Consultation response

Gender Recognition Reform (Scotland) Bill

March 2020

Contents

[About the Equality and Human Rights Commission 2](#_Toc34403592)

[Who we are 2](#_Toc34403593)

[How we have approached this consultation 2](#_Toc34403594)

[Introduction 3](#_Toc34403595)

[Domestic and international legal framework 3](#_Toc34403596)

[Consultation questions 6](#_Toc34403597)

[Question 1 6](#_Toc34403598)

[Question 2 8](#_Toc34403599)

[Question 3 10](#_Toc34403600)

[Question 4 11](#_Toc34403601)

[Question 5 15](#_Toc34403602)

[Contacts 16](#_Toc34403603)

[EASS 16](#_Toc34403604)

# About the Equality and Human Rights Commission

## Who we are

The Equality and Human Rights Commission is the National Equality Body (NEB) for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected characteristics set out in the Equality Act (EA) 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

We are an “A Status” National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).

## How we have approached this consultation

We have chosen to respond to the questions where we believe we can add value. We have not responded to question 5 on impact assessments, which we do not typically do during consultative or legislative processes prior to the finalisation of assessments.

# Introduction

1. We welcome the Scottish Government’s consultation on its draft Gender Recognition Reform (Scotland) Bill. The Commission considers that a simplified system for obtaining legal recognition of gender through a change in legal sex would better support trans people to live their lives free from discrimination, and supports the aims of the draft Bill.[[1]](#footnote-1)
2. The interaction between the Gender Recognition Act (GRA) 2004 and the EA 2010 is a complex area of law. As well as answering the questions posed through the consultation, and notwithstanding the fact that EA 2010 is reserved legislation, our consultation response also seeks to bring clarity to this legislative interaction.

## Domestic and international legal framework

1. Under the Human Rights Act 1998, trans people – individuals whose gender identity does not align with their sex recorded at birth – have the right to full recognition of their acquired gender in law under Article 8 (right to private and family life) and Article 12 (right to marry) of the European Convention on Human Rights (ECHR).[[2]](#footnote-2)
2. Under UK law, ‘sex’ is binary (male or female), with legal sex being determined by what is recorded on an individual’s birth certificate.
3. ‘Gender’ is not defined in law. It usually refers to socially-constructed characteristics generally associated with women and men. These vary in different societies and can change over time. As they grow up, individuals are taught socially appropriate norms and behaviours, usually according to their sex as recorded at birth.[[3]](#footnote-3)
4. While a trans individual can have their acquired gender recognised administratively, for example on a passport, they can only change how their gender is recognised in law by acquiring a Gender Recognition Certificate (GRC). This also enables the individual to acquire a new birth certificate recording their legal sex in line with their acquired gender.
5. The EA 2010 protects individuals from discrimination and harassment because of specified ‘protected characteristics’. This protection applies to those who have the protected characteristic, those perceived to have it and those who are associated with it. One of these protected characteristics is sex, which applies “to a man or to a woman”. Another is gender reassignment, which protects an individual who “is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex”.[[4]](#footnote-4)
6. Individuals are treated under the sex discrimination provisions of the EA 2010 in line with their legal sex. Thus, a trans person with a GRC is treated as having the sex recorded on their GRC (and new birth certificate), while a trans person without a GRC is treated as having the sex recorded at birth. In both cases, they are protected from discrimination because of gender reassignment.
7. The exceptions in the EA 2010 permitting different treatment on the basis of gender reassignment (for example the exceptions related to single-sex services and associations) do not hinge on whether or not an individual has a GRC. Any use of the exceptions permitting different treatment must be objectively justified, meaning that it must be a proportionate means of achieving a legitimate aim, and will therefore depend on the particular circumstances. While an individual’s possession, or not, of a GRC may be part of the evidence a court would consider in a gender reassignment discrimination case, it is unlikely to be a determining factor.[[5]](#footnote-5)
8. In developing our submission, we have given due consideration to relevant principles and standards related to international human rights law that are designed to inform and guide domestic policy-making and the development of administrative rules and laws. We consider these principles and standards alongside the domestic and international legal standards set out above.
9. In 2006 the [Yogyakarta Principles](https://yogyakartaprinciples.org/) were set out by a group of human rights experts, representatives of non-governmental organisations, and others. In 2017 additional principles were articulated in relation to sexual orientation, gender identity, gender expression and sex characteristics. Principle 3 of the 2006 Principles is particularly relevant to this submission. It asks countries to “take all necessary...measures to ensure that procedures exist whereby all State issued identity papers which indicate a person’s gender/sex including birth certificates...reflect the person’s profound self-defined gender identity” and to “ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned”.
10. In 2015 the Parliamentary Assembly of the Council of Europe – the body responsible for overseeing the European Convention on Human Rights (ECHR) – adopted [Resolution 2048](http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21736&lang=en), which calls on all Member States to “develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards...and other similar documents”.

