

Engender Response to the Equalities, Human Rights and Civil Justice Committee inquiry into the Gender Recognition Reform (Scotland) Bill

May 2022

1. Introduction

Engender is Scotland's feminist policy and advocacy organisation, working to increase women's social, political and economic equality, enable women's rights, and make visible the impact of sexism on women and wider society. We work at Scottish, UK and international level to produce research, analysis, and recommendations for intersectional feminist legislation and programmes. Our views in support of the proposed changes to the Gender Recognition Act remain unaltered. We have previously provided detailed feedback through consultation responses to the Scottish Government in 2020¹ and in coalition with several of our partners in the women's rights sector in 2018.²

We are responding to this consultation primarily due to the links that have been made in public debate, media and elsewhere, between reform of the application process for a Gender Recognition Certificate (GRCs) and women's equality and rights. We will endeavour to address the Committee's stated areas of interest in this response. However, beyond the potential intersection of GRCs and the realisation of women's equality and rights, we only have limited comments to make as many of the Bill's provisions and Committee's consultation interests relate to areas of law and policy that do not fall within our remit.

2. Overarching Reflections

Engender recognises the need for reform of the gender recognition process to keep pace with evolving international human rights norms on the realisation and protection of trans peoples' rights.³ As advocates for equality, we are invested in and will always seek to support efforts by government to adhere to international best practice in inclusive law and policy making and human rights standards.

We therefore broadly support and welcome the provisions set out in the Gender Recognition Reform (Scotland) Bill.

¹ Available at: <https://www.engender.org.uk/content/publications/Engender-response-to-the-Scottish-Government-consultation-on-the-Gender-Recognition-Reform-Scotland-Bill.pdf>

² Available at: <https://www.engender.org.uk/content/publications/Scottish-Womens-Sector-response-to-the-consultation-on-proposed-changes-to-the-Gender-Recognition-Act.pdf>

³ International Commission of Jurists (2017) Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. Available at: <http://yogyakartaprinciples.org/>

We recognise that some elements of the public discourse and reporting around the Bill have been polarised and beset with inaccuracies; contributing to confusion and entrenching the perception that this Bill, and the broader aims of trans inclusion and rights, are fundamentally in conflict with the aims of women's equality. Engender does not share or uphold this view. Rather, we see the paths to equality for women and trans people as being deeply interconnected and dependent on shared efforts to dismantle patriarchal and intersecting systems of oppression that impose barriers to full equality and our enjoyment of rights.

Across several years of extensive consideration of this legislation our headline finding has been, and remains, that the proposed reforms to the Gender Recognition Act will not negatively impact on women's equality and rights.

2.1 The Interaction between Gender Recognition Reform and Women's Equality and Rights

We are confident that reform will not have any adverse effect on the capacity of the Equality Act 2010 and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to protect women from discrimination and advance women's equality and rights.

Significant public discussion has centred on the rights conferred by these legal instruments and whether gender recognition reform poses a threat to women's equality. We offer the following points, to underline our findings that the Gender Recognition (Scotland) Bill will not change or negate the protections provided to women through the Equality Act 2010 and CEDAW.

On the Equality Act specifically, we would draw the Committee's attention to the paper produced for Engender by Prof. Nicole Busby, Professor of Human Rights, Equality and Justice, available at: <https://www.engender.org.uk/content/publications/ON-THE-BASIS-OF-SEX-Protection-against-discrimination-on-the-grounds-of-sex-and-gender-reassignment-under-the-EA-2010.pdf>

This paper goes into some detail in setting out the legal provisions relevant to the protection against discrimination available to individuals on the grounds of sex and gender reassignment under the Equality Act 2010.

In particular, we wish to highlight:

- **The Equality Act 2010 definition of 'sex' has been used to include both biology and socially constructed gender norms.** The Equality Act recognises that women

require protection against discrimination on the grounds of both their biological difference from men and the social construction of gender which influences social norms and individual and household behaviours so that women's lived experience differs from men. The restriction of the definition of sex to a purely biologically determined status would result in a narrower application of the Equality Act.

- **Protection from discrimination on the ground of gender reassignment is not contingent on having a Gender Recognition Certificate.** The gender reassignment exceptions in the Equality Act 2010, which allow single-sex services to provide a different service or no service to trans people where this is a proportionate means of achieving a legitimate aim, will not be affected by reform to the Gender Recognition Act.
- **Changes to the Equality Act 2010 are reserved to Westminster.** The Scottish Parliament does not currently have the powers to make any changes to the Equality Act 2010. It is not able to amend or create any other law restricting or enhancing women's equality except in areas that have been specifically devolved.

