn't a particularly satisfactory way of thinking about trans people's bodies, as the body of a man must be a man's body!

Similarly, it is why people confuse non-binary identities and intersex people, because people think that a gender identity that isn't male or female must mean a physical body that isn't male or female, because we are so used to conflating sex and gender – again, because gender identity is often assumed to "match" a person's body in the way society expects. This can often lead people to assuming that intersex people won't identify as men or women, when we know that overwhelmingly intersex people would identify this way.

Because of this, I think it is almost impossible to separate out sex and gender, because the two things are mutually premised on an idea of a binary, and of a correspondence, and trans and intersex people sort of “muddle” that neatness.

When we talk about intersex people, we talk about variations in “sex characteristics” or variations in “bodies” – not variations in sex. For example, the way that we would describe the difference between non-binary and intersex people (as we know people are often particularly confused between these two terms) is:

Physical bodies are often seen as fitting into a binary – of all ‘male’ or all ‘female’ sex characteristics. In fact there can be many variations of people’s sex characteristics. **Intersex** is an umbrella term used for people who are born with variations of sex characteristics, which do not always fit society’s perception of ‘male’ or ‘female’ bodies.

Being **non-binary** is not the same as being intersex – it is about having a gender identity that is not described simply by using the words ‘man’ or ‘woman’, rather than having sex characteristics that do not fit society’s perception of ‘male’ or ‘female’ bodies. A person can be non-binary no matter what physical body they have.

So rather than saying intersex is a different “sex” to male or female, we describe it as a difference or variation in male and female sex characteristics, and a difference in physical body. Again – this is because we would consider your “sex” to include your “gender identity”.

So after claiming I wouldn’t get too nerdy about this – there’s my response!

We’d be very happy for you to borrow any of the wording from the above if it’s useful for the explanation in the consultation, or to advise on specific wording for a particular section if it’s useful.

Hope that helps,

[redacted]



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From: [redacted]@gov.scot

Sent: 29 August 2017 08:01

To: [redacted]@equality-network.org; [redacted]@equality-network.org; [redacted]@equality-network.org; [redacted]@equality-network.org; Simon Stockwell; Sarah Duncan

Subject: Sex and gender

Morning,

I was reflecting more on our discussion about sex and gender again last night. Whilst I absolutely accept the reasons for using these terms interchangeably, and the benefits of doing so for trans people, including non-binary people, and intersex people, given the concerns you had about the conflation of the issues by the media if the launch of both consultations were to be on the same day, do you not think it's important to have a greater distinction between the two terms in order to aid the general public's understanding of these issues?

Trans people, including non-binary people, and intersex people will have a good understanding of the definitions of each term and what it means in relation to their own identity and may be comfortable using them interchangeably, however, lay people may struggle to understand the difference, particularly if they are cis-gender and have never had to give consideration to their gender identity or any intersex variation.

I was thinking back to something [redacted] said a few years ago about intersex inclusion, and that although people weren't familiar with what intersex meant, using it in the LGBTI acronym would raise awareness of the term and issues associated with it. Given the high profile of the forthcoming consultations, would it not be beneficial to try and use the correct terminology where possible at all times to aid understanding of the differences between the two terms. I know you will do this in practice anyway, I'm just thinking about comms around this, and the inevitable correspondence we will receive on this and how to best respond.

Thoughts?

[redacted]
LGBTI Equality Policy
[redacted]

Document 19

From: [redacted]@gov.scot
Sent: 05 September 2017 17:23
To: [redacted]@gov.scot; Stockwell SW (Simon)
Cc: Duncan SE (Sarah) (Justice)
Subject: RE: Sex and gender

There's legislation where a person's sex is implicit such as a reference to a [mother](#), a [father](#), and a [man](#). There are other examples in the HFE legislation – [redacted] talked us through many of these in relation to amendments needed to make the legislation gender neutral.

Re: section 9 of the Gender Recognition Act 2004 – I assumed previously that it refers to a person's "sex" changing because that was the legal effect of getting a GRC and therefore necessary for recognition within the existing legal framework, including discrimination law.

[redacted]

From: [redacted]@gov.scot
Sent: 05 September 2017 09:29
To: [redacted]@gov.scot Stockwell SW (Simon)
Cc: Duncan SE (Sarah)
Subject: RE: Sex and gender

Thanks for this, [redacted]. Is there any legislation that you've come across that you can recall where the sex or gender of a person has been stated? Anything around PRRs or HEF? Were you thinking that this was in the legislation itself or the explanatory notes?

No, re the EA 2010, I was referring to the protected characteristic of sex which is defined as "being a man or a woman" which is how we would tend to define gender identity. However, at our meeting last Monday, [redacted] said that Press for Change had deliberately advised that both sex and gender should be used in the wording in section 9 of the GRA 2004 to avoid the possibility of trans people still being discriminated against either through their sex (if the act amended their gender) or vice versa.

Thanks,
[redacted]

From: [redacted] @gov.scot
Sent: 05 September 2017 08:57
To: [redacted] @gov.scot; Stockwell SW (Simon)
Cc: Duncan SE (Sarah)
Subject: RE: Sex and gender

What I had in mind is that I think legislation largely uses the term (or the concept of) "sex" except a few notable instances such as the Gender Recognition Act 2004 and

the provisions on being able to say which gender of person you want to examine you in certain circumstances.

Re: the Equality Act 2010, are you talking about the wording of the protected characteristic of “gender reassignment”?

“A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex.”

[redacted]

From:[redacted] @gov.scot
Sent: 04 September 2017 08:58
To: Stockwell SW (Simon)
Cc: Duncan SE (Sarah); [redacted]@gov.scot
Subject: RE: Sex and gender

Hi,

I took a steer from [redacted] on this. [redacted], are you able to provide any examples of legislation where this is the case?

I agree the EA 2010 uses the terms interchangeably which I had always thought was an error, but after last week’s meeting, it looks more likely that it may have been drafted this way on purpose (if it was in relation to trying to stop discrimination against trans people on the basis of both their sex and gender). This has helped progress trans equality, however, it looks to be mudding the waters in other areas, such as data collection.

I thought I recalled the STA saying that they thought certain terms in the EA 2010 required amending – certainly gender reassignment, but I thought they had also included sex. Perhaps they might not argue for this, however, if it would open trans people up to more discrimination.

[redacted]

From: Stockwell SW (Simon)
Sent: 01 September 2017 18:09
To: [redacted]@gov.scot
Cc: Duncan SE (Sarah); [redacted] @gov.scot
Subject: RE: Sex and gender

[redacted]

Equality Act??

I am not sure we have evidence that legislation has got it wrong? Legislation might conflate sex and gender - as we discussed at the meeting with the EN/STA, the GRA does exactly that but it does it for policy reasons.

Simon

Document 20

From: [redacted]@gov.scot

Sent: 01 September 2017 10:39

To: [redacted]@gov.scot

Cc: Stockwell SW (Simon); Duncan SE (Sarah) (Justice); [redacted]@gov.scot

Subject: RE: Sex and gender

Hi [redacted]

Thanks for your email and apologies for missing you off the copy list. Thanks for coming back on these points, I appreciate your comments.

