Gender Recognition Reform (Scotland) Bill
Briefing for the stage 3 amendments debate on 20th December 2022

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The Equality Network is a leading Scottish LGBTI equality and human rights charity. Scottish Trans is the project of the Equality Network focusing on the equality, human rights and inclusion of trans people.

We welcome the Gender Recognition Reform (Scotland) Bill, which would represent an important and significant improvement in the way that trans men and women are able to update the sex recorded on their birth certificate, and obtain legal recognition of how they live their lives.

The below briefing focuses in detail on the amendments suggested to the bill at stage 3. We would urge MSPs to reject amendments that fundamentally undermine the principles of the bill, agreed by a large majority at stage one.

For information about how the law currently works and why it needs to change, please see: "Five reasons to support reforming the Gender Recognition Act" which we sent to all MSPs at the end of October.

Group 1: Applications by 16- and 17- year olds

6, 93, 94, 7, 98, 24, 15, 25, 99, 8, 26, 9, 12, 101, 37, 105

A key principle of the Gender Recognition Reform (Scotland) Bill, agreed by a large majority at stage one, was that the age at which a person could apply for a Gender Recognition Certificate (GRC), and obtain legal gender recognition of the gender they live in, should be lowered to 16.

This is in keeping with the Age of Legal Capacity (Scotland) Act 1991, which presumes that young people have the capacity to take decisions on their own behalf. Lowering the age to 16 is supported by the Children and Young People's Commissioner for Scotland, who giving evidence to the Equalities, Human Rights and Civil Justice Committee at stage one said:

"We support the move to lower the age to 16. Protection and participation rights are not mutually exclusive, and we are looking for a process that recognises not only the growing autonomy of young people but the need to support and protect them."

The bill was amended significantly at stage 2 to increase the time that applicants aged 16 and 17 need to be living in their gender from three months to six months, and to require them to have a discussion with an adult who knows them personally, or a person in a role providing advice, support, or information to young people, about the impacts of obtaining a GRC.

We recommend MSPs **<u>support</u> amendment 99.**

This will require applicants aged 16 or 17 to provide details of the role of, or their relationship with, the person with whom they discussed their application, to the Registrar General when making the application. This will ensure that younger applicants have this discussion, without placing an undue burden on them to evidence this, which would increase barriers to them accessing their legal rights as discussed below.

We recommend MSPs **<u>oppose</u> amendments 6, 7, 8, 9, 12, 15, 24, 25, 26, 37, 93, 94, 98, 101 and 105.**

All of these amendments would in various ways increase barriers to 16 and 17 year olds applying for a GRC.

Amendments 6-9 and **12** would mean applicants need to be 18 or over to apply and should be rejected. They undermine one of the key principles of the bill, which is to reduce the minimum age to 16.

Amendment 15 narrows the scope of who a 16- or 17- year old applicant can have a discussion with about obtaining a GRC and should be rejected. It is also flawed because "suitably qualified" is not defined.

Amendments 24, 25, 98 and **101** are not needed if MSPs support amendment 99. They either require a 16 or 17 year old applicant to provide the name and contact details of the person with whom they discussed obtaining a GRC, require a 16- or 17- year old applicant to be able to provide evidence that they have done so, or require that the Registrar General is satisfied that they have been given appropriate guidance, support or advice. This might be very difficult where, for example, a younger applicant has called a helpline such as ChildLine and had this conversation over the phone – such services do not provide names and contact details for their staff. **Amendments 98 and 101** would not be needed if amendment 99 is agreed, as amendment 99 ensures that the Registrar General can confirm that an applicant who is 16 or 17 has had this conversation, without placing an overly high burden on the young person to evidence this.

Amendments 26 and 37 are not needed, as under the bill the Registrar General can refer any application to the sheriff court, regardless of the age of the applicant, where they believe that the applicant lacked capacity to make the application. The court is

best placed to decide issues of capacity, not the Registrar General. If the court so decides, the Registrar General does not issue a GRC.

Amendments 93 and 94 require the age for applicants not to be lowered from 18 to 16 until the Cass Review has been completed, and its findings taken into consideration. The Cass Review is a review into the provision of gender identity healthcare services in England and Wales, and is entirely unrelated to the process of applying for a GRC in Scotland, which has no relation to medical treatment.

