

Response to the government consultation Gender Recognition Reform (Scotland) Bill

Name of organisation

Sex Matters

Information about the organisation

Sex Matters is a not-for-profit organisation that advocates for clarity about sex in language, policy and law, in order to safeguard the human rights, health, safety and dignity of everybody. Sex matters in life and in law. This is particularly important for protecting women's rights, and safeguarding children and vulnerable people. Clarity about sex also has implications for protecting the rights and wellbeing of people with other protected characteristics, including age, disability, race, religion or belief, sexual orientation and gender reassignment.

The form then asks us to share our thoughts on a range of issues.

The removal of the requirement for a medical diagnosis of gender dysphoria and supporting medical evidence.

We do not agree with this proposal. Removing all medical oversight from the process of legal sex change will increase the pool of people eligible to legally change their sex by a large multiple, and change the character and nature of applicants. This is more than a simple administrative reform and will have implications for other people.

Before the enactment of the GRA, government policy explicitly stated that GRCs were intended for the group they identified as transsexuals undergoing medical transition with a diagnosis of gender identity disorder, gender dysphoria or transsexualism. The bill does not state that the target of the legislation has changed. These people are adequately served by the current system, in which around 95% of applicants are successful.

It was recognised at the time of enactment of the GRA that there was a much larger group of people who cross-dress for other reasons. As the Department of Constitutional Affairs stated in a briefing in 2003: "Transsexualism is not transvestitism or cross dressing for sexual thrill, psychological comfort or compulsion." Medical diagnosis was a means to differentiate between these two groups. Removing medical diagnosis opens up the GRA to a larger group with a different profile.

The GRA enables a person to change their legal sex "for all purposes" and makes information about a person's sex (and therefore their previous identity) subject to strict confidentiality with

criminal penalties in relation to employers, service providers and others who deal with a person in an official capacity (GRA S22). This form of extreme protection about a person's identity should not be given out indiscriminately on the basis of self-certification.

While the European Court of Human Rights did "not find any significant factors of public interest" in the case of Christine Goodwin that led to the enactment of the GRA, it has become clear that allowing people the legal fiction of changing their sex does impact on the fundamental rights of other people, particularly women. There are conflicts of rights, which include the fundamental rights not to be subjected to degrading treatment (Article 3) and not to have private life interfered with arbitrarily (Article 8), as well as freedom of belief (Article 9) and freedom of expression (Article 10).

Most people believe that a person with a male body is a man (and vice versa) and in fact they are. Single-sex facilities are particularly important for women because of the risk of voyeurism, exhibitionism and sexual assault. Ambiguous rules and social norms about who can use a "single-sex" space increase these risks.

Allowing people to self-certify to change their legal sex removes vulnerable individuals from mental-health assessments which might deliver a different diagnosis of the reasons for their feelings of gender distress.

Provisions enabling applicants to make a statutory declaration that they have lived in the acquired gender for a minimum of three months (rather than the current period of two years) and that they intend to live permanently in their acquired gender.

The legislation does not make clear what "living in the acquired gender" involves. At a short timescale and without medical diagnosis it is particularly inadequate.

It cannot be interpreted as involving wearing particular clothing, adherence to gender stereotypes, having medical treatment or taking cross-sex hormones.

Nor can it involve using services and spaces provided for the privacy and dignity of members of the opposite sex, since this would subject other people to indignities.

The two-year period in the current law recognises that it takes time for doctors to rule out other causes of distress and make a diagnosis of gender dysphoria. Reducing the qualifying period is irresponsible and could very easily lead to distressed people, including children, making decisions about their legal status before doctors have a chance to find the root cause of distress and recommend treatment.

Whether applications should be made to the Registrar General for Scotland instead of the Gender Recognition Panel, a UK Tribunal.

We are very concerned about the fracturing of the treatment of sex in legislation in the United Kingdom. The rules for obtaining a GRC should not differ across the UK.

The UK government has decided not to pursue legislation to allow changing sex by self-identification. It is not clear that a Scottish GRC could or should be accepted for issuing a UK GRC and a new birth certificate for someone with a birth certificate issued in England, Wales or Northern Ireland. The Gender Recognition Panel comprises legal and medical experts. It provides a safeguard against bad-faith actors and protects those who might be harmed by acquiring a GRC prematurely.

The introduction of “quickie GRCs” in Scotland will attract legislative tourists. Draft legislation does not make clear what is meant by is “ordinarily resident” in Scotland or born in Scotland. This legislation will open up self-declaration to applicants from elsewhere in the UK, based on an unspecified short stay in Scotland. The process will also be open to all students attending a Scottish university. Scottish-born prisoners housed in the prison estate in England and Wales may be eligible.

It is unclear whether a GRC granted in Scotland, at a much lower threshold than in England and Wales, will have the same effect UK-wide as one granted under the current system.

Clause 12 of the Bill sets out that copies of certificates are to be sent to the Registrar General for England and Wales or to the Registrar General for Northern Ireland if the person holds a birth or marriage certificate from those two jurisdictions. This suggests that the law in England and Wales and in Northern Ireland should view these certificates as valid, even though these parliaments have not made a democratic decision to adopt self-ID.