At Monday's meeting, EN/STA set out why they are content with the terms sex and gender being used interchangeably. When the GRA 2004 was being developed, Press for Change suggested the wording used in section 9 where sex and gender are used interchangeably. [redacted] advised that this was intentional in order to prevent trans people from being discriminated against in terms of their sex. Their view was that there was a risk that service providers, etc. would say something along the lines of "the act means we recognise your acquired gender identity, however, your sex hasn't changed" and trans people would still be denied services.

I have to say that surprised me as we have been working hard with NRS and ONS on terminology for the Census and trying to be clear about how data collection could be affected by the use of certain options over others.

You make a good point about the law, so even if there is legislation that uses these terms interchangeably, there is other legislation which only uses one of these, and there is a particular reason for doing so. [redacted]

I think that as policy makers with a fairly good understanding of LGBTI equality issues, we recognise that gender identity (and sex) is a spectrum, and that people choose to define themselves in various ways on this spectrum, and that this isn't necessarily fixed over the course of their life. However, I don't think this is true for the wider public, and our role is to help inform their understanding in the way we develop policy and legislation. The clearer things are, the better their comprehension of the issues. To use the terms interchangeably has the potential to confuse people about an already fairly complicated issue and is likely to attract criticism.

On your final point, in the context of our sex vs gender debate, I had been discussing with the Gender Team if discrimination was more likely to be on the grounds of a person's sex or their gender. [redacted] gave an example of a situation where a small business was looking to recruit, and discarded an application from a woman of childbearing age. This would be discrimination on the grounds of her perceived sex, whether she was trans or not. This would also include discrimination against cis-women who, for example, are unable to conceive, however cis-men, whether they were infertile or not, wouldn't be discriminated against in this way.

I think it's fair to say that this is likely to be an ongoing debate throughout the development of this legislation and beyond, but I do think it's important for us to continue discussions internally as well as with stakeholders.

Thanks,
[redacted]

Document 21

From: Stockwell SW (Simon)

Sent: 12 September 2017 08:47

To: Duncan SE (Sarah) (Justice)

Cc:[redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot;
[redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot;
[redacted]@gov.scot; [[redacted]@gov.scot; [redacted]@gov.scot];
[redacted]nrscotland.gov.uk; [redacted]nrscotland.gov.uk; [redacted]@gov.scot;
[redacted]@gov.scot

Subject: RE: Review of Gender Recognition Act 2004- draft consultation- comments by Tues 12 September

[redacted]

Sarah

[redacted]

- I think we should include a “nothing” option in respect of those under 16. A variety of reasons: there’s no consistency on this in gender recognition in other countries; there are drawbacks to all of the options for under 16s; as Dr [redacted] said, there is an argument that younger children need protection as well as rights; making the age 16 (with no real life experience requirements) is a significant change in any event.

[redacted]

- I think we should make it clear that we are keeping the exemption for celebrants not having to marry people with a full GRC. For completeness, we’ll need to give CabSec a flavour of what people are saying on the 2010 Act (eg Roman Catholic priests and single sex services).

[redacted]

Simon Stockwell
Family and Property
[redacted]

Document 22

From: Duncan SE (Sarah)

Sent: 12 September 2017 15:08

To: [redacted]@gov.scot

Cc: [redacted]@gov.scot; [redacted]@gov.scot; Stockwell SW (Simon); [redacted]@gov.scot

Subject: RE: Review of Gender Recognition Act 2004- draft consultation- comments by Tues 12 September

[redact],

Many thanks for these comments. You have I think seen an earlier version of our framing/scoping work for the CRWIA done by [redacted]. We met with LGBT Youth groups aged 13-25 in May. I'll need to check if we have referred to that in our current version of the partial CRWIA.

Sarah

[redacted]

Document 23

Extract from document dated 20 Sep 2017

[redacted]

[redacted] have asked us whether the proposed changes to the 2004 Act would have any impact on who could enter the priesthood. The short answer is no as we are not seeking any changes to provisions in the 2010 Act which allow religious bodies to impose restrictions on which categories of persons can become ministers of religion. Paragraph 6.14 of the consultation says this.

[redacted]

Document 24

From: Duncan SE (Sarah)
Sent: 21 September 2017 10:57
To: [redacted]@gov.scot
Cc: Stockwell SW (Simon); [redacted]
Subject: RE: Review of gender recognition - CRWIA

Yes, thanks, I'd agree. I wanted to add some text about the meeting with LGBT Youth which I hadn't yet done.

Sarah

Document 25

Extract from draft Equality Impact Assessment

[redacted]

Disability

- [There is evidence that transgender people have a high incidence of mental health issues than the general population.](#) Initial evidence suggests that [mental health issues are related to the prejudice and discrimination experienced by the transgender people, and that their transgender people's and transgender disabled people's](#) mental health may benefit from socially transitioning to live in accordance with their gender identity. [The evidence suggests that these mental health issues are related to the prejudice and discrimination experienced by the transgender people.](#) Streamlining the legal gender recognition process by removing any requirement for medical evidence or evidence of [RLiving for a defined period in the acquired gender](#) might further reduce stigma and improve mental health.

Comment from [redacted]: Should a reference to the STA's mental health research be cited here? Section 4.8 cites that 66% of respondents reported that they had used mental health services for reasons other than access to gender reassignment medical assistance.

Document 26

From: Duncan SE (Sarah)

Sent: 03 October 2017 15:57

To: [redacted]@nrscotland.gov.uk

Cc: Stockwell SW (Simon); [redacted]@gov.scot; [redacted]@gov.scot;
[redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot;
[redacted]@gov.scot; [redacted]@nrscotland.gov.uk

Subject: RE: Factual Briefing request - Gender Recognition

Thanks [redacted] for these comments.

I'll look to add some information about where the doubts about the quality of the evidence around the persistence of feelings of gender incongruence come from. Both medical/ psychological researchers looking into the long term experience of children and adolescents and trans support/advocacy groups have challenged the validity of these research outcomes. (I know that LGBT Youth Scotland have referred to recent medical/psychological research that suggests that the more 'persistent and consistent' a child's feelings about their gender identity are, the more likely they will maintain that preferred identity into adulthood.)

Sarah E Duncan

Scottish Government: Family and Property Law Team

[redacted]



Document 27

Extract from briefing dated 4 Oct 2017

[redacted]

- The Scottish Transgender Alliance's (STA) 'Equal Recognition' campaign calls for reform of the 2004 Act, so that legal gender recognition is based on an applicant's self-declaration.

[redacted]

The STA 'Equal Recognition' campaign

6. The campaign asks for:

- The requirement for a psychiatric diagnosis of gender dysphoria to be removed from the legal gender recognition process and a simple administrative process of self-declaration introduced by which people could apply to have the sex on their birth certificate changed.
- The current minimum age of 18 for obtaining legal gender recognition be reduced.
- For non-binary people (people who do not identify as men or women) to be legally recognised.