# Consultation questions

## Question 1

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

Yes ✔
No ☐

1. We do not think that a requirement for applicants to have lived for a period of time in their acquired gender prior to application is necessary if the process of acquiring a GRC is designed in such a way as to ensure that applicants demonstrate that they fully understand the legal, social and personal implications of a legal change in status.
2. In order to ensure there is full understanding and valid consent, we consider that the application process must enable applicants to demonstrate that they have received all the necessary information about, and have fully understood and considered:
	1. The legal consequences, such as changes to marriage/civil partnership, pension and social security rights
	2. The social consequences, such as how it may affect their day to day interactions with friends, family, neighbours and colleagues, and how they can best prepare to manage their change in status
	3. The personal consequences, such as the impact of the decision on their mental and emotional well-being in the short and longer-term, and sources of support they have or could turn to if needed as they adjust to their decision.
3. Nonetheless, the proposal in the draft Bill for applicants to confirm they have lived in their acquired gender through a statutory declaration would be significantly less burdensome than the current requirement to collect and provide evidence.
4. This is based on our understanding that the collation of evidence can cause unnecessary delays and potentially prolonged distress for those seeking legal recognition of their acquired gender. Many trans people may also find it difficult to demonstrate lived experience even if they have it, as they are at greater risk of homelessness and unemployment,[[6]](#footnote-6) so may not have easy access to documents such as passports, driver’s licences, payslips and utility bills. Young people may also have more problems producing evidence, especially if their families are not supportive.
5. Insofar as a requirement of lived experience acts as a proxy for ensuring that an individual fully understands the legal, social and personal implications of their decision, we consider that this function can be better and more proportionately served by a different process, as set out in our answer to Question 2 below.

## Question 2

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

Yes ✔
No ☐

1. The Commission considers that a period of reflection is unnecessary if the process of acquiring a GRC is designed in such a way as to ensure that applicants demonstrate that they fully understand the legal, social and personal implications of a legal change in status.
2. In order to ensure there is full understanding and valid consent, the Commission considers that the application process must enable applicants to demonstrate that they have received all the necessary information about, and have fully understood and considered the legal, social and personal consequences, as set out in our response to Question 1 above.
3. A statutory declaration to this effect would be a significant step with legal implications. An applicant is responsible for the contents of their declaration, which is a written statement of facts. The draft Bill makes clear that it would be an offence potentially punishable by up to two years' imprisonment and/or an unlimited fine to make a false statement in a statutory declaration.
4. Additionally, we believe individuals applying for a GRC should have a face-to-face meeting with a suitably qualified person to ensure their understanding and consent. The process for selecting and appointing qualified persons for this purpose should be done in partnership with trans representative organisations and experts by experience.
5. The qualified person could also answer any questions the applicant might have to ensure that the individual can provide fully informed consent to the process.
6. We recommend that all aspects of the new system are reviewed after a defined period, including through a thorough consultation with those with lived experience and all other affected groups, to consider its effectiveness.

## Question 3

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

Yes ✔
No ☐
Don’t know ☐

1. 16- and 17-year-olds are legal adults in Scotland. The Commission agrees that 16- and 17-year-olds should be permitted to apply for legal recognition of their change of gender. This is in line with the current age in Scotland where people have the right to make other major decisions such as vote in the Scottish elections, join the armed services and marry.
2. However, there is a clear need for any new system to balance the removal of unnecessary barriers with the introduction of adequate safeguards. This is particularly important when the system is extended to younger applicants such as those aged 16 and 17. We suggest that further consideration is given to whether any additional steps are needed to ensure that a young person fully understands the social, personal and legal implications of their decision, in consultation with young people with lived experience and other relevant stakeholders. In particular, we suggest that the Scottish Government considers the use of a process that includes face-to-face information and support, as set out in our response to Question 2 above.