Amendment 105 would essentially raise the minimum age that a person could apply for a GRC to 16.5 years old. This does not reflect any existing threshold in Scots law relating to capacity, and should be rejected.

Group 2: Applicants with criminal charges or convictions

18, 22, 28, 39, 39A, 39B, 39C, 40, 40A, 40B, 40C, 40D, 40E, 41, 42, 50, 52, 53

We abhor sexual violence and domestic abuse. Trans people of all genders experience gender based violence at higher rates than the general population, and we are committed to working wherever we have the opportunity to tackle the causes of gender based violence, and to increasing the support provided to survivors.

We recommend MSPs **support amendments 40, 40A, 40B, 40C, 40D, 40E, 41** and **42**

These amendments require the chief constable to notify the Registrar General of the application for, or the granting of, a sexual harm prevention order, a sexual offences prevention order, or a sexual risk order, that includes the condition that an individual may not apply for a GRC, or will include this condition if granted.

It is our strongly held view that the possession of a GRC would not facilitate a person committing a sexual offence, or indeed any criminal offence. A GRC does not grant a person access to specific services or spaces. It allows a trans person to update the sex recorded on their birth certificate, and have their gender recognised in law. But access to single-sex services or spaces is not determined by whether or not a trans person has a GRC. Trans people with and without GRCs are often included and welcomed in services that reflect how they live their lives (e.g. trans women in women's services, and trans men in men's services). However, all single-sex services are able to treat trans people with and without GRCs less favourably, or exclude them, where this is a proportionate means of achieving a legitimate aim. This is regulated by the Equality Act 2010, and will not be impacted in any way by the provisions of this bill. It is also rightly the case that obtaining a GRC does not provide protection from being prosecuted and convicted for gender specific offences, as is made clear in section 20 of the Gender Recognition Act 2004, which is not amended by this bill.

However, unlike the amendments in this group which we oppose, we agree that if the chief constable were to make a successful application for either a sexual harm prevention order, a sexual offence prevention order, or a sexual risk order in which

the chief constable met the required threshold to evidence that a condition of such an order should be to prevent that individual from applying for a GRC, that this would be an appropriate way of preventing specific individuals from making an application for a GRC.

There would require to be evidence provided to the sheriff that preventing an application from a specific individual for a GRC would prevent future harm, and protect either the general public or specific members of the public from this harm. This would include consideration of whether interfering with their right to a private and family life, guaranteed under article 8 of the European Convention of Human Rights, was proportionate. If such an order were granted with this condition, we would be satisfied that this was a necessary and proportionate restriction on a specific individual's ability to apply for a GRC.

Moreover, these amendments would use a pre-existing legal route. The issuing of a sexual harm prevention order, a sexual offence prevention order or a sexual risk order to a specific individual would not unfairly stigmatise all trans people by linking the application process for a GRC with criminal conviction checks and bans relating to criminal convictions, but instead would focus on those specific individuals who were demonstrably a risk to others.

We recommend MSPs **oppose amendments 18, 22, 28, 39, 39A, 39B, 39C, 50, 52, and 53**

These amendments seek to prevent those who commit certain offences from obtaining a GRC, allow an application to be paused where someone is being prosecuted for certain offences at the point of application, so that if they are convicted they cannot obtain one, provide a power to revoke a GRC if certain offences are committed after obtaining one, and allow an individual to appeal to the sheriff that it was 'manifestly unfair' that they could not make an application for a GRC due to a previous conviction

Whilst we agree that people on the sex offenders register should need to notify the Police about making an application for a GRC, which would be introduced by **amendment 22,** we note that the Cabinet Secretary for Social Justice, Housing and Local Government has already committed to "introduce regulations to amend the Sex Offender Notification Requirements so that those on the register are required to notify the Police with details as to whether they have made an application for a gender recognition certificate", before the Act is commenced. This is more appropriate than unfairly stigmatising all trans people, and the process for applying for a GRC, by doing so on the face of the bill.

We do not think that it is proportionate for an individual to be unable to obtain legal recognition of their acquired gender, or to face additional barriers to doing so, due to having previously committed, or going on to commit, specific offences. All of the offences are rightly criminal, and have penalties on conviction reflecting the seriousness of the offence.