7. The campaign originally asked for the SG to engage with intersex people, to understand their concerns and recognise their right to bodily autonomy and social equality. This was separated out from the main Equal Recognition Campaign as there was concern that the different issues for intersex people and transgender people might be confused.

Age at which people can apply for legal gender recognition

8. The STA want people to be able to apply for legal gender recognition from 16 and for children under 16 to be able to access gender recognition where a parent or legal guardian provides their consent. Organisations with a child's rights focus may well argue against the need for parental consent and suggest that decisions should be for children with sufficient capacity.

[redacted]

Document 28

Extract from note dated 6 Oct 2017

[redacted]

- There will be opposition to the consultation from religious bodies such as the Christian Institute, CARE for Scotland, the Free Church of Scotland and the Roman Catholic Church.

Document 29

From: Stockwell SW (Simon)

Sent: 10 October 2017 11:40

To: [redacted]@equality-network.org; [redacted] @equality-network.org

Cc: [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot;
[redacted]@gov.scot; Duncan SE (Sarah) (Justice) ; [redacted]@nrscotland.gov.uk;
[redacted]@nrscotland.gov.uk; [redacted]@equality-network.org;
[redacted]@equality-network.org

Subject: Gender recognition: self-declaratory system: applications by people with learning disabilities or additional support needs

[redacted]

[redacted]

Hi.

One of the points arising from the Equality Impact Assessment we have prepared for the consultation is how a self-declaratory process would work in relation to people who have a learning disability or additional support needs. Part of the answer to that might be to ensure that guidance is as simple as possible and that there is support from relevant third sector organisations.

Any thoughts?

We could perhaps discuss at our meeting on Monday.

Simon Stockwell
Family and Property
Scottish Government
[redacted]

Document 30

From: [redacted]

Sent: 23 October 2017 09:34

To: Stockwell SW (Simon)

Subject: RE: Applications to the Gender Recognition Panel by people with learning disabilities or additional support needs

Simon

Interesting legal issue. It depends is the answer. We have had at least 2 and probably 3 such applications. We would need to be satisfied that the patient applicant had the power and capacity to give their attorney instructions. For the physically incapacitated that may be easier than someone with a mental capacity issue. We have rejected such applications.

[redacted]

From: Stockwell SW (Simon)

Sent: 23 October 2017 08:09

To: [redacted] ; [redacted]@hmcts.gsi.gov.uk

Cc: [redacted]@gov.scot [redacted];

[redacted]@gov.scot;[redacted]@gov.scot;[redacted]@gov.scot; Duncan SE (Sarah)

(Justice);[redacted].gov.uk;[redacted].gov.uk; [redacted].gov.uk; [redacted]@nrscotland.gov.uk;

[redacted]@nrscotland.gov.uk

Subject: RE: Applications to the Gender Recognition Panel by people with learning disabilities or additional support needs

[redacted]

Thanks. In relation to gender recognition, I assume the GRP would not accept an application on behalf of a person by someone holding a power of attorney for them or by someone who has been appointed by the court as that person's deputy [or, in Scotland, guardian]?

Simon Stockwell

Family and Property

Scottish Government

[redacted]

From: [redacted]

Sent: 10 October 2017 11:44

To: Stockwell SW (Simon); [redacted];[redacted].gsi.gov.uk

Cc: [redacted]@gov.scot; [redacted].gov.uk;

[redacted]@gov.scot;[redacted]@gov.scot;[redacted]@gov.scot; Duncan SE (Sarah)

(Justice);[redacted].gov.uk;[redacted].gov.uk; [redacted].gov.uk; [redacted]@nrscotland.gov.uk;

[redacted]@nrscotland.gov.uk;

Subject: RE: Applications to the Gender Recognition Panel by people with learning disabilities or additional support needs

Simon

Some jurisdictions would appoint an appointee to act for the person with learning disability if their disability was severe. That is what happens in the Social security jurisdiction. It raises the question of whether the applicant has the capacity to self certify.

We have had 2 cases in recent times when the applicant was so severely disabled that a nominee had been appointed to act for them in the Court of Appeal.

[redacted]

From: [redacted].gsi.gov.uk
Sent: 10 October 2017 15:34
To: Stockwell SW (Simon)
Cc: [redacted]@gov.scot; [redacted].gsi.gov.uk; [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot; Duncan SE (Sarah) (Justice); [redacted].gov.uk; [redacted].gov.uk; [redacted]@nrscotland.gov.uk ; [redacted]@nrscotland.gov.uk
Subject: RE: Applications to the Gender Recognition Panel by people with learning disabilities or additional support needs

Hi Simon

This is not simple to address, we have had applicants who had learning difficulty and other issues. We normally advise them to use friends and family for help. Often people with mental or learning difficulty have care worker assign to them and we advise them to seek help from care worker. I have taken call from care worker asking advice to fill form. We have also had call from Citizen Advice asking help to fill in the form in present of the applicant. So there is always help available.

Regards.

[redacted]

"I am not authorised to bind the Ministry of Justice contractually, nor make representations or other statements which may bind the Ministry of Justice in any way via electronic means."

From: Simon.Stockwell@gov.scot [<mailto:Simon.Stockwell@gov.scot>]
Sent: 10 October 2017 11:36
To: [redacted].gsi.gov.uk
Cc: [redacted]@gov.scot; [redacted].gsi.gov.uk; [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot; [redacted].gov.uk; [redacted].gov.uk; [redacted].gov.uk; [redacted]@nrscotland.gov.uk; [redacted]@nrscotland.gov.uk
Subject: Applications to the Gender Recognition Panel by people with learning disabilities or additional support needs

[redacted]

Hi.

As you know, we are currently working on a consultation to review the Gender Recognition Act 2004 in Scotland and move to a more self-declaratory process for obtaining legal gender recognition.

One of the points arising from the Equality Impact Assessment we have prepared is how a self-declaratory process would work in relation to people who have a learning disability or additional support needs. Part of the answer to that might be to ensure that guidance is as simple as possible and that there is support from relevant third sector organisations.

Is this an issue which the GRP comes across at the moment and, if so, how do you deal with it?

Simon Stockwell
Family and Property Scottish Government
[redacted]

Document 31

Extract from document dated 11 Oct 2017

[redacted]

- There may be issues around how self-declaration will work for people with learning disabilities or additional support needs (eg see page 7 under “Disability”). We can see if that can be tackled adequately through clear guidance and support from third sector organisations (and will discuss with the Equality Network/Scottish Transgender Alliance and with Irish counterparts) and will provide further advice after the consultation.

[redacted]

Document 32

From: Duncan SE (Sarah)
Sent: 17 October 2017 09:46
To: [redacted]
Cc: [redacted]@gov.scot
Subject: FW: Equal Recognition FAQs

[redacted],

Thanks for this. I've copied [redacted] as I think the Women's Services sheet which I've looked over will be particularly useful from the perspective of the enquiries to SG we were speaking about yesterday. The lines taken are similar to that we have discussed here.

Thanks for the time you, [redacted] and [redacted] gave us yesterday. Once I've looked over all the documents, I'll come back to you if I have any questions once I've looks over all the documents.