## Question 4

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

Yes ✔
No ☐

1. Our answer to this question first deals with comments on specific provisions within the draft Bill, before outlining our position with respect to the interaction between the GRA and the EA 2010.

#### Section 2: Persons who may apply

1. The draft Bill provides that applicants should have been born in Scotland or adopted in Scotland, or be ordinarily resident in Scotland.
2. The Commission believes that any new process should be open to everyone. Applying for legal gender recognition in Scotland will only affect the applicant’s legal gender recognition in Scotland and in countries that recognise Scotland’s process.
3. Opening up legal gender recognition to everyone would ensure that trans people who reside outwith Scotland but are planning to move to Scotland are able to make an application. This will ensure that trans people are able to live in their acquired gender and integrate into Scottish society with full legal recognition of their acquired gender from the moment that they start their life in Scotland. Yogyakarta Principle 31 states that the immigration status of an applicant should not prevent them from applying for or obtaining legal gender recognition.
4. The Scottish Government should also seek to ensure that a legal recognition certificate issued in Scotland is recognised elsewhere in the UK and in other jurisdictions.

#### Section 4: Grounds on which application to be granted

1. As noted above, we consider that requiring individuals to sign a statutory declaration is an appropriate and proportionate measure to allow applicants to demonstrate their seriousness of intent.
2. Section 4 of the draft Bill provides for clause 8C (1)(a)(iv), which requires the Registrar General to grant an application if, among other things, the applicant’s statutory declaration confirms that the applicant “intends to continue to live in the acquired gender permanently”.
3. However, we recognise the possibility that, in exceptional circumstances, an individual may come to realise that gaining legal recognition of their acquired gender was not the right decision and may want to change back to their sex recorded at birth. Such occurrences should be rare if the process for ensuring the implications of changing legal sex are fully understood is robust.
4. The [Commission previously considered that a limit of two applications per individual would be appropriate](https://www.equalityhumanrights.com/sites/default/files/gender_recognition_act.pdf) to ensure that the rights of applicants are respected while providing a proportionate safeguard against misuse of the system. Further consultations with stakeholders have brought to our attention rare situations in which a limit of two applications could cause undue distress for an individual.[[7]](#footnote-7) We therefore do not suggest a limit to the number of applications, but instead propose that the process outlined above is robust and thorough in order to provide appropriate safeguards for the applicant and others. It may therefore be appropriate to apply a more stringent process for second and subsequent applications.

#### Section 11: Further provision about applications

1. This section of the draft Bill would enable the Registrar General to set any application fee by regulations.
2. The Commission understands that it is necessary for the Government to charge for the provision of some public services, including those which involve a change of legal status. However, this fee should not act as a barrier to applicants receiving an essential public service.
3. We are concerned that the current fee of £140 may pose an unnecessary barrier for some trans people, particularly younger people, seeking legal recognition of their acquired gender. In light of this, and on the assumption that the de-medicalisation of the process as set out in the draft Bill will reduce costs associated with dealing with an application, we support the Registrar General having the power to vary the fee on the basis that this power is used to set a more proportionate fee. We would support both a general reduction in cost to applicants, and the introduction of a system which enabled a further reduced fee based on income or other hardship criteria.

#### Interaction between the GRA and the EA 2010: single-sex and separate-sex services

1. As noted at paragraph 7 above, the EA 2010 protected characteristic of gender reassignment applies to any individual who “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”. It does not require any medical intervention or diagnosis of gender dysphoria. Any change to the GRA will not affect this.
2. The EA 2010 includes exceptions to the general principle of non-discrimination for the operation of single-sex and separate-sex services where that is justified. Such services may include, for example, women-only gyms, post-natal health services, male-only or female-only hairdressers, separate hospital wards, and separate prisons for men and women. They also include women-only domestic abuse services and sexual assault support services.
3. Separate-sex services (whether equal or different for each sex) and single-sex services (only to persons of one sex) are permitted under Schedule 3 to the EA 2010, where it is proportionate, on the grounds that a joint service for both sexes would be less effective or it would not be reasonably practicable because of the extent to which the service is required by one sex. A single-sex service could be appropriate, for instance, where services are used by two or more people at the same time and users of one sex might reasonably object to the presence of a person of the other sex.
4. The Commission considers that the inclusion of these exceptions in the EA 2010 is both necessary and proportionate. Violence against women and girls is a significant issue in our society.
5. Paragraph 28 of Schedule 3 permits different treatment of trans people in ‘anything done in relation to’ the lawful operation of separate services for the sexes and single-sex services, provided such conduct is objectively justified – ‘a proportionate means of achieving a legitimate aim’.