It is not proportionate for there to be an additional punishment, which would only apply to trans people, of interfering with someone's right to a private and family life,

guaranteed under article 8 of the European Convention of Human Rights, which is what underpins the right to legal gender recognition. As all members will know, legislation passed in the Scottish Parliament must comply with the European Convention of Human Rights. We are very concerned that these amendments could wreck the entire bill, by placing it outwith legislative competence, due to not being ECHR compliant.

Amendments 40, 40A-E, 41 and 42 provide a proportionate level of protection, overseen by the chief constable and the court.

Group 3: Meaning of "ordinarily resident in Scotland"

19

We recommend MSPs **support amendment 19.**

We believe that asylum seekers who are living in Scotland should be able to apply for gender recognition. Unfortunately it seems that it is outwith legislative competence for the Scottish Parliament to provide this. **Amendment 19** would therefore appear to be necessary to ensure the bill is within competence.

Some people seeking asylum in Scotland will meet the test of being 'ordinarily resident' here and so be able to apply. We would urge the Scottish Government to commit to ensuring that guidance to be produced by the Registrar General about applying for a GRC includes information for asylum seekers on the meaning of 'ordinarily resident'.

Group 4: Support and information for applicants and potential applicants

23, 20, 21

We recommend MSPs **oppose amendments in this group.** We welcome the spirit of these amendments, and would of course warmly welcome increased support and information for trans people, and a commitment from the Scottish Government to support the provision of this.

However, we think that **amendment 23** is too broadly drawn. It is unclear how "individuals who are considering making an application for a gender recognition certificate" would be identified, or how it would be "ensured" that they could access support and information as a result of this provision.

Group 5: Grounds on which the application is to be granted: medical evidence and time living in the acquired gender

95, 96, 97, 10, 11, 16, 102, 107, 137

We recommend MSPs **oppose amendments in this group.**

Amendment 10 would require applicants who are 16 or 17 to have been living in their acquired gender for two years before application.

Amendment 11 would apply the same two year requirement to applicants over 18. These amendments undermine one of the key principles of the bill, which is to reduce the time delay between when a trans man or woman has begun permanently living in their gender, and they are able to apply for legal gender recognition. They should be rejected.

Amendment 16 would require a report from a medical practitioner that the applicant had discussed the application with them. This undermines another key principle, which is to demedicalise the process. Being trans is not an illness. The amendment would re-medicalise and reintroduce evidence to the process, and could also reintroduce the cost of a doctor's note, making legal recognition less accessible to trans people on lower incomes. It should be rejected.

Amendments 95, 96, 97, and 102 also undermine this principle by remedicalising the process. They introduce a requirement for an applicant to confirm at the time of making an application that they "discussed the intention of the applicant to obtain a gender recognition certificate with a medical professional and received any mental health support that was considered by that professional to be necessary." This should be rejected.

It is deeply unacceptable that an applicant would need to confirm that they had received mental health support before obtaining a GRC. This would remove an applicant's ability to make choices about their own mental health and wellbeing and medical care. It is also deeply pathologising of trans people. By specifying mental health support, these amendments seem to make a clear and harmful assumption that an applicant would need a medical professional to check that making their application was what was right for them, and not instead a symptom of mental ill health.

Amendments 107 and 137 reintroduce the extensive rules on medical evidence currently required under the Gender Recognition Act 2004 – a diagnosis of gender dysphoria, and an additional medical report. This undermines a key principle of the bill, which is to simplify and demedicalise the process, and should be rejected.

Group 6: Minor and technical

27, 29

We recommend MSPs **support these technical amendments.**

Group 7: Statutory declarations: formalities and supporting evidence

100, 1, 103, 104, 140, 106, 2, 3, 4, 5, 47, 47A, 48, 49, 141

We recommend MSPs **support amendments 47, 48, 49, 103 and 140**

Amendment 47 includes within the provisions of the bill the requirement that an applicant for a GRC must provide two pieces of proof to verify their identity to the person that is witnessing their statutory declaration. Amendments 48 and 49 are consequential.

Amendments 103 and 104 are alternatives. Amendment 103 would mean that the person who witnesses the statutory declaration made for the purpose of an application for a GRC cannot be a local councillor – so that they would need to be a notary public or a JP. Both 103 and 104 would require that the statutory declaration made should use the form specified by the Registrar General by regulations. This would ensure that applicants were confident that they had completed this important part of the process correctly. Amendment 140 is consequential.

