

Engender response to the Scottish Government consultation on the Gender Recognition Reform (Scotland) Bill

March 2020

1. INTRODUCTION

Engender is a feminist policy and advocacy organisation working to realise women's equality and rights in Scotland. We work across women's economic, social and cultural, and political inequality and advocate for change to the law and to policy to realise women's rights.

We welcome this opportunity to respond to a consultation on the Gender Recognition Reform (Scotland) Bill, because of links that have been made between reform of the application process for a Gender Recognition Certificate and women's equality and rights.

In this submission we will briefly outline the work that Engender has done in response to the two phases of consultation on reform; our analysis of the direct impact of reform on women's equality and rights; and our work around some of the issues that have been associated with reform but do not form part of the Bill. In section 4 we respond directly to the questions in the consultation with information and analysis that is most relevant to our work.

Our headline finding is that the proposed reforms to the Gender Recognition Act will not negatively impact on women's equality and rights.

We do recognise that some elements of the public discussion around reform have been polarised and rife with inaccuracies, and that some of the reporting of this public conversation has therefore entrenched confusion about what changes will mean in practice. We also recognise that public bodies, including Scottish Government, are not doing the necessary work to integrate thinking about women and girls' equality and rights into their policymaking and service design and delivery

processes. A robust equality impact assessment (EQIA) during the first consultation on reform could perhaps have provided earlier reassurance that women's equality and rights would not be undermined by changes to the administrative processes of the Gender Recognition Act.

1.1 Terminology within this consultation response

Sex

Whether you are a man or a woman.¹

Gender

Gender is 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.

Gender identity

Whether an individual's internal sense of themselves aligns with their sex as recorded at birth.

2. HOW ENGENDER RESPONDED TO THE FIRST PHASE OF CONSULTATION

2.1 Before the consultation

The party manifestos of every MSP elected in the Scottish Parliament elections in 2016 included a commitment to reform of the Gender Recognition Act (GRA). Scottish Government action on reform was first included in the Fairer Scotland Action Plan² and then in the Programme for Government 2017-18.³ Engender's analysis of the manifestos was linked to our Gender Matters Manifesto⁴ and the

¹ In terms of equality data collection, this would also include an 'other' option, in which individuals may describe themselves as e.g. non-binary.

² Scottish Government (2016) *Fairer Scotland Action Plan* Available at: <https://www.gov.scot/publications/fairer-scotland-action-plan/>

³ Scottish Government (2017) *A Nation with Ambition: The Government's Programme for Scotland 2017-2018* Available at: <https://www.gov.scot/publications/nation-ambition-governments-programme-scotland-2017-18/>

⁴ Engender (2015) *Gender Matters Manifesto: Twenty for 2016* Available at: <https://www.engender.org.uk/content/publications/Engenders-Gender-Matters-Manifesto---Twenty-for-2016.pdf>

twenty demands we set out to advance women's equality and rights, and so GRA reform was not included in our 'gender edit' of these.⁵

In November 2017, before the first consultation opened, we published a short statement of support for the Equal Recognition Campaign, in coalition with other national women's organisations and campaigns: Scottish Women's Aid, Equate Scotland, Women 50:50, Close the Gap, Zero Tolerance, and Rape Crisis Scotland.⁶ This set out our analysis that we 'did not regard trans equality and women's equality to contradict or be in competition with each other'.⁷

2.2 Phase one consultation on the principles of reform

In response to the phase one consultation on the principles of legislative reform, the women's sector again submitted a brief joint response.⁸ This outlined:

1. Our long history of deliberation on the interrelationship between trans equality and rights and women's equality and rights.
2. Our experience of engaging with equality law and policy, and in service delivery at national and local level.
3. Our understanding that, despite decades of feminist scholarship, we are still near the beginning of theorising sex, gender, gender identity and the interrelationships between them.
4. Our broad support for a self-declaration system for legal gender recognition and action to recognise non-binary people, and their alignment with soft law provisions developed by the Council of Europe⁹ and international human rights experts.¹⁰

⁵ Engender (2016) *A Gender Summary of Political Parties' Manifesto Commitments Scottish Parliamentary Elections 2016* Available at: <https://www.engender.org.uk/content/publications/Gender-edit-Holyrood-2016.pdf>.