Sarah E Duncan
Scottish Government: Family and Property Law Team
[redacted]



From: [redacted]
Sent: 17 October 2017 09:38
To: Duncan SE (Sarah)
Subject: Equal Recognition FAQs

Hi Sarah,

Thanks for coming in for those marathon back-to-back meetings yesterday, it was nice to see you. I've reattached our policy docs, which as I mentioned yesterday all have an FAQ section at the end that might be of some use. I've also attached the really short women's services sheet we've been handing out at various trainings and events – it's aimed at service providers but the info in terms of ***this doesn't change anything*** would be useful for responding to some of your contacts as well!

Feel free to use any bits that are useful or to come back to me with questions.

Thanks,

[redacted]



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Document 33

Attachment referred to in emails of 17 Oct 2017

International best practice in gender recognition law: **Young People Briefing Paper** October 2017

What's the problem?

At the moment, the Gender Recognition Act only allows people who are 18 years or older to apply to have their gender legally recognised. To bring the law up to international best practice, this age restriction should be amended, so that trans young people in Scotland have the same right to have their gender recognised as everyone else.

This should be done in two ways:

- 16 and 17 year olds should be able to apply for legal gender recognition by the same process as people who are 18 and over.
- Young people under the age of 16 should be able to apply for legal gender recognition with the consent of their parents or guardians.

Why does this matter?

For 16 & 17 year olds

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

[image redacted]

Young people at Beyond Gender, a group for trans young people run by LGBT Youth Scotland

"I'm currently 17 and am going away to college next year. I would much prefer to have myself as male on the official records, but they need to have my 'real' details on the system." **Young trans person**

In Scotland, young people are deemed to have full legal capacity at 16 years old. They are able to vote in elections, get married, and consent to any medical, surgical or dental treatment, as well as a host of other rights. This should also extend to having their gender legally recognised. Changing the law in this way will reflect the general consensus in Scottish politics that 16 and 17 year olds are able to make decisions for themselves. **The right to have your gender legally recognised should be extended to 16 and 17 year olds, on the same basis to which it applies to people over 18.**

For young people under 16

“Absolute denial of legal gender recognition to individuals under a given age is not consistent with existing international standards regarding the rights of children.” **Amnesty International Report¹**

A small but increasing number of trans young people in Scotland are able to be open about their gender identity and live happy, healthy lives with the support of their parents, families and peers. At the moment, even those young people who have been living for many years as themselves, who are accepted by their families, and who go along to school expressing themselves in the way that they feel most comfortable, are unable to have their gender identity legally recognised on their birth certificate. With their parent’s consent they can already change their gender on their medical records and passport but their birth certificate remains stuck in their old gender which causes them significant distress and inequality. They are left in an unacceptable legal limbo for years with their birth certificate conflicting with their gender identity, their other identity documents and the reality of their daily life. Respecting trans young people’s gender identity is in line with the United Nations Convention on the Rights of the Child², including:

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

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

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

- **Article 14** - the right to freedom of expression.
- **Article 16** - the right to privacy.
- **Article 28** - the right to education.

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

"[the] proposal of a new act on changes of legal gender involves a clear line being drawn between the legal and medical aspects of the process of changing gender. A decision to change legal gender is a purely administrative decision... This change has no link or connection with irreversible gender reassignment care and treatment within the health and medical care system." **Swedish Government Inquiry on gender recognition law reform**³

Trans young people continue to face high levels of discrimination whilst in education in Scotland:

- 77% of transgender young people have experienced homophobic, biphobic, or transphobic bullying in schools⁴
- 42% of those trans young people who have experienced bullying have left education as a result⁵

Giving trans young people the right to have their gender legally recognised would send a message that the government respects young trans people, and encourage schools to do more to protect their trans students. It would move practice forward, and demonstrate that we should be taking young trans people's rights seriously.

We know that more young people are coming out and being supported by their families to live the lives they want to – we can see this by the fact that referrals for young people to the child and adolescent service at Sandyford Gender Identity Clinic in Glasgow increased from 90 in 2014 to 178 in 2015 – a rise of 98%.⁶

³ *Juridiskt kön och medicinsk könskorrigering: Betänkande av Utredningen om åldersgränsen för fastställelse av ändrad könstillhörighet* (2014) Swedish Government Official Reports, Stockholm

⁴ *Life in Scotland for LGBT Young People: Education Report* (2013) LGBT Youth Scotland

⁵ Ibid.

⁶ *Gender identity clinic services under strain as referral rates soar* (2016) Kate Lyons, The Guardian, 10/7/2016

The Scottish Trans Alliance also now deals with many more enquiries from parents and schools regarding trans young people than it ever has done before. Extending legal gender recognition to trans young people under 16 is not going to encourage people to be trans or increase the number of trans young people – it is simply going to allow them a way to be recognised as who they truly are. **The right to legal gender recognition should be available to young people under the age of 16, with the support of parents or guardians.**

What is international best practice?

For 16 & 17 year olds

In the Netherlands and Norway, gender recognition is available to 16 and 17 year olds in the same manner it is available to over 18s.

For young people under 16

In Malta and Argentina, there is no lower age limit for applying for legal gender recognition – your parents or guardians make an application on your behalf. Legislation in both countries refers to the UNCRC, and taking the child's best interests and views into account. If the consent of parents or guardians is unobtainable, but it is still considered in the child's best interest, a court is able to rule that they should have their gender legally recognised.

In Norway, young people aged 6-15 can have their gender legally recognised if their parents or guardians consent. In instances where two people have parental responsibility, but only one consents, a young person or child's legal gender can still be amended if it is in their best interests. Similarly, if no person with responsibility is able to make a decision but changing a young person or child's legal gender is considered in their best interests, this is still possible.

What are our recommendations for Scottish law?

1. 16 and 17 year olds should be able to apply to have their gender legally recognised by the same process as people who are 18 or over.
2. Young people under the age of 16 should be able to apply to have their gender legally recognised with the consent of their parents or guardians. In instances where more than one person has parental responsibilities for a young person, and not all of those people consent to a change in legal gender:

- The Sheriff Court would make a decision if a family was in dispute regarding the best interest of the child or young person.
- This would take into account the wishes of the child or young person, in accordance with their age and maturity.

Some questions answered

Q. Will changing the law encourage young people to have irreversible medical procedures, which they can't change their minds about later?

A. Allowing young people to have their gender legally recognised is **not about access to medical treatments**. The change in the law would simply allow a person of any age to be able to change the gender on their birth certificate to reflect who they really are. Decisions about the medical treatment of young trans people would continue to be made by medical professionals, and would not be affected by this change in law.

Q. Children are too young to know if they are trans. Surely this will just encourage them to think about something that can wait until they are older?

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

Q. What if a young person changes their mind when they are older?

A. It is very unlikely that someone would reach the point where they and their parents are ready to apply for legal gender recognition without being very sure of themselves. However, a very small number of people do over time change their view of how they want to present their gender identity. It is already the case that changing your legal gender is not an irreversible decision, and this would continue. Similarly to a marriage, although you would make the application with the intent of the decision being permanent, the law would allow for the possibility that circumstances change. If somebody's decision did change, they would be able to apply in the same way again to have their legal gender changed again.