We recommend MSPs **oppose amendments 100, 1, 106, 2, 3, 4, 5, 47A and 141**

A key principle of the Gender Recognition Reform (Scotland) Bill, agreed by a large majority at stage one, is that the process by which trans people can obtain a Gender Recognition Certificate and legal recognition of the gender in which they live their life should be done on the basis of self-declaration.

Self-declaration refers to a process of legal gender recognition that is de-medicalised and administrative. Rather than requiring evidence of any medical treatments or diagnoses, or that a person has been living in their gender, instead it requires a statutory declaration by the individual applying. This is the model that is considered to best uphold trans people's human rights, as stated by a range of human rights experts including the Scottish Human Rights Commission (see here and here), the UN Independent Expert on protection against violence and discrimination on the grounds of sexual orientation and gender identity, and the Commissioner for Human Rights of the Council of Europe.

Self-declaration models are already in place in more than 30 jurisdictions around the world, with populations of more than a quarter of a billion people. The first country to introduce self-declaration for legal gender recognition was Argentina in 2012, and the most recent was Switzerland in 2020.

All of these amendments introduce evidence requirements. These would fundamentally undermine this key principle of the bill.

Amendment 100 would require an applicant to include copies of the identification they had used to verify their identity to the person witnessing their statutory declaration with their application. This is entirely unnecessary, as the person witnessing the statutory declaration will only have done so if they were satisfied with the evidence provided.

Amendments 1-5 would require applicants to provide evidence that they had been living in their acquired gender for three months. To be eligible to make an application, a person must have been living in their 'acquired gender' for at least three months, and to swear this in their statutory declaration. A statutory declaration is a witnessed, legal oath, that is counter-signed by a notary public or Justice of the Peace. Making a false statutory declaration is a criminal offence. Reintroducing

requirements for applicants to provide evidence that they have been living in their acquired gender in addition to making a statutory declaration swearing this would fundamentally undermine a key principle of the bill, which is to move to a system of self-declaration. It should be rejected.

Amendments 106 and 141 would require a counter-signatory to an application. The statutory declaration that the applicant is required to submit will already have been counter-signed by a solicitor or justice of the peace. It is not right in principle that something as fundamental to a person as their own gender identity should be subject to another person's approval. This may also serve as a particular barrier for more isolated trans men and women, who might lack supportive family members or friends, and lack the confidence to approach a work colleague or other relevant person to act as a counter-signatory.

Amendment 47A would amend **amendment 47**. It provides a specific list of acceptable items of identification than an applicant can provide when making their statutory declaration. We think that it should remain up to the discretion of the notary public or JP to decide which pieces of proof of identity are acceptable, as provided by amendment 47

Furthermore, amendment 47A specifies that the identification must be in the 'acquired gender' and also that all items must have a name and title. Several items listed would not fulfil these requirements: for example a driving licence with a male gender code does not allow a title to be displayed, and for people who use a gender neutral title such as 'Reverend' then many of the more administrative items such as letters from the person's solicitor would not give any indication of the applicant's acquired gender.

Group 8: Background checks for applicants

30, 31, 32, 33, 35, 36, 38, 43, 44, 45

We recommend MSPs **oppose amendments in this group.**

These amendments would require all applicants to undergo a criminal conviction check. They would also prevent those who had committed certain offences (or were suspected by police of doing so) from obtaining a GRC if doing so would be deemed 'unreasonable', and would require Police Scotland to be notified about a GRC being granted where a person has certain previous convictions.

We would refer MSPs to our comments at Group 2 in this regard. We think that the amendments in that group that introduce the ability for specific individuals to be banned from making an application for a GRC, under the conditions of a sexual offence prevention order, a sexual harm prevention order, or a sexual risk order, are the most appropriate way to deal with concerns in this area.

Requiring all applicants to undergo checks for criminal convictions or police checks is disproportionate, stigmatises trans people, and is an unfair invasion of all applicants' privacy.

Disclosure Scotland already has processes in place, when doing checks relating to suitability to work in certain roles, that mean that people are unable to hide previous details – such as their previous names, and their gender history. This has been working well since the Gender Recognition Act 2004 was passed (and indeed is the same process used for trans people both with and without GRCs, as many trans people have changed their name and updated their passport, driving licence etc. without obtaining a GRC). Disclosure Scotland have confirmed this directly in evidence to the Equalities, Human Rights and Civil Justice Committee, and no provisions of the bill would change how that system operates.