⁶ National Women's Organisations (2017) *Statement in Support of the Equal Recognition Campaign and Reform of the Gender Recognition Act*. Available at: <https://www.engender.org.uk/news/blog/statement-in-support-of-the-equal-recognition-campaign-and-reform-of-the-gender-recognition/>

⁷ *ibid.*

⁸ National Women's Organisations (2018) *Review of the Gender Recognition Act 2004: A Consultation - Scottish Women's Sector Response* 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>

⁹ Resolution 2048 of the Parliamentary Assembly of the Council of Europe resolution 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."

¹⁰ 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/>

The bulk of our joint consultation response was the enumeration of three specific concerns about what may happen as a result of some of the proposals set out in the Scottish Government's consultation paper.

2.2.1 Amending the Equality Act 2010

The first concern we outlined in our Phase one consultation response was around amendments to the Equality Act 2010. We were concerned that Scottish Government's proposals to expand the definition of 'sex' in the Equality Act 2010 to include 'non-binary' lacked clarity, had not been tested or developed with feminist equality law scholars and practitioners, and may undermine existing protections for women against sex discrimination and unequal pay. Additionally, we believed that that these proposals may unintentionally lead to regression of Scotland's obligations under the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). In response, the Scottish Government has now dropped this proposal to amend the protected characteristic of 'sex' and it does not appear within this consultation.¹¹

2.2.2 Data on women and men

The second concern we set out in our Phase one consultation response related to gender-sensitive sex-disaggregated data.¹² Some of the discussion around the Gender Recognition Act reform consultation suggested that the widening public recognition of non-binary identities meant that it was no longer necessary or 'appropriate' for public bodies to gather data about individuals' sex. Gender-sensitive sex-disaggregated data is essential to the work of all national women's organisations on policy advocacy. In response to these concerns, Scottish Government has tasked the Chief Statistician with developing consistent guidance for public bodies which secures the most accurate and useful data about women and men.¹³

2.2.3 Concerns about women-only space

The third concern that we described in our Phase one consultation response was around single-sex service delivery. We were aware of concerns outwith the women's

¹¹ Engender and other women's organisations welcomed the proposal to include 'non-binary' in the Equality Act 2010 protected characteristic of 'gender reassignment'. This proposal has also been dropped, along with other options for formal recognition of non-binary identities.

¹² Gender-sensitive data refers to statistics and other information that adequately reflect gendered differences and inequalities in the situation of women and men in all areas of life. Sex-disaggregated data is data that is broken down by sex, so that it is possible to compare and contrast differences between men and women.

¹³ Scottish Government (2019) *Working Group about a Person's Sex and Gender: Terms of Reference* Available at: <https://www.gov.scot/publications/sex-and-gender-in-data-working-group-terms-of-reference/>

sector that the Scottish Government's proposals would somehow undermine the capacity of violence against women service delivery organisations to meet women's needs. We affirmed:

- That proposals that hinge on trans people being able to change their sex on their birth certificate would not impact at all on service delivery within our services. This is because no women's service or group in our networks requires sight of a birth certificate in order to grant access to services or membership.
- That violence against women organisations receiving Scottish Government funding from specific VAW funds have trans-inclusion plans in place, which mean that most (if not all) offer some form of service to trans women and/or trans men, and that providing services to trans people has not given rise to concerns or challenges of which we were aware.
- That services provided by rape crisis and women's aid prioritise women's safety, confidentiality, privacy, dignity, and wellbeing above all else. Over decades of practice, services have developed tools and approaches to manage risk to any individual woman's wellbeing that may arise from interacting with other service users.

In response to this concern, Scottish Government is working to produce specific guidance on single-sex services for policymakers and public sector bodies. Scottish Government is also calling on UK Government to develop statutory guidance on the use of the 'gender reassignment exceptions' in the Equality Act 2010.

2.3 Engender's activities since the first consultation phase

2.3.1 Engaging with individual women

Gender Recognition Act reform is not one of Engender's policy calls, but some parts of the public conversation around it have touched on issues that are important to our work. These include public understanding of women's protection from sex discrimination and harassment by the Equality Act 2010; the value of expert violence against women services; and the importance of gender-competent policy development. We have therefore carved out some space to engage with the issues presented by the public discourse and respond to the consultation.

While our work is rooted in women's lived experience, and draws on a programme of engagement with women, women's organisations, feminist academics, and equality

organisations, it is important to note that our work is not the aggregation of views of women across Scotland.¹⁴

Although there has been a febrile public discussion on social media, particularly on Twitter, this has not been reflected in either our organisational inbox or in the meetings that we have with a wide range of stakeholders.