Looking at CEDAW, the following points are particularly salient:

- CEDAW sets out minimum standards, including substantive equality between women and men, that state parties must realise.⁴ While the UK is the signatory to the Convention, the Scottish Government has committed to incorporate CEDAW into Scots Law.
- **The CEDAW Committee does not use the current gender recognition regime as a qualification mechanism for submission of complaints.** Therefore, the use of CEDAW as an accountability mechanism by civil society organisations, or use of the Optional Protocol by individuals will remain unaffected by the proposed gender recognition reform.
- **The CEDAW Committee has been clear, in its concluding observations, that trans women and intersex people fall within the scope of CEDAW.** For example, in 2019 it called upon the UK to amend the public sector equality duty created by the Equality Act 2010 to 'address situations of intersecting forms of discrimination' for 'lesbian, bisexual and transgender women and intersex persons'.⁵

⁴ UN General Assembly (1979) Convention on the Elimination of All Forms of Discrimination Against Women United Nations. Available at: <https://www.un.org/womenwatch/daw/cedaw/cedaw.htm>

⁵ UN Committee on the Elimination of Discrimination against Women (2019) Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GBR/CO/8&Lang=En

3. Consultation Questions

Engender has consistently expressed the view that the current process for acquiring a GRC is overly complex, expensive and burdensome for the applicant. Trans women, particularly those who are disabled, BME, migrants, unemployed, homeless or experiencing domestic abuse, are particularly disadvantaged by burdensome and bureaucratic processes, and may face particular difficulty in establishing their status and gathering documentation.

Engender therefore supports the overarching aims of the bill to remove unnecessary and disproportionate barriers to legal gender recognition, and as such the realisation of equality and human rights for trans people.

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

Current requirements to provide a psychiatric diagnosis and supporting medical evidence are not in step with evolving human rights norms and developments in global health and diagnostic policy.⁶ In 2019 the World Health Organisation removed ‘gender identity disorders’ from the mental disorders listed in the International Classification of Diseases (ICD-11) and replaced it with recognition of ‘gender incongruence’ in a section on sexual health.⁷ Given the deeply harmful history of pathologisation of LGBT communities as a mechanism of discrimination in many countries, this move has been widely welcomed as a necessary step to end the systematic stigmatisation of trans identities.

As advocates for women’s equality, Engender is acutely aware of the harm that disproportionate or unnecessary medical barriers, including requirements for corroboration by medical practitioners can cause. This is particularly true where burdensome and arbitrary medical requirements are enforced around deeply personal decisions and the exercise of self-determination and autonomy.

We would therefore strongly support the proposals to remove requirements around medical diagnosis of gender dysphoria and supporting medical evidence from the Gender Recognition Certificate process.

⁶ See, for example, Principle 31 of the Yogyakarta Principles, available at: http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

⁷ World Health Organisation, Transgender Health in the Context of ICD-11 <https://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/who-europe-brief-transgender-health-in-the-context-of-icd-11> (last accessed 16/05/22).

3.2 Provisions enabling applicants to make a statutory declaration that they have lived in the acquired gender for a minimum of three months.

We do not see a period of three months as necessary or determinative of a person's intention to "live in their acquired gender" and it is unclear on what grounds this timeframe has been selected. The provisions of the Bill that require a statutory declaration to be made by the applicant that they intend to live in their required gender for the rest of their lives, with a threat of criminal penalties for false declarations, should provide adequate due process to ensure the seriousness with which an applicant has approached securing certification.

Statutory declarations would presumably require clear confirmation that the applicant fully understands the consequences of obtaining a Gender Recognition Certificate. The requirement for such a declaration should also serve to reduce the administrative and social burden of seeking "sufficient evidence" that one has suitably "lived in the acquired gender" while still ensuring a significant demonstration that they fully understand the legal, social and personal implications of a legal change in status. It would also serve to reduce potential barriers in securing the necessary documents, such as utility bills, which could be a particular issue for further marginalised groups, including disabled, young and homeless people, people from certain minority ethnic communities, and those experiencing domestic abuse.

Engender's understanding of gender is as a socially constructed set of norms, roles, and relationships that is constituted in our social mores, laws, processes and policies. It is time and culture specific and functions as a hierarchy. 'Sex' is the state of being either a woman or a man. Engender therefore concludes that a requirement for an applicant to "live in their acquired gender" for a prescribed period is unhelpful, unclear and could undermine efforts to render the application system less sexist.

We believe that the necessary test of intention and commitment by individuals is met by the requirement of a statutory declaration, rendering a three-month lead in period unwarranted.

3.3 Whether applications should be made to the Registrar general for Scotland instead of the Gender Recognition Panel, A UK Tribunal.

Engender previously recommended that the use of Registrar's offices would be a more appropriate vehicle for administration of the gender recognition process than the current gender recognition panel system (GRP).