Group 9: Applications by adults with incapacity

34, 46

We recommend MSPs **oppose amendments in this group.**

Amendment 34 would require the Registrar General to contact the Public Guardian before granting an application to ascertain if they have registered a welfare power of attorney or a guardianship order. Many people have registered a welfare PoA, in case they in future become incapacitated – this indicates nothing about their current capacity. Similar checks are not required for, for example, entering a marriage. We do not think that obtaining a GRC should be treated as a particularly unique or dangerous process for an individual to go through, that it requires special checks of capacity.

We welcome the spirit of **amendment 46**, although think it is unclear what it would actually require in relation to the Registrar General exercising a function under the Act with due regard to the Adults with Incapacity (Scotland) Act 2000. We are concerned that this amendment might be found to be outwith legislative competence as it mentions “opportunities to advance equality and non-discrimination” when the devolution of equality in the Scotland Act 1998 is limited to the “encouragement of equal opportunities”.

However, we would welcome a commitment from the Scottish Government to ensure that information provided by the Registrar General about the Act is done in an inclusive way, and that information includes providing advice help and support to those considering making an application but who are unsure whether they have the capacity to do so, so they can understand how any decision relating to their capacity will be made.

Group 10: Certificates obtained by fraud

108, 110, 114, 115, 116, 138, 139

We recommend MSPs **support amendments 108, 110, 114, 115, 138 and 139.**

Amendments 108 and 110 clarify the meaning of a fraudulent application for a GRC.

Amendment 114 is an improved version of an amendment, lodged by the same MSP, that was passed at stage 2.

We would like to reiterate our position that we do not think that a statutory aggravation of fraudulently obtaining a GRC is necessary. There is no evidence from other jurisdictions that operate similar gender recognition arrangements that gender recognition is being fraudulently applied for to facilitate the commission of offences. It remains entirely unclear to us how the possession of a GRC could be used to facilitate the commission of offences. Where a person had fraudulently obtained a GRC, they could also be prosecuted and sentenced for this as a standalone offence under section 14 of the bill, in addition to any other offence. In practice, we do not foresee the statutory aggravator being used.

However the statutory aggravator was agreed at stage 2, and a**mendment 114** improves the wording, requiring that 'the person's gender, as recognised by the [fraudulent GRC], was material to the commission of the offence'.

Amendment 115 automatically revokes a GRC where someone is found guilty of an offence with the statutory aggravation. We agree that this would be appropriate. Amendments 138 and 139 are consequential.

We recommend that MSPs **oppose amendment 116.** A GRC does not give a person access to a single-sex service.

Trans people with and without GRCs are frequently included in single-sex services in line with the gender they live in. However, trans people with and without GRCs are able to be treated less favourably, or excluded, by the operators of single-sex services if this is a proportionate means of achieving a legitimate aim. This is laid out at Schedule 3 Paragraph 28 of the Equality Act 2010, and was explained in detail to the EHRCJ Committee at stage one by the Equality and Human Rights Commission. We would add also that obtaining a GRC by fraud is already a criminal offence under section 14 of the bill.

Group 11: Late application for review of Registrar General's decision

We recommend MSPs **support amendment 109.** This would allow an extension to the time limit for appealing a decision of the Registrar General which must be granted if the applicant had a good reason for not making it sooner, and can be granted at the Registrar General's discretion otherwise.

Group 12: Manifestly unfounded application to sheriff to revoke certificate

We recommend that MSPs **support amendment 51.**

We have serious concerns that trans people may face vexatious complaints to the sheriff court to revoke their GRC, simply because a family member or other "person with an interest" does not accept their trans identity.

There are campaign groups that disagree with this bill, and in some cases, with the concept of gender recognition itself, and we are concerned that a group might seek out, and possibly fund, cases where a family member is willing to take a trans family member to court to challenge their GRC.

For example, a family member who opposes the person being trans might base a claim that their application for a GRC was fraudulent on social media content showing the trans person in the "wrong clothing", or that they failed to correct someone who use the wrong pronoun for them. Whether or not the challenge succeeded, the result would be to put the trans person under huge stress, having to defend their identity in court.