In the last few years, Engender has undertaken two large-scale consultations that have attempted to identify key unfinished business for women's equality and rights. The first of these informed Engender's *Gender Matters Roadmap*, which sets out calls for actions across a wide range of policy domains that includes care, education and training, employment, health, media and arts, politics and public life, public space, social security, violence against women, and women's rights.¹⁵ The other consultation focused on Scotland's performance against the articles of the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), and sought women's views and the views of women's and equalities organisations on the extent to which those rights were being realised.¹⁶

Neither of these processes elicited significant levels of disquiet surrounding perceived tension between trans rights and women's rights. No one who took part in the Gender Matters consultation events raised the subject at all. Of individual responses to our joint CEDAW survey, only 2.9% of responses from women in Scotland specifically mentioned the Gender Recognition Act reform.

2.3.3 Meetings with groups opposed to Gender Recognition Act reform

It is, however, clear that GRA reform is an issue of considerable concern for some women. For a small group of women, it is the principal women's equality issue with which they are engaged. We wanted to hear from those who are opposed to reform, in order to ensure that we were across all of the evidence and opinion that they would be able to share with us, and to identify any additional issues that we should explore.

We invited Scotland-based groups and bloggers who had contacted Engender to express concerns about reform of the Gender Recognition Act to a meeting, convened in Edinburgh, and offered travel expenses and to cover care costs.

¹⁴ The Scottish Women's Convention is the body that was founded and is funded to carry out that work. See more at: <https://www.scottishwomensconvention.org/>

¹⁵ Engender (2017) *Gender Matters Roadmap: towards women's equality in Scotland* Available at: <https://gendermatters.engender.org.uk/>

¹⁶ Engender (2019) *Convention on the Elimination of All Forms of Discrimination Against Women: Scotland shadow report* Available at: <https://www.engender.org.uk/content/publications/CEDAW-Scotland-report-Jan-2019.pdf>

ForWomen.scot and Feisty Women¹⁷ met with us in October 2019, and ForWomen.scot provided us with some follow-up information. We met separately with MurrayBlackburnMackenzie in December 2019. Women & Girls Scotland have not been able to meet with us. In February 2020, LGB Alliance sought an immediate meeting with us, but no staff were available to attend within their timescale of three days.¹⁸

In addition, we included sessions on interactions between the Equality Act 2010 and Gender Recognition Act 2004 in our two-day *Scotland's Feminist Future* conference in January 2020. All of the organisations listed above (apart from LGB Alliance, which had no Scotland-specific presence at the time) were invited to attend this free conference.

We have reviewed materials from groups and blogs that oppose reform of the Gender Recognition Act. These have focused on the three issues identified in 2.3: the effect on the Equality Act 2010 and its scope to protect women's equality; ensuring that women have access to appropriate services provided with safety and dignity; and managing the risk of male perpetrators using the processes around transition to hurt and harm women.

2.3.5 Access to services for women

Engender does not work on service design and delivery, and we do not provide services to women beyond training, information, and events. However, we are aware that there are concerns that policymakers and service designers are not aware of how the Equality Act 2010 works to protect single-sex spaces. We have therefore participated in a number of working groups designed to produce guidance to make this more clear. This includes:

- A Scottish Government working group producing guidance for trans inclusion in school settings; and
- A Scottish Government working group producing guidance for policymakers and service designers on the provisions of the Equality Act 2010 and the ways in which they should approach the provision of single-sex services.

As outlined in section 3.1 below, the proposed Gender Recognition Act reform will not require single-sex services to act any differently than in their current practice

¹⁷ Feisty Women are not opposed to reform of the Gender Recognition Act, as set out at: Feisty Women (2019) *Gender Recognition Act - Feisty Women's Position* Available at: <https://www.feistywomen.co.uk/post/gender-recognition-act-feisty-women-s-position>

¹⁸ We have invited all of the groups opposed to Gender Recognition Act reform to share briefing and other materials with us.

when developing policies and practices around the safety, privacy, and dignity of service users.¹⁹

Services, including those run by women's organisations like rape crisis and women's aid, will be able to apply appropriate risk management policies and practices where these are a proportionate means of achieving a legitimate aim. This is true even if they negatively impact on trans people by making it more likely that trans people will be excluded from a service or part of a service.