Proposals that applications are to be determined by the Registrar General after a further period of reflection of at least three months.

The Bill in fact offers the extraordinary measure of introducing criminal penalties for revealing “protected information” about a person’s sex at the point that the period of reflection begins and for two years after the end of the reflection period if the applicant does not confirm in writing that they do not wish to proceed with the application (or perhaps even longer).

Thus even without finalising their legal sex change, a person would acquire an “invisibility cloak” for their sex.

The proposal to amend section 22 broadens the extent of secrecy about sex from someone who has been granted a GRC to someone who has simply applied for one. It might even include someone who has been turned down for one.

Current wording: (b) if the application under section 1(1) is granted, otherwise concerns the person’s gender before it becomes the acquired gender.

Proposed amended wording: (b) whose gender has become the acquired gender, and which concerns the person’s gender before it became the acquired gender.

The provision of secrecy about a person’s sex is not something that should be given out indiscriminately.

The implications of these secrecy provisions should be seriously considered for areas such as safeguarding and single-sex services.

Whether the minimum age for applicants for obtaining a GRC should be reduced from 18 to 16.

We are strongly opposed to this. The interim report of the Cass Review of Gender Identity Services in the NHS in England highlighted the recent rapid increase in the number of children requiring support for gender distress, and the lack of evidence about this population and their outcomes. It notes that consensus and open discussion are lacking about the nature of gender dysphoria and therefore about the appropriate clinical response. Dr Cass emphasised that social transition is a significant step, which increases the likelihood of a child going on to seek body modifications which will leave them sterile and without adult sexual function.

The minimum age for marriage in Scotland falls short of the international standard of 18. Scotland should not compound this by reducing the minimum age for a child to change their legal sex.

If you have any comments on the provisions for confirmatory GRCs for applicants who have overseas gender recognition.

The Bill would introduce an inconsistent approach to gender recognition throughout the UK. While England, Wales and Northern Ireland would continue to only recognise gender recognition from an approved jurisdiction, the proposal for Scotland does not mention approved jurisdictions.

If you have any comments on the offences of knowingly making a false application or including false information.

Making a false declaration will constitute a criminal offence, punishable up to two years imprisonment. But it is not clear what this would mean, or how it could be proved.

This again raises questions of what living “in a gender” involves. For example, clothing, hairstyles, mannerisms or other outward features of traditional masculinity or femininity could not be used to judge whether someone was “living as a woman”, since women (and men) are not required to dress according to gender stereotypes.

Nor could names or pronouns. Many young people have adopted neo-pronouns such as they/them/their and zee/zim/zeir and combinations such as he/she/their. Knowing someone’s pronouns or name does not tell you whether they consider themselves to be “living as a man” or “living as a woman”.

Furthermore, a person is making a statutory declaration at the beginning of a period of reflection – there must therefore be an expectation that a person can be in a state of

uncertainty, and change their mind during the period of extended reflection (which can go on for two years and three months).

If the Bill's intended policy outcomes could be delivered through other means such as using existing legislation or in another way?

We would encourage the Scottish Government to consider a much simpler, de-medicalised process for protecting the privacy of transgender people, without undermining clarity about sex. This would be to allow anyone to obtain a copy of their short-form birth certificate without their sex marked on it.

This would maintain the integrity of record-keeping about individuals' sex (information which is needed in some situations), while also allowing them to live as they chose in terms of gender expression.

Organisations that individuals interact with can already record self-identified aspects of their gender expression (such as whether they prefer to be called Mr, Ms or Mx) and simply not record or display information on their sex at all, apart from in situations where this information is needed.

Digital-identity frameworks allow data subjects to maintain much more control over information attributes than was previously possible with analogue systems. There is no need to corrupt public records and data on sex to respect and protect the private lives of people who do not wish to acknowledge their sex in every social or official interaction.

This measure would also accommodate people with "non-binary" identities.

If you have any suggestions for how this Bill could be amended. If so, please provide details.

An amendment could be introduced to clarify that a GRC does not change a person's sex for the purpose of the Equality Act or for the Human Embryo and Fertilisation Act.

Any other comments on the Bill

As the Equality and Human Rights Commission has set out in its recent guidance, the Equality Act 2010 allows service providers to offer single-sex services, such as toilets, changing rooms, women's refuges and schools, as well as female-only sport competition, and this is based on biological sex, not on a person's "acquired gender".

Given the confusion and hostility that have arisen about who can use single-sex spaces, any reformed legislation on gender recognition and associated communication to applicants should make it clear that individuals do NOT gain the right to use spaces provided for the dignity and privacy of members of the opposite sex.

The impact of the proposed law on the integrity of security and safeguarding systems, including anti-money laundering, criminal records disclosure and “safer recruitment”, should be assessed, as well as the risk that individuals could use the ability to self-identify into sequential new identities to evade record-keeping in risk-based systems.

More information

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