We are particularly concerned that in order to defend themselves from a claim of having made a fraudulent application, trans men and women may be forced to provide evidence to a court demonstrating that they have not done so, over and above the requirements for obtaining a GRC set out in the Bill. This might include evidence required under the current law, such as a psychiatric diagnosis, or medical reports detailing any medical interventions they have had as part of their transition.

This would fundamentally undermine the purpose and provisions of the Bill.
We also note that the person whose GRC is being challenged may incur very substantial costs defending it in court, and may be unable to afford the defence.

Group 13: Interaction with the Equality Act 2010, the concept of sex, and single-sex services

54, 111, 112, 113, 117, 118, 119, 120, 121, 61, 123, 72, 73, 74, 127, 128, 129, 130, 133, 92, 136

We recommend that MSPs **support amendment 54.**

Amendment 54 would require Scottish Ministers to publish guidance on the operation of the Act, in consultation with relevant equality and human rights statutory bodies, including the Equality and Human Rights Commission and the Scottish Human Rights Commission.

We recommend that MSPs **oppose amendments 111, 112, 113, 117, 118, 119, 120, 61, 123, 72, 73, 74, 127, 128, 129, 130, 133, 92 and 136.**

Amendment 112 relates to Section 9(3) of the Gender Recognition Act 2004. The Bill does not modify, amend or replace any part of Section 9(3) of the 2004 Act, and so this amendment is superfluous and not needed.

Amendments 113, 127 and 130 relate to specific provisions in the Equality Act 2010. We are very concerned that these amendments could wreck the entire bill, by placing it outwith legislative competence, because the Equality Act is reserved. An amendment was agreed at stage 2 to include section 15A which states: "For the avoidance of doubt, nothing in this Act modifies the Equality Act 2010." That is as far

as the Parliament can go within competence, and covers the whole of the Equality Act.

Amendments 111, 117, 118, 119, 120, 72, 73 and 74 require guidance to be produced relating to the operation of single-sex services, or provisions within the Equality Act 2010. **Amendment 92** requires regulations on this.

We understand that there is uncertainty and differing opinions amongst members about how single-sex services do and should be operating when it comes to taking decisions about how to include trans people, or to treat them less favourably or exclude them when it is a proportionate means of achieving a legitimate aim.

This bill will not impact on the operation of single-sex services. This is because Paragraph 28 of Schedule 3 of the Equality Act 2010 allows all trans people (both with and without GRCs) to be treated less favourably or excluded from a single-sex service where this is a proportionate means of achieving a legitimate aim. This was confirmed, with a detailed explanation of the relevant legal mechanisms, by Melanie Field, Chief of Policy and Strategy at the Equality and Human Rights Commission, to the Equalities, Human Rights and Civil Justice Committee at Stage One.

Additionally, we do not think that guidance relating to single-sex services that is specifically related to the impact of the Act will best meet the needs of either service providers, service users, or members with an interest in this area. In our experience, barriers trans people face to accessing services, and questions and uncertainties that service providers have, are rarely related to the question of whether an individual trans person, or trans people generally, do or do not have a GRC. Whilst we are not opposed to such guidance being produced for single-sex services, we think that this would be better achieved by making funding available for sector-specific guidance, that could focus on practical and relevant areas and questions for those sectors – which are likely to be different in, for example, the gender based violence sector than they are in schools (for which guidance already exists).

Furthermore, the Equality Act 2010 is reserved, and it is the remit of the Equality and Human Rights Commission to produce guidance on the operation of the Equality Act, which is not modified by this bill (as confirmed by section 15A). Amendments requiring guidance on this to be produced by the Scottish Government risk being outwith legislative competence, and so placing the entire bill at risk, and/or encroaching on the remit of the EHRC.

We consider that **amendments 121, 61, 123, 129** and **133** are unnecessary if members accept the amendments that we support on reviewing the operation of the Act, in group 15. Those amendments would ensure a comprehensive review of the impact of the Act after three years. **Amendments 121, 61 and 123** would require a report on certain impacts to be published within just one year, which is too soon to research and report properly on the impact. **Amendment 121** would also require an unreasonable annual re-reporting frequency. **Amendments 129 and 133** are about the impact of the bill on the Equality Act. The bill does not modify the Equality Act, and consultation and reporting on the Equality Act are properly for the Equality and Human Rights Commission, not the Scottish Government.