The existing policy and practice of specialist violence against women services in Scotland tends to include trans women, recognising their experience of men's violence, and often includes trans men. Local violence against women services are autonomous, but there are national service standards that rape crisis centres²⁰ and women's aid groups²¹ work to, and these set minimum standards around equality, taking a gendered approach to men's violence, and centring victim-survivors in the design and delivery of services. Violence against women organisations also work with victim-survivors of men's violence to enable women to speak truth to power about their experience of services and the justice system, as in the Survivor Reference Group.²²

2.3.6 Prevention of harm by perpetrators in specific settings

Those who advocate for reform of the Gender Recognition Act and those who advocate against it are both concerned with women's safety as a critical issue. There are concerns about predatory men, many of whom have been imprisoned for perpetrating gender-based violence, who may mendaciously use self-identification to gain access to the women's prison estate.

Engender has met, along with Scottish Women's Aid and Rape Crisis Scotland, with representatives from the Crown Office, Police Scotland, Scottish Prison Service, and psychologists providing services around risk assessment to discuss the process by

¹⁹ See also: Sharpe, Alex (2020) *Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?* The Modern Law Review, January. doi:10.1111/1468-2230.12507

²⁰ Rape Crisis Scotland, and Rape Crisis England & Wales (2011) *Rape Crisis National Service Standards: Summary Information for Partners, Funders, and Commissioners* Available at: https://rapecrisis.org.uk/media/2135/rcnss_partners_final.pdf

²¹ Scottish Women's Aid (2011) *Women's Aid in Scotland: National Service Standards and Assessment Criteria* Available at: http://www.endvawnow.org/uploads/browser/files/scotland_shelter_service_standards_asmnt_criteria_womens_aid_2011.pdf

²² Rape Crisis Scotland (2019) *Survivor Reference Group: Initial Report* Available at: <https://www.rapecrisscotland.org.uk/resources/SRG---First-Meeting-recommends-booklet-pages.pdf>

which prisoners transition and what this means for their placement in the women's prison estate. It is our understanding that the current arrangements do not guarantee trans women with a gender recognition certificate (GRC) a space in the women's prison estate and that the reallocation process includes substantive risk-assessment. Scottish Prison Service has publicly said that they will be updating their Gender Identity and Gender Reassignment policy,²³ and Engender will engage with this process, as appropriate.

2.3.7 Ensuring good quality gender pay gap data

The gender pay gap is an indicator of persistent workplace inequality between women and men and represents gendered patterns of labour market participation that include women's unpaid caring roles, horizontal and vertical occupational segregation, and discrimination within pay systems. Part of public policy responses to the pay gap include transparency measures, where private sector companies across Great Britain²⁴ and public bodies in Scotland²⁵ are required to publish their headline gender pay gaps and information about occupational segregation. It is thought that the requirement to publish a headline pay gap figure may cause an organisation to act to reduce it.

Questions have been asked about whether GRA reform will confound or confuse the enterprise level data produced and analysed by private sector companies and public bodies. Close the Gap, Scotland's expert organisation working on women and the labour market, has carried out some modelling to identify the impact of population average levels of transition on headline pay gap figures in public bodies, large private sector companies, and small and medium enterprises. Previous small-scale surveys suggest that trans women earn up to a third less after transition,²⁶ but even when *Close the Gap* assumed that salary levels would remain exactly the same for trans women workers, the headline pay gap was unaffected. It is Close the Gap's view that

²³ Pennie Taylor (2018) *Scots prisons to consult on changes to transgender policy* The Ferret. Available at: <https://theferret.scot/change-in-policy-on-transgender-people-in-prison/>

²⁴ UK Government (2017) *Equality Act 2010 (Gender Pay Gap Information) Regulations 2017* Available at: <https://www.legislation.gov.uk/ukdsi/2017/9780111152010>; Close the Gap (2020) *The Gender Pay Gap: What Senior Leaders Need to Know* Available at: <https://www.closeyourpaygap.org.uk/files/briefing-3-senior-leaders-2020.pdf>

²⁵ Close the Gap (2016) *Public Sector Equality Duty: Guidance for Reporting on Gender and Employment, Equal Pay, and Occupational Segregation* Available at: <https://www.closesthegap.org.uk/content/resources/Close-the-Gap-PSED-guidance-on-gender-and-employment-2016.pdf>

²⁶ Schilt, Kristen, and Matthew Wiswall (2008) *Before and after: Gender Transitions, Human Capital, and Workplace Experiences* B.E. Journal of Economic Analysis and Policy 8 (1). Berkeley Electronic Press: 39.