Q. Isn't a 16 or 17 year old too young to make such a big decision without the consent of their parents?

A. In Scotland, young people are deemed to have full legal capacity at 16. They are able to vote in elections, get married, and consent to any medical, surgical or dental treatment. They should also be trusted to know their gender identity, and to apply to change this legally if they want to, without needing the consent of their parents. Changing the law in this way will reflect the general consensus in Scottish politics that 16 and 17 year olds are able to make decisions for themselves.

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Document 34

Attachment referred to in emails of 17 Oct 2017

International best practice in gender recognition law:

Non-binary Briefing Paper October 2017

What's the problem?

In Scotland, a person's legal gender is defined by what is recorded on their birth certificate. At the moment, there are only two options that can be recorded: male or female. But for some people, neither of these two terms wholly describes their gender identity. We call this group of people non-binary people. Our definition of a non-binary person is a person who:

“identifies as either having a gender which is in-between or beyond the two categories ‘man’ and ‘woman’, as fluctuating between ‘man’ and ‘woman’, or as having no gender, either permanently or some of the time.”

Currently, people who have a non-binary gender identity are unable to have their gender legally recognised. This means that they are unable to have documents that accurately reflect their sense of themselves, as men or women do, causing distress and difficulties in their everyday lives.

International best practice is now to recognise non-binary people. This should be done by:

- Allowing people with non-binary gender identities to have their gender accurately recorded on their birth certificates.
- Introducing a third legal gender category, and updating legislation to reflect the recognition and existence of non-binary people.

Why does this matter?

The impact of not being recognised

“I don’t believe, and not just in this issue, I don’t believe this generally, that change in the law, very often, in and of itself, solves the problem. Often, most problems take much more to solve than simply changing what’s on the statute book, but very often, you cannot solve the other problems until you take that step of recognising something very clearly in law.” **First Minister Nicola Sturgeon**⁷

At the moment, non-binary people in Scotland have no recognition at all. Under Scottish law, there are two legal genders: man and woman. This is because our law reflects the very entrenched idea that there are only these two gender identities, or that these two terms will fit everyone. But for non-binary people this is simply not the case – and this means their gender identities, and by extension, them, are invisible within our legal system.

This lack of legal recognition directly impacts how non-binary people are treated in their day-to-day lives. It means that almost all service provision assumes that everyone is only a man or a woman, all employers assume that everyone is only a man or a woman, and all identification provided for Scottish citizens declares people as only a man or a woman.

In 2015, Scottish Trans Alliance did a survey of 895 non-binary people across the UK. We found that **65% of non-binary people felt like services never included them**⁸. When we asked respondents what impact this lack of inclusion had, we were told:

- 84% felt that their gender identity wasn’t valid
- 83% felt more isolated or excluded
- 76% had lower self-esteem
- 65% had poorer mental health
- 63% were less likely to access other services⁹

“I do not feel confident accessing services as a non-binary person. It is an identity which is constantly delegitimised, and because it is not recognised as a valid gender identity by most people, it is very easy to discount. I feel that...disclosing my gender identity is likely to cause

⁷ First Minister Nicola Sturgeon was asked at the LGBTI Hustings on 31st March 2016 “When do you plan on recognising non-binary gender identities in law?”

⁸ Scottish Trans Alliance *Non-binary people’s experiences in the UK* 2016 <http://www.scottishtrans.org/wp-content/uploads/2016/11/Non-binary-report.pdf>

⁹ Ibid.

discrimination, if not overt than at least covert.” **respondent to our non-binary survey**¹⁰

A lack of recognition of non-binary people in the law allows for service provision which excludes people who don’t identify simply as men or women.

When we asked non-binary people in the UK about their experiences in employment, we were told:

- 90% worried their identity wouldn’t be respected
- 88% worried it would make their work environment more difficult
- 80% felt they had to pass as male or female to be accepted
- 52% had to adhere to gender stereotyped dress codes/uniforms
- 42% had heard that non-binary people were not normal at work

“Working in an environment that is not inclusive of non-binary identities is exhausting and damaging to your mental health. You need a lot of support from outside work and strategies to keep yourself going throughout the day. It is hard because not only are you facing discrimination, no one sees it as that because they don't see non-binary as existing.” **Respondent to our non-binary survey**¹¹

A lack of recognition of non-binary people in the law allows employers not to recognise their non-binary employees, and makes non-binary people feel unable to be open about their identities in the workplace.

Non-binary people are also unable to get identification which accurately describes their gender, such as driver’s licences and passports. This means that when non-binary people apply for jobs, board a flight, or buy a drink in the pub, they have to show identification which denies and mislabels them.

“I would feel far more comfortable if my passport, driver’s licence, etc., said my actual gender rather than the one I was assigned at birth. The gender on them currently feels wrong, and I feel like having my real gender on those items would be a big step in making myself and others feel more comfortable with our identities, and in making sure people in

¹⁰ Scottish Trans Alliance *Non-binary people’s experiences in the UK 2016* <http://www.scottishtrans.org/wp-content/uploads/2016/11/Non-binary-report.pdf>

¹¹ Ibid.

general know about and acknowledge non-binary people.” – **respondent to our non-binary survey**¹²

A lack of recognition of non-binary people in the law means that they are unable to get identification that gives accurate information about their gender, or which reaffirms and validates their identity.

The right to be recognised

“I think it is no longer, in this day and age, appropriate for people not to have their perfectly legitimate identity recognised legally, because from that lack of legal recognition comes many of the other problems that we’re talking about; a lack of general recognition in the population, a lack of understanding of the issues and the barriers that people face.”

First Minister Nicola Sturgeon¹³

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

The process to obtain legal gender recognition currently available to trans men and women was introduced in the UK as a consequence of a ruling by the European Court of Human Rights. This ruling stated that not being able to have your gender legally recognised is a breach of your Article 8 right to a private life¹⁴. In the fourteen years since that ruling was made, huge progress has been made in Scottish politics’ approach and commitment to trans equality. However, a continued lack of recognition of non-binary people leaves them in the exact position that trans men and women were in before this ruling and the subsequent introduction of the Gender Recognition Act 2004; with no way to be legally recognised as who they are.

¹² Scottish Trans Alliance *Non-binary people’s experiences in the UK* 2016 <http://www.scottishtrans.org/wp-content/uploads/2016/11/Non-binary-report.pdf>

¹³ First Minister Nicola Sturgeon was asked at the LGBTI Hustings on 31st March 2016 “When do you plan on recognising non-binary gender identities in law?”

¹⁴ European Court of Human Rights “Case of Christine Goodwin v. United Kingdom” accessed at [http://hudoc.echr.coe.int/eng#{\"fulltext\":\[\"CASE OF CHRISTINE GOODWIN v. THE UNITED KINGDOM\"\],\"documentcollectionid2\":\[\"GRANDCHAMBER\", \"CHAMBER\"\],\"itemid\":\[\"001-60596\"\]}](http://hudoc.echr.coe.int/eng#{\)

“Everyone has the right to recognition everywhere as a person before the law...Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.” – **Yogyakarta Principles**¹⁵

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

We believe that if you fully support the rights of trans men and trans women to have their gender identity recognised legally, then you should equally support this right for non-binary people.