Amendment 128 specifies that the Bill has no impact on the collection of data on sex. Nothing in the bill makes any provision for the collection of data on sex, so this amendment is unnecessary. In addition, we are concerned that this amendment may cause public bodies, service providers and employers to wrongly assume that they must collect data on the sex recorded on someone's GRC or birth certificate in all circumstances. Decisions about data collection should be taken on a case-by-case basis depending on the relevant, lawful, and useful information that is needed. This is rarely the most useful information for such organisations to collect.

As an example, we would highlight the decision in Fair Play for Women LTD vs. Registrar General for Scotland and Scottish Ministers at the Inner House at the Court of Session in February 2022, which found that trans men and women should be able to answer 'male' and 'female' to the sex question on the census respectively, regardless of whether or not they had a GRC.

Group 14: Copying of certificates to other Registrars General

55

We recommend that MSPs **support amendment 55**.

We very much hope that the UK Government will agree to recognise Scottish gender recognition certificates in other parts of the UK, but we accept that this is a matter for the UK Government and Parliament to decide, not this Parliament.

At present, the UK Government fully recognises gender recognition from a number of other jurisdictions that operate self-declaration processes very similar to those the bill puts in place, including Belgium, Denmark, Iceland, Luxembourg, Malta, New Zealand, Norway, Switzerland, Uruguay, and parts of Australia, Canada, Spain and the US. If the UK Government does agree to similarly recognise Scottish GRCs, the provision removed by this amendment can be replaced via the section 104 order that would be introduced at Westminster to implement this and other consequential amendments.

Group 15: Review of the Act

56, 60, 75, 76, 76A, 77, 78, 79, 80, 81, 82, 83, 83A, 84, 84A, 85, 86, 87, 88, 89, 90, 90A, 134, 91

We recommend that MSPs **support amendments 56, 60 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 84A 85, 86, 87, 88, 89, 90 and 91.**

We support the idea of a single general review of the Act that would cover a range of potential impacts, which is done within a reasonable timeframe after the Act is commenced, so the Act can be properly evaluated. These amendments consolidate the amendments agreed at stage 2 into a single general review, including considering prisons, healthcare and the operation of section 22 of the Gender

Recognition Act (privacy protections), and introduce some additional areas of review such as the impacts on Disclosure Scotland.
Importantly, this review would include consideration of the Act's waiting periods on trans people and the impact of differential time periods on 16 and 17 year olds. We strongly support this, as we think these periods are unnecessary and unusual, and expect that a review would find that the reflection period rarely if ever led to any applicant deciding not to receive their GRC. It would also include a review into the impact of the provisions relating to a person with an interest being able to apply to revoke a GRC, which we continue to have significant concerns about (and discuss in more detail in relation to amendment 51 in group 12 above).

We think that **amendment 84A** is a useful clarification.

We recommend that MSPs **oppose amendments, 76A, 83A, 90A and 134**

Amendments 76A and 90A would require a review of the Act to be done every five years, for the fifteen years following the first review after three years. This is very onerous and unnecessary. We are not aware of any other legislation that has repeated post-legislative review in this way.

Amendment 83A unfairly stigmatises trans people, by including specific focus on offender management and disclosures. It is also not needed if members support amendment 88, which will review the operation of the Act on Disclosure Scotland.

Amendment 134 is not needed. The review of the Act already explicitly includes a specific focus on section 22 of the Gender Recognition Act, and amendment 83, which we support, strengthens this. This will include reviewing whether the exceptions remain appropriate, and reporting on this.

Group 16: Operation and impact of the Act

122, 57, 58, 59, 67, 68, 13, 14, 71, 131

We recommend that MSPs **support amendments 122, 13 and 71.**

Amendments 13 and 17 state, for the avoidance of doubt, that the Bill has no impact on Article 9 and Article 10 rights under the European Convention on Human Rights. The Bill does not impact on these rights, and as MSPs will know, the Scottish Parliament cannot pass legislation that contravenes the ECHR.

Amendment 122 relates to the functions of Scottish Ministers in relation to prisons. We agree that these will not be impacted.

We do not think that these amendments are needed, but if they provide reassurance and clarity in specific areas then we think they are helpful.

We recommend MSPs **oppose amendments 57, 58, 59, 67, 68, 14 and 131.**

We consider that **amendments 57, 58, 67 and 68** are unnecessary if members accept the amendments that we support on reviewing the operation of the Act, in

group 15. Those amendments would ensure a comprehensive review of the impact of the Act after three years.