‘self-declaration will not adversely affect efforts to address the causes of the gender pay gap’.²⁷

3. THE INTERACTION BETWEEN GRA REFORM AND WOMEN’S EQUALITY AND RIGHTS

In this section we set out our analysis of the way in which the proposed Gender Recognition Act reform will interact with women’s equality and rights. Within the public discussion, these are often referred to as ‘sex-based rights’. Although this does not have a fixed definition, it is likely to include:

- **Equality Act 2010**, which provides women with protection from discrimination on the grounds of sex, and creates a duty on public bodies to advance equality between women and men; eliminate discrimination, harassment, and victimisation; and foster good relations between women and men²⁸.
- **UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)**, which is sometimes known as the International Women’s Bill of Rights²⁹.

Our headline finding is that reform will not have any adverse effect on the capacity of the Equality Act 2010 and CEDAW to protect women from discrimination and advance women’s equality and rights.

3.1 The Equality Act and GRA

In order to ensure that we had the best possible analysis of the interaction between the way that existing anti-discrimination law protects women’s equality and equality for trans people, we commissioned a paper on this from Scotland’s only professor of equality law, Professor Nicole Busby.³⁰ Professor Busby’s paper is available on Engender’s website and forms an annex to the submission of this consultation response. This section contains excerpts from her paper, as well as our summary of the implications for issues that have been discussed around GRA reform.

²⁷ Close the Gap (2020) *Response to the Scottish Government consultation on the Gender Recognition Reform (Scotland) Bill*

²⁸ EHRC Scotland (2016) *Technical Guidance on the Public Sector Equality Duty: Scotland* Available at: https://www.equalityhumanrights.com/sites/default/files/redraft_of_psd_tech_guidance_-_v6sc.pdf

²⁹ UN General Assembly. 1979. “Convention on the Elimination of All Forms of Discrimination Against Women.” United Nations.

³⁰ Busby, Nicole (2020) *On the Basis of Sex: Protection against Discrimination on the Grounds of Sex and Gender Reassignment under the Equality Act 2010* Engender. Available at: <https://www.engender.org.uk/content/publications/>

Some relevant key points:

- **Changes to the Equality Act 2010 are reserved to Westminster.** The Scottish Parliament is not competent 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.
- **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.** An individual's protection from discrimination on the basis of gender reassignment does not require them to have received medical treatment or to have gone through the current gender recognition process.
- **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.**

3.1.1 What does 'sex' mean in the Equality Act 2010?

Laws contain their own definitions and there is no single, coherent definition of 'sex' or 'gender' across all fields of law. Equality law, family law, and other legal domains have all generated their own overlapping (and sometimes contradictory) definitions over time.

The definition of sex on the face of the Equality Act 2010 leaves scope for interpretation by tribunals and courts:

- S.11 says that "a reference to a person who has [the protected characteristic of sex] is a reference to a man or to a woman";
- S.212 says that "'woman' means a female of any age";
- S.7 on gender reassignment says that "A person has the protected characteristic of gender reassignment if the person 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. (Our emphasis.)

Writing about the Equality Act's prohibition of discrimination on the grounds of sex, the UK's then foremost equality expert Bob Hepple, said, "For most legal purposes...it is the biological difference that is critical.... [However] it must be recognised that the law's focus on the biological differences between men and women can be an obstacle to the achievement of full equality in practice." He goes on to critique the socially constructed gender roles that "encourage gender stereotyping and traditional social prejudices, which it is the goal of the law to remove".³¹

The cases that have been taken using the Sex Discrimination Act and then Equality Act have engaged with issues relating to (most) women's biology, including menopause. However, they have also engaged with issues relating to women's gendered social roles, including as caregivers to older and disabled people, which are not directly linked to biology.

This coverage of gender within the concept of sex discrimination is vitally important for feminist advocates. For example, a mixed sex school which restricted cookery classes to girls only on the basis that as women they will be responsible for cooking within households would be acting illegally. Such an assumption would not be based on the biological differences between men and women but wholly related to socially constructed gender roles and stereotyping.

3.3.2 Sex discrimination 'exceptions' to the Equality Act

The symmetry of the Equality Act 2010, in which both men and women are protected from sex discrimination, does not reflect the reality of gendered inequality. One of the ways in which the Equality Act took account of the substantial differences in the lived realities of men and women was the creation of exceptions to its prohibition of discrimination in employment and in the provision of goods, facilities, and services.

For example, if the Equality Act did not include exceptions then a rape crisis centre that only served women would be directly discriminating against men on the grounds of sex. They could be challenged in court by men who insisted on accessing their services, and men could be awarded compensation. Instead, the exception in Schedule 3, Part 7 (27) provides for single-sex services.