Further to the points we made in section 3.1 around the pathologisation of trans identities, we find that the current precedent set by the GRP, that individuals must justify their deeply felt, personal experiences of gender expression to a panel who will judge whether this meets an arbitrary threshold, to be highly outmoded and

problematic. We are aware of reports that panels have made decisions about a person's gender recognition based on sexist stereotypes, asking questions about, for example, which toys they played with as a child. These types of questions reinforce sexist gender notions which also contribute to women's oppression and marginalisation.

Engender therefore supports the cessation of administration of the gender recognition process using panels, and supports the move to a process overseen by the Registrar General for Scotland

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

Engender recognises the intention of a period of reflection is to “enshrine the seriousness of the process” and we agree that obtaining a gender recognition certificate must be a considered and serious process.⁸ However, we also support arguments that requiring a period of reflection is contrary to the principle that trans people know themselves and their identity is valid. As with regards to question 3.2 above, it is unclear what the rationale for this specific time frame is.

The statutory declaration proposed represents a legal process with criminal consequences for misuse with serious penalties attached. Requiring three months reflection after an individual has sworn a legal oath appears to be an unnecessary addition.

We are of the view that a statutory declaration should be sufficient guarantee that individuals are approaching the process seriously.

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

Engender does not specifically work with young people and would therefore highlight the specific expertise of organisations who work with this age group. We acknowledge that other rights and obligations such as voting and taxation apply to people aged 16 and 17, while also recognising that appropriate safeguards, developed with trans young people, will be required. We are of the view that the provisions set out in the bill represent a good balance between the right to self-determination for young adults and safeguarding, and we are therefore generally supportive of the move to reduce the minimum age for obtaining a GRC from 18 to 16.

⁸ Scottish Parliament (2022) Gender Recognition Reform (Scotland) Bill Policy Memorandum. Available at: <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/gender-recognition-reform-scotland-bill/introduced/policy-memorandum-accessible.pdf>

3.6 If you have any comments on the provisions for interim GRCs

We do not have detailed comments on the use of interim GRCs but are broadly supportive of their purpose to allow individuals to access their legal rights at the point where divorce or dissolution of a marriage or civil partnership coincides with a GRC process, ensuring fairness for both parties.

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

Engender does not have any specific reflections or comments on provisions for confirmatory GRCs. Our understanding is that these provisions would only be utilised in limited circumstance and are a proportionate way to provide mechanisms for those who have overseas gender recognition and require an amendment to be made to a register entry (for birth, marriage or civil partnership) held by the Registrar General.

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

As outlined previously, Engender recognises the need to ensure that the Gender Recognition Certificate process is a serious undertaking and we see statutory declarations as a key element in providing the necessary gravity, as well as ensuring a fair and accessible administrative process. Knowingly making a false application or declaration must therefore be considered as a matter of utmost seriousness, carrying proportionate penalties. We are unclear however, as to why a specific offence must be created around the gender recognition process and why existing provisions protecting against false statutory declarations cannot be utilised.⁹

The creation of a specific offence that duplicates the powers of another existing provision, and wholly focusses on the actions of one group of people who are already marginalised and misunderstood within society, runs the risk of compounding the process of ‘othering’ trans communities that contributes to discrimination. The creation of a specific law may also lead to a perception of exceptionalism, whereby breaches of this law are viewed as somehow different, more serious or urgent than breaches of existing duplicative laws.

While cases of so-called “de-transition” are extremely rare,¹⁰ the legislation and subsequent enforcement must provide for the possibility that a person may subsequently come to a decision that the process was not the right one for them. These

⁹ The Criminal Law (Consolidation) (Scotland) Act 1995 at section 44 subsection (2)(a)

¹⁰ Skye Davies, Stephen McIntyre, Craig Rypma (2019) *Detransition rates in a national UK Gender Identity Clinic* Available at: <https://epath.eu/wp-content/uploads/2019/04/Boof-of-abstracts-EPATH2019.pdf>

instances should be very clearly understood to differ entirely from those where someone has knowingly made a false application or declaration.

We strongly encourage the Committee to consider whether the creation of a separate, specific offence is necessary.

3.9 If you have any comments on the removal of powers to introduce a fee

Engender supports the provisions to remove powers to introduce a fee. We consider this a proportionate way to ensure that the gender recognition process is accessible and equitable, particularly for those on lower earnings, accessing social security, experiencing financial coercive control, or who would otherwise require the financial support of a partner to help pay for the process. Accessing legal gender recognition is crucial to the realisation of rights and equality for trans people and as such should be available without undue financial burdens.

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

Engender does not have any other reflections in this regard, beyond those made above.

3.11 If you have any suggestions for how this Bill could be amended. If so please provide details. Any other comments.

Engender does not have any other reflections in this regard, beyond those made above.