January 2019

Factsheet – proposed reform of the Gender Recognition Act 2004

Background

The Scottish Government is committed to reviewing and reforming gender recognition law. On 9 November 2017, we issued a consultation on the Gender Recognition Act 2004. The consultation closed on 1 March 2018.

We have published an independent analysis of the consultation responses¹ and we are considering the responses to the consultation. We have not yet reached a decision on next steps.

Why has the Scottish Government proposed to change the 2004 Act?

The 2004 Act was ground-breaking when introduced as it allowed trans people to obtain legal gender recognition for the first time.

However, more than 10 years have passed since the 2004 Act was implemented.

In the Scottish Government’s view, the 2004 Act arrangements are complicated, time-consuming and unnecessarily intrusive for applicants. We want to improve the process.

We also want to reform the 2004 Act so that it is in line with international best practice.

Other countries have implemented more streamlined legal gender recognition processes. These include Argentina, Colombia, Denmark, Malta, the Republic of Ireland, Norway and Belgium.

What changes has the Scottish Government proposed?

In the consultation, we proposed removing the requirements that applicants have a diagnosis of gender dysphoria and demonstrate that they have lived in their acquired gender for at least two years.

The Scottish Government intends that applying for legal gender recognition would remain a serious, solemn and important step. We proposed that applicants would be required to appear in person before a notary public or justice of the peace to make a statutory declaration, confirming the truth of their application and their intention to live in their acquired gender for the remainder of their life.

Applications would then be submitted for consideration by either the Scottish Government or the National Records of Scotland.

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How will you ensure that applications are genuine?

Making a false statutory declaration would, as now, be a criminal offence. This can be punished by imprisonment for up to two years.

Additionally, we propose that it would continue to be possible for a gender recognition certificate to be revoked where it was obtained by fraud.

You have proposed that the minimum age of applicants for legal gender recognition should be reduced to 16 from 18 years. Why?

Reducing the minimum age of applicants for legal gender recognition to 16 would be consistent with the exercise of other rights by those aged 16 and over in Scotland.

What rights can people aged 16 and 18 exercise in Scotland?

Here are examples of the rights a person aged 16 in Scotland can exercise:

- leave home without a parent or guardian’s consent
- marry or enter a civil partnership
- vote in a Scottish election
- get a full time job
- consent to surgical, medical or dental procedures and treatments
- enter into any legally binding contract
- record a change of name officially
- consent to lawful sexual activity
- apply for a UK passport on their own behalf.

And when aged 18, a person in Scotland can exercise rights including the following:

- buy alcohol or tobacco
- place a bet
- serve as a juror in both civil or criminal cases
- vote in UK elections.

What about people under 16 years old?

The consultation did not make a proposal in relation to people under 16. Instead, it sought views on the options for the under 16s. The options we set out included not permitting people under 16 to apply for legal gender recognition.

A careful balance must be struck between treating children with dignity and respect, giving their views weight in line with their capacity, and ensuring that they have the right protection and care.

The Scottish Government has not yet taken any decisions on this.
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How many people do you expect to apply under the proposed reformed process?

We estimate that between 250 and 400 people a year would apply under the proposed reformed process.

This is based on the experience of application numbers in Denmark, Norway and the Republic of Ireland.

Will you recognise non-binary people?

The consultation asked for respondents’ views on the options for advancing recognition of people who do not identity as men or women.

The Scottish Government has not yet made any decisions on this.

Do the proposed reforms affect the services that trans people can access from NHS Scotland?

No.

Gender recognition reform is not about NHS Scotland services. The proposals for reform do not affect the support available for trans people who need it, or the existing arrangements for access to treatment for those who are diagnosed with gender dysphoria.

Could the proposed reforms affect the meaning of the protected characteristic of sex under the Equality Act 2010?

No.

The Scottish Government is not seeking to change the Equality Act 2010 which protects people from being discriminated against because of a protected characteristic such as sex or gender reassignment.
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Would the proposed reforms affect women-only services such as domestic abuse refuges and rape crisis centres?

No.

The Scottish Government is not seeking to change the existing arrangements under the Equality Act.

Using exceptions in the Equality Act\(^2\), organisations can decide on a case by case basis whether it is right in the circumstances to offer a service to a trans woman.

These services will continue to risk assess all their potential service users.

Our understanding is that domestic abuse refuges in Scotland already offer trans-inclusive services.

What about prisons?

The Scottish Prison Service will continue to carry out risk assessments on where individual prisoners should be housed.

Does recognition affect who can take part in a sporting event?

We have not proposed any change here.

It would remain a matter for sporting bodies to decide who may take part in a particular event or competition.

The Equality Act 2010 promotes inclusion, but also permits the exclusion of a trans person from a competition, including a trans person who has been legally recognised in their acquired gender, where this is necessary to uphold fair or safe competition.\(^3\)

What are the next steps?

We recently published the independent analysis of the consultation responses.\(^4\)

Respondents made points both in favour of and against the proposed reforms. We are carefully considering these points and will issue our response to the consultation in due course.

We committed in the recent Programme for Government to continue work to enable us to bring forward legislation on gender recognition in the next legislative programme.\(^5\)


\(^5\) Programme for Government is at https://www.gov.scot/programme-for-government/.