“As society’s understanding of gender evolves, government must adapt. Part of that is being more thoughtful about how and when we collect gender or sex information, and how we use it.” – **Marie-France Lalonde, Government and Consumer Services Minister, Legislative Assembly of Ontario**

The legal recognition of non-binary people will also have the knock-on effect of improving their access to appropriate and inclusive services, and opportunities to be employed in safe environments where they feel confident and open to be themselves.

Legal recognition is an important step in ensuring the ability for non-binary people to both be included, and to participate, fully in Scottish life.

What is international best practice?

Malta, Argentina, New South Wales (Australia) and Oregon and California (USA) all provide for non-binary people to have their gender legally recognised.

Denmark, Australia, New Zealand, Bangladesh, India, Pakistan, Nepal and Ontario (Canada) allow non-binary people to be recognised on some legal documents, such as passports, driver’s licences or voter registration cards.

¹⁵ The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity

What are our recommendations for Scottish law?

1. That the new gender recognition law does not limit people to being recognised only as a man or a woman, but is written in an inclusive way which allows people who are non-binary to also have their gender identities recognised.

2. That a third legal gender category is created in Scottish law to reflect the recognition of non-binary people. Subsequently:

- New legislation will be written in a way that is inclusive of non-binary people.
- Existing legislation must be interpreted appropriately to include non-binary people.

Some questions answered

Q. I don't understand what you mean by non-binary. Isn't everyone a man or a woman?

A. The idea that there are two genders, 'man' and 'woman', and that all people are one or the other of these two genders, is one of the most common and present norms in Scottish society. However, it is just a norm – much like the idea that women should get married, stay at home and look after children was for many years. There have always been people who don't fit into either of these two boxes.

The way each individual person understands their gender identity is unique to them. If you have never thought about your identity as a man or a woman, this might be because it happens to fit into society's expectations of you. Perhaps you were assigned male at birth, grew up feeling like a boy, felt like a man as you got older, and have always comfortably expressed your gender, through the way you dress, talk and behave, in ways that are considered typically masculine. Other people might have different experiences at any of these points. For some of these people, the words 'man' and 'woman' simply don't make sense; not for their sense of identity, not for how they see themselves in the world, and not for how they would describe their experiences to others. Although most people do identify as men or women, some – non-binary people – don't. Their gender identities are just as valid as the gender identities of men and women.

Q. Wait, so all trans people are non-binary then?

A. No, the vast majority of trans people identify as men and women. So, very broadly, you have:

- men, including trans men,
- women, including trans women,
- and non-binary people. Non-binary people refers to anyone who:

identifies as either having a gender which is in-between or beyond the two categories 'man' and 'woman', as fluctuating between 'man' and 'woman', or as having no gender, either permanently or some of the time.

This change to the law would still allow trans men and women to be able to be legally recognised as who they are; men and women. What it would also do, however, is create the possibility for non-binary people to be recognised. At the moment, this right to recognition is one that all men and women have, but is denied to non-binary people.

Q. Can't non-binary people just pick whichever gender is closest to theirs on paperwork?

A. Non-binary people should have the same right to have their gender identities respected and legally recognised as men and women. It is unfair to expect anybody to be recorded or identified as a gender that does not fit their reality – that is why a legal gender recognition process was introduced for trans men and women.

Non-binary people have a diverse range of gender identities – many of which do not position themselves in relation to the identities of men and women. For many non-binary people, the idea of picking which gender of 'man' or 'woman' is closer to theirs would not make sense. If these ideas and the language around them are new to you, listening to non-binary people talk about their experiences and identities will probably help you to understand more – you can read some of our non-binary work at:

<http://www.scottishtrans.org/non-binary>

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International best practice in gender recognition law: **Self-Declaration Briefing Paper** October 2017

What's the problem?

The current process for a trans person to legally change their gender in Scotland is complex, intrusive and humiliating. Trans people have to provide evidence of a psychiatric diagnosis of gender dysphoria before they can have their gender legally recognised, as well as detailed evidence of any medical treatment they have received as part of their transition. They also have to provide evidence that they have been living in their 'acquired gender'¹⁶ for two years, by submitting bank statements, pay slips and copies of identification. This evidence is included in an application that is sent off to the Gender Recognition Panel, a tribunal of lawyers and doctors, who review the submission and decide whether or not to grant the individual a Gender Recognition Certificate, changing their legal gender.

International best practice is now to remove these intrusive psychiatric, medical and other evidence requirements and in our view, Scotland should do the same.

This should be done by:

- Allowing people to change their legal gender by a simple, administrative process based on self-declaration, as is now international best practice.

Why does this matter?

Removing the psychiatric diagnosis

"Nobody knows better than myself who I authentically am. It is terribly insulting to have to get the permission of a psychiatrist in order to get my birth certificate changed" **Becky Kauffman, trans woman**

When using mental health services, **29% of trans people have had their gender identity treated as a symptom of a mental health issue,**

¹⁶ This is the language used in the Gender Recognition Act 2004 to talk about a trans person's gender identity

rather than their genuine identity.¹⁷ Historically, trans identities have been conflated with mental illness, and continue in the present to be misunderstood in this way, not just by the general public but also in parts of the medical profession. Requiring trans people to have a diagnosis of gender dysphoria in order to have their gender legally recognised reinforces this outdated assumption that being trans is a mental health problem.

The current evidence requirements are intrusive and humiliating, violate trans people's right to privacy, and further stigmatise trans identities. Reforming the legislation is about recognising that the need for a psychiatric diagnosis pathologises trans people, and requiring medical evidence rather than simply the testimony of the individual suggests that trans people themselves are not the best placed to make decisions about their gender and lives.

“No particular medical, surgical or mental health treatment or diagnosis is an adequate marker for anyone's gender identity, so these should not be requirement for legal gender change.” **World Professional Association for Transgender Health**¹⁸

“States shall... take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity.”¹⁹ **Yogyakarta Principles International Panel of Experts in International Human Rights Law**

It is now widely understood that each individual person is the best placed to understand their own gender identity. Removing the psychiatric diagnosis requirement from legal gender recognition sends a clear message that trans people are not unwell, and are able to decide for themselves how they identify and want to live. **The need to submit evidence of a psychiatric diagnosis to have your gender legally recognised should be removed.**

Creating a simple administrative process

Council of Europe Resolution 2048 in 2015 called on member states to provide 'quick, transparent and accessible' legal gender recognition

¹⁷ *Trans Mental Health Study* (2012) McNeil, J., Bailey, L., Ellis, S., Morton, J. and Regan, M.