On **amendment 59**, while we welcome the provision of guidance around the operation of the bill, the bill has no impact on the inclusion of trans people in sport, which is governed by section 195 of the Equality Act 2010. That section applies to all trans men and women, whether or not they have a GRC, and so the process for obtaining a GRC has no impact on inclusion in sport. This was outlined in detail by evidence given by sportscotland to the Equalities, Human Rights and Civil Justice Committee. Sportscotland provide guidance on trans people in sport, and they and the individual sports governing bodies are the appropriate organisations to provide such guidance, in consultation with the Equality and Human Rights Commission.

The bill does not affect rights under article 9 of the ECHR (all Scottish Parliament legislation must comply with the ECHR). Amendment 13 would confirm that. **Amendment 14** is therefore redundant. In any case, guidance around ECHR rights in devolved matters is properly a matter for the Scottish Human Rights Commission.

Amendment 131 would require a specific consultation exercise with women and girls six months after Royal Assent, which is far too soon for a review of the Act. Of course, we would welcome a gendered analysis of any impacts within the comprehensive review of the Act put in place by the amendments we support in group 15.

Group 17: Gender identity healthcare

62, 132, 135

We recommend MSPs **oppose the amendments in this group.**

It is important to note that this bill does not apply in any way to, or change in any way, gender identity health care.

Amendment 62 is very broadly drawn, and it is very unclear what, specifically, it would require in relation to research into health outcomes. We would of course warmly welcome greater funding and resources for research into trans people's health, but we think that it is very important that this is done with the due consideration needed to make such research as meaningful as possible.

Amendments 132 and 135 would require reviews into the provision of gender identity healthcare in Scotland. Gender identity healthcare provision will not be impacted in any way by changing the process of obtaining a GRC. This was confirmed by David Parker, Lead Clinician for the National Gender Identity Clinical Network for Scotland in evidence to the Equalities, Human Rights and Civil Justice Committee at stage 1.

There are significant problems with NHS gender identity healthcare services in Scotland. These include exceptionally long waiting times for a first appointment (at the largest Clinic, in Glasgow, the wait is over four years), a lack of staffing, and an outdated service model that is overly specialised and reliant on psychiatrists. We

would be very concerned that these amendments, which link reviewing gender identity healthcare to the impact of the Act, would result in work and reviews in this area that were far too limited in scope, and divert important resources from urgently needed improvement work, such as the work being undertaken through the Scottish Government's "NHS gender identity services: strategic action framework".

Group 18: Reporting

124, 63, 64, 65, 125, 66

We recommend MSPs **support amendments 63, 64, 65 and 66.**

These introduce some more detailed requirements for the Registrar General's annual reports on the operation of the gender recognition system, such as the number of GRCs granted, rejected and withdrawn, and whether the person has been recognised as male or female.

We recommend that MSPs **oppose amendments 124 and 125.**

Amendment 124 would require the Registrar General to report on a six monthly basis rather than annually. All other reporting by the RG (for example on marriages) is annual. Six monthly reporting is unnecessary and would cost more.

Amendment 125 is not needed. Amendments 63 to 66 provide for detail in the Registrar General's annual reports.

Group 19: Data collection

69, 70, 126

We recommend MSPs **oppose amendments in this group.**

Amendment 69 requires Scottish Ministers to report on detransition. We presume this would be done by reporting on the number of people who re-applied for a GRC, to reverse the effect of one previously obtained, although this is not clear from the drafting. We would not be opposed to data collection about the number of people who re-applied for a GRC. However, in our experience, a significant number of people who detransition do so due to facing negative social attitudes, prejudice and discrimination after coming out. A significant number also go on to retransition later, when their life circumstances change. We therefore think this amendment would result in misleading and unhelpful partial information about those who detransition. Furthermore, the number of people who detransition is tiny. It is likely to be at most in low single figures per year. It is therefore very unlikely to be possible to publish the number while ensuring confidentiality.

Amendments 70 and 126 place overly onerous and unnecessary requirements on Scottish Ministers to introduce regulations on data collection. The bill already includes annual reporting requirements on the Registrar General, and, especially with the amendments in group 15, a strong and comprehensive review after 3 years.