1. Any exception from the general principle of non-discrimination applies only in situations where it is both appropriate and necessary. The exclusion of a trans person from single or separate sex services must be rationally connected to a legitimate aim. Where there are alternatives, the least discriminatory approach must be pursued, striking a fair balance in the particular circumstances of each case between the relevant interests of trans people, service providers and other service users.
2. Crucially, the operation of these exceptions does not depend on the existence of a GRC, and they would continue to operate as they do now – and have done since 2010 – should the draft Bill become law. We note that the EA 2010 became law several years after the GRA, and had the intention been for a GRC to be a pivotal factor in the operation of the exceptions, the EA 2010 could have been drafted as such – but it was not.
3. We also note that evidence from providers of existing trans-inclusive single-sex services to the Scottish Government’s 2018 consultation did not identify any instances of men falsely claiming to be trans women in order to access single-sex services, and that access to these services is not based on sight of a service user’s birth certificate. Therefore, reform to the GRA will not impact on how they provide these services.[[8]](#footnote-8)

## Question 5

Do you have any comments on the draft Impact Assessments?

Yes ☐
No ✔

# Contacts

This publication and related equality and human rights resources are available from [our website](http://www.equalityhumanrights.com).

Questions and comments regarding this publication may be addressed to: correspondence@equalityhumanrights.com. We welcome your feedback.

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1. [Our response to the Scottish Government’s previous consultation on gender recognition reform, which provides more specific detail, is available on our website](https://www.equalityhumanrights.com/en/our-work-scotland/our-work-scotland/consultations-scotland). [↑](#footnote-ref-1)
2. [This is clear from relevant European case law, which is summarised in this document](https://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf). [↑](#footnote-ref-2)
3. However, we acknowledge that in practice ‘sex’ and ‘gender’ are often used interchangeably, including by public authorities. [↑](#footnote-ref-3)
4. The Explanatory Notes to the Act make clear that a person does not have to be under medical supervision to come within the definition of gender reassignment. The gender reassignment protected characteristic does not cover non-binary gender identities.

It’s also worth noting that language has evolved since the passage of EA 2010, which used the term ‘transsexual’ to describe someone who has the protected characteristic of gender reassignment. Transsexual is now generally considered to be an outdated term and is not used by most trans people. We use the term ‘trans’ to refer to a person with the protected characteristic of gender reassignment. [↑](#footnote-ref-4)
5. The one exception to this is the provision relating to solemnisation of marriage through religious ceremony in Part 6ZA of Schedule 3. [↑](#footnote-ref-5)
6. LGBT Foundation, ‘[Transforming outcomes: a review of the needs and assets of the trans community](https://lgbt.foundation/transformingoutcomes)’. [↑](#footnote-ref-6)
7. For example, where individuals are faced with a lack of support such that they personally feel unable to live in their acquired gender, and as a result revert to their sex recorded at birth, but later feel better supported and able to live in their acquired gender and wish to again obtain legal recognition of a change in sex. The process set out in this submission aims to minimise the risk of this kind of situation arising by ensuring that applicants have fully considered the legal, social and personal consequences of changing legal sex and are informed about how to access further support. [↑](#footnote-ref-7)
8. See, for example, the ‘[Scottish Women’s Sector Response](https://www.closethegap.org.uk/content/resources/Scottish-Womens-Sector-response-to-the-consultation-on-proposed-changes-to-the-Gender-Recognition-Act.pdf)’, developed by Close the Gap, Engender Scotland, Equate Scotland, Rape Crisis Scotland, Scottish Women’s Aid, and Zero Tolerance. [↑](#footnote-ref-8)