¹⁸ *WPATH Statement on Identity Recognition* (2015) World Professional Association for Transgender Health https://amo_hub_content.s3.amazonaws.com/Association140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf

¹⁹ *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007) <http://www.yogyakartaprinciples.org>

processes²⁰. The current process in Scotland fails to meet any of these criteria:

Quick: You have to have been living in your 'acquired gender' for two years before you can apply. Because you have to be able to prove this, people who are unaware of the requirements may have to wait even longer to ensure they have collected the necessary evidence.

Transparent: You send your application to a tribunal who you never meet, and who don't have clear, definitive or publicly accessible decision-making criteria.

Accessible: The application process is difficult, time-consuming and expensive. Scottish Trans Alliance often has to help trans people struggling with their applications. You also have to have a psychiatric diagnosis of gender dysphoria – which some people may be unwilling or unable to obtain.

Many trans people will be living happy, positive lives being open about who they are and expressing their gender in the way that is most comfortable to them. If they are unable to fulfil the current onerous requirements to have their gender legally recognised, they will not be able to have this lived reality reflected in all of their identity documents. Trans people should have the same right to be legally recognised as who they are as everyone else, without having to engage with such a time-consuming and difficult application process. **Legal gender recognition should be available through a simple administrative process.**

What is international best practice?

There are an increasing number of countries that are allowing trans people to have their gender legally recognised based on a simple process of self-declaration. Although the Gender Recognition Act 2004 was world-leading at the time it was passed, it is now far behind international best practice.

Denmark, Ireland, Malta, Norway, Argentina and Colombia allow people to change their legal gender by completing an application similar to a statutory declaration declaring their gender identity.

What are our recommendations for Scottish law?

That people are able to change their legal gender by a simple, administrative process based on self-declaration.

Individuals would complete a form similar to a statutory declaration, declaring what their gender identity is, asking to be legally recognised as

²⁰ Council of Europe Parliamentary Assembly Resolution 2048 on discrimination against transgender people in Europe (2015): <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21736>

that gender from now on, and stating that they intend that change to be permanent.

Some questions answered

Q. Shouldn't people have to consult with a doctor before having irreversible medical procedures, which they can't change their minds about later?

A. Having your gender legally recognised is **not about access to medical treatments**. For those people who do choose to medically transition (this means having medical treatment, for example, hormones or surgery), this will continue to be done under the supervision of doctors. Trans people are already able to have their gender legally recognised in Scotland without having undergone any medical procedures. Recognising someone's gender identity should never be linked to whether or not they have medically transitioned.

Q. Doesn't the current process safeguard against people making a decision without thinking it through? What if someone changes their mind?

A. It is very unlikely that someone would reach the point where they are ready to apply for legal gender recognition without being very sure of themselves. However, a very small number of people do over time change their view of how they want to present their gender identity. It is already the case that changing your legal gender is not an irreversible decision, and this would continue. Similarly to a marriage, although you would make the application with the intent of the decision being permanent, the law would allow for the possibility that circumstances change. If somebody's decision did change, they would be able to apply in the same way again to have their legal gender changed again.

Q. Wouldn't men be able change their legal gender to female in order to gain access to women's services, such as refuges, to be abusive?

A. Single sex services across Scotland, including Scottish Women's Aid services for people who have experienced gender based violence, are already trans-inclusive and have been for several years. This includes being inclusive of those trans women who may still be legally recognised as male. It is important to acknowledge that women-only services in Scotland have already been allowing their services to be accessed by trans women on a self-declaration basis, rather than relying on the current process of legal gender recognition, and this has not resulted in any problems.

Women-only services, such as refuges, already have robust risk-management and safeguarding policies in place, for example to be able to identify and prevent a female perpetrator of violence being able to access a service where someone she has abused is staying. In the extremely unlikely scenario that legal gender recognition was used by a man, with this intention, the existing risk management procedures of services, would ensure that the person concerned was recognised as a safety risk and preventative action would be taken. A refuge would continue to have the ability to exclude any potential service user based on an individualised risk assessment of their behaviour and circumstances, regardless of whether or not the person has received legal gender recognition.

Q. If the process is made more straightforward, what is to stop people from changing their legal gender as a joke?

A. Changing legal gender has a range of legal and other implications for the person concerned. As trans people know, having a different legal gender from your actual gender identity causes big problems. It is very unlikely therefore that anyone would put themselves in this position. The Irish Gender Recognition Act came into effect in September 2015, and allows recognition by a simple administrative process of self-declaration. There have been no reports of anybody using the process to change their legal gender for anything other than genuine reasons – to be recognised as who they are. Likewise, there have been no reports of anyone in Scotland changing their gender on any of the identity documents (such as driving licences and bank cards) that have been changeable by self-declaration for over three decades.

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Document 36

Attachment referred to in emails of 17 Oct 2017



Legal Gender Recognition & Women's Services: What might the changes mean?

What does the Equal Recognition campaign call for?

The Equality Network & Scottish Trans Alliance's Equal Recognition campaign wants to change the way that transgender people are able to have their gender legally recognised. A person's legal gender is determined by the gender on their birth certificate. At the moment, the process is intrusive and humiliating, and excludes certain members of the transgender community – such as those who are under 18 and those who identify as non-binary.

The three changes we are asking for in the law are:

1. To remove the psychiatric diagnosis requirement for legal gender recognition, and to move to a simple system of self-declaration
2. To reduce the age at which young people can have their gender legally recognised
3. To introduce legal gender recognition of non-binary people who do not identify as men or women

The first of these proposals has had some attention in the media around what this might mean for women-only services. This info sheet is intended to tackle some of the misconceptions around the impact of changing gender recognition law.

What would the changes mean for women's services?

The vast majority of women's services in Scotland are already inclusive of transgender women, regardless of whether they have had their gender legally recognised. This includes being inclusive of those trans women who may still be legally recognised as male. It is important to acknowledge that many women-only services are already allowing their services to be accessed by

trans women on a self-declaration basis, rather than relying on the current process of legal gender recognition.

The proposed changes will have no impact on who is able to use women's services in Scotland. Instead, it will simply ensure that transgender people are recognised legally as who they are without having to submit intrusive medical reports, a psychiatric diagnosis, and two year's worth of evidence that they have been living in accordance with their gender identity. This is exactly the approach to inclusion that the women's sector is already taking in Scotland.

Will this reduce women's safety in women-only services? Is it not possible that abusive men will change their gender legally under this simplified process in order to gain access to these spaces?

Our proposal for changing the law is that changing your legal gender would require you to make a statutory declaration. It is a crime to intentionally make a false declaration, so a man using the updated process simply for the purpose of trying to gain access to women's services would be committing a crime.

Currently, no women's services in Scotland require seeing a person's birth certificate in order to grant her access to a service. People are already able to update the gender on their driving licences and change their names by self-declaration – and we have never heard of any man doing either of these things in an attempt to access a women's service, in over ten years of working closely with many gender-based violence services in Scotland.

Women-only services, such as refuges, already have robust risk-management and safeguarding policies in place, for example to be able to identify and prevent a female perpetrator of violence being able to access a service where someone she has abused is staying. In the extremely unlikely and unprecedented scenario that legal gender recognition was used by a man, with this intention, the existing risk management procedures of services, would ensure that the person concerned was recognised as a safety risk and similar preventative action would be taken.

If you'd like to learn more about the campaign, or talk about any of the issues raised on this info sheet in more detail, please feel free to:

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Document 37

From: Duncan SE (Sarah)

Sent: 18 October 2017 17:41

To: [redacted]@gov.scot

Cc: Stockwell SW (Simon); [redacted]@gov.scot; [redacted]@gov.scot;
[redacted]@gov.scot

Subject: Review of Gender Recognition Act- preparation of frequently asked questions

[redacted]

I've done an initial version of the FAQs using the comments you'd already given me on the skeleton last week.



Review of Gender
Recognition- ...

[redacted]

I think we'll want to try to get views from [redacted] and [redacted] if possible on the question re children and I'm not sure I sufficiently caveat our statements about health treatment to reference available material rather than SG knowledge in the area.

[redacted]

Sarah

Sarah E Duncan/Family and Property Law Team/[redacted]

Document 38

Extracts from email dated 23 Oct 2017

From: Stockwell SW (Simon)

Sent: 23 October 2017 08:15

To: Duncan SE (Sarah)

Cc: [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot; [redacted]@gov.scot

Subject: RE: Gender Recognition Act 2004- submission to Cab Sec & draft note to FM- Option 4 in consultation

Importance: High

[redacted]

Sarah

[redacted]

5. The other points I wondered about are:

- whether we should amend the text of the main body of the consultation to say that based on what the Impact Assessments have found in other jurisdictions, we don't expect many people under 16 would apply for gender recognition in Scotland. (The STA also said this when we met them recently). However, I've not made a change. I think, on balance, the detail of that particular discussion is best left just in the Impact Assessments (although I don't feel strongly on this). We could perhaps add a line to the submission on what the Impact Assessments have found here?

[redacted]

Simon Stockwell

[redacted]

Document 39

From: Duncan SE (Sarah)

Sent: 25 October 2017 15:42

To: [redacted]; [redacted]

Cc: Stockwell SW (Simon); [redacted]@gov.scot; [redacted]@gov.scot;
[redacted]@gov.scot

Subject: Review of Gender Recognition Act- consultation- Frequently Asked Questions

Dear [redacted] and [redacted],

We are currently preparing for the launch of the consultation on the review of the Gender Recognition Act shortly, probably in November.

To that end we are planning to publish some 'Frequently Asked Questions' and answers to deal with enquiries we think will be common. Although the consultation addresses only legal recognition, it has been suggested that we should include a question to address apparent confusion in some media reports about puberty suppressors and gender affirming hormones.

We've drafted two potential questions and answers relevant to your work at [redacted], which are attached. I would be grateful if either of you were able to comment or correct this text.

One question concerns the numbers of people aged 17 and under referring themselves or being referred to the gender identity service at Sandyford. I don't have definite numbers of referrals for 2016. Can you confirm whether numbers have now levelled off since then, or whether they are still increasing? The NGICNS statistics don't confirm this.

We've used a variety of sources to prepare our proposed answer on puberty suppressors and gender affirming hormone treatment. I believe that we are correct to call both a form of hormone treatment as I understand that GnRH analogues contain synthetic hormones which suppress the production of natural hormones.



FACQs on medical
males-childr...

I'd be grateful for your comments or corrections if possible by Monday 6 November.

Many thanks.

Sarah E Duncan/Family and Property Law Team/[redacted]

Document 40

Extracts from briefing dated 3 Nov 2017

[redacted]

LGBT Youth Scotland manifesto 2016-2021

1. LGBT Youth Scotland is calling for reform of the Gender Recognition Act 2004. Their calls are effectively the same as those made by Scottish Trans Alliance in their Equal Recognition Campaign. The LGBT Youth Scotland Manifesto 2016-2021 calls for:

- Removal of the psychiatric diagnosis requirement for legal gender recognition;
- Reduction in the age for legal gender recognition from 18 to 16 and the ability for children under 16 to access legal gender recognition with consent from a parent or guardian; and
- Improved legislation to ensure there is legal recognition for those who do not identify as a man or woman (non-binary people).

[redacted]

Views of young people about the benefits of legal gender recognition for them

15. LGBT Youth have published the views of their Youth Commission on Gender Recognition on what legal gender recognition would mean for them:

“It would relieve stress from a lot of application processes as well as making me equal in the eyes of the law. When being denied gender recognition, I am being denied equal opportunities to those of my non-trans peers. In my eyes that is discrimination.”

“It would validate me and I wouldn’t need to out myself constantly in situations where my birth certificate is needed.”

“Inconsistent documentation means (I feel) I can’t apply for a job. I’m afraid to do anything that requires identification; travelling, renting or going out with friends. I constantly feel like I’m illegal.”

Document 41

From: [redacted]

Sent: 06 November 2017 16:26

To: Duncan SE (Sarah) (Justice)

Cc: Stockwell SW (Simon); [redacted]@gov.scot ; [redacted]@gov.scot

Subject: RE: Review of Gender Recognition- latest version of consultation

Thanks! I have a couple of very small suggested changes to the Glossary, so as not to set up targets for people to complain about!

We're not quite sure why "sex" is defined in the way it is, as it seems to be used through the paper in reference to legal sex and to the protected characteristic. It might be clearer to take out the definition, or to define it in relation to the law? The definition currently quoted for "sex" is what we and other LGBTI groups in Europe would call "sex characteristics" – that is the physical characteristics related to sex that vary from person to person including intersex people. As you've probably seen, SOGI, as previously used by international bodies is now tending to become SOGISC, for the three protected (although the 3rd is only protected in Malta currently) characteristics of sexual orientation (LGB), gender identity (T) and sex characteristics (I).

In the definition of "intersex" I would strongly recommend avoiding the term "condition" which is seen by many as a pathologising term. So I would suggest "a general term used for a variety of physical variations..." or maybe "physical differences" if you think the former is clumsy.

Our definition of "intersex", which was created jointly with Intersex UK and UKIA, is "Umbrella term used for people who are born with variations of sex characteristics, which do not always fit society's perception of male or female bodies."

Ref para 5.08: "Some other countries..." – is the Scottish Govt aware of any countries with self-declaration that do require spousal consent? We're not aware of any at the moment.

[redacted]

[redacted]



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From: Sarah Duncan

Sent: 06 November 2017 14:01

To: [redacted]@equality-network.org

Cc: [Simon.Stockwell](#); [redacted]@gov.scot; [redacted]@gov.scot

Subject: Review of Gender Recognition- latest version of consultation

Importance: High

[redacted],

I attach the current version of the consultation in pdf format. Hopefully, this will allow you sufficient time to look it over for the purpose of finalising your press release and so on. There will be some further (minor) tweaks prior to publication. There have been some changes since we met, but the structure is effectively the same.

Total pages should be 184 once publishers have finished, as there is an extra Annex L.

Sarah

Sarah E Duncan/Family and Property Law Team/[redacted]

Document 42

Extracts from draft consultation referred to in email exchange of 6 Nov 2017:

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

“sex” – generally refers to a person’s physical and biological characteristics.

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