³¹ Hepple, Bob (2011) *Equality: The New Legal Framework* Hart Publishing

Exceptions to the sex discrimination prohibition within the Equality Act include, among other things:

- Separate services for men and women;
- Single sex services; and
- Communal accommodation.

In the first two of these instances, as well as satisfying other criteria, the way that the service is provided must be a 'proportionate means of achieving a legitimate aim'. With regards to accommodation, this must be 'managed in a way that is as fair as possible to both men and women'.

Reform to the Gender Recognition Act 2004 will not affect the operation of the sex exceptions.

3.3.3 Gender reassignment discrimination exceptions

The ground that provides protection against discrimination for trans people is called 'gender reassignment'. Section 7 of the Equality Act 2010 says that:

A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purposes of reassignment the person's sex by changing physiological or other attributes of sex.

And

A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.³²

The Equality Act 2010 protects trans people from discrimination on the grounds of gender reassignment whether or not they have a Gender Recognition Certificate (GRC), and whether or not they have had a diagnosis of gender dysphoria or any kind of sex-affirming medical treatment.

As with sex discrimination, there are exceptions to the protections set out in the Equality Act 2010. There is a specific gender-reassignment exception that relates to separate services for the sexes and the provision of single sex services.

³² The Act uses outdated terminology ('gender reassignment' and 'transsexual') but applies it broadly and inclusively. See EHRC guidance at <https://www.equalityhumanrights.com/en/advice-and-guidance/gender-reassignment-discrimination> and the Women and Equality Committee's 2016 recommendations at <https://www.equalityhumanrights.com/en/advice-and-guidance/gender-reassignment-discrimination#recommendations> regarding the use of terminology in the Act which both note are outdated in terms of common usage with 'trans' being the preferred term.

Schedule 3, Part 7 (28) provides an exception from the prohibition on gender reassignment discrimination where this is a 'proportionate means of achieving a legitimate aim' in providing such services.

In summary, this means that trans women and/or men can be excluded from single sex services and from services that are delivered separately to men and women, or be provided with those services in a different way, where this is proportionate and the aim of the organisation providing the service is legitimate.

In addition, there is also a gender reassignment discrimination exception in Schedule 23 (3), which relates to access to communal accommodation that is sex-segregated, where this is a 'proportionate means of achieving a legitimate aim'.

These exceptions would apply in instances both where an individual had a gender recognition certificate (GRC) and where they did not, but otherwise met the definition of gender reassignment in the Equality Act 2010.

There are two³³ relevant Statutory Codes of Practice that accompany the Equality Act 2010. One covers employment³⁴, and one covers service delivery³⁵. These became law on 6 April 2011, and provide authoritative guidance for those interpreting the Equality Act 2010.

The Code of Practice on Services provides that:

If a service provider provides single-or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present.³⁶

It goes on to state that,

Service providers should be aware that where a transsexual person is visually and for all practical purposes indistinguishable from a non-transsexual person of that gender, they should normally be treated according to their acquired gender, unless there are strong reasons to the contrary.

³³ There is also a third Code of Practice that covers equal pay.

³⁴ Equality and Human Rights Commission (2011) *Employment: Statutory Code of Practice* Available at: <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>

³⁵ Equality and Human Rights Commission (2011) *Equality Act 2010 Code of Practice: Services, Public Functions and Associations : Statutory Code of Practice* Available at: https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf

³⁶ Equality and Human Rights Commission (2011) *Equality Act 2010 Code of Practice: Services, Public Functions and Associations : Statutory Code of Practice* Page 198, para 13.58 Available at: https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf

Reform to the Gender Recognition Act 2004 will not affect the operation of the gender reassignment exceptions. This is because the fact of having a gender recognition certificate does not preclude the exclusion of an individual from a service as set out in either of the exceptions.

3.2 UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)

The Gender Recognition Act reform will have no effect whatsoever on the requirement for Scottish Government to implement CEDAW and take any necessary steps to ensure compliance with its principles. CEDAW sets out a set of minimum standards, including substantive equality between women and men, that state parties must realise.³⁷ Nor will reform have any impact on the use of CEDAW as an accountability mechanism by civil society organisations, or use of the Optional Protocol by individuals. This is because the CEDAW Committee does not use the current gender recognition regime as a qualification mechanism for submission of complaints.

The CEDAW Committee has been clear, in its concluding observations, that trans women and intersex people are within the scope of CEDAW. 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’.³⁸

4. 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, unemployed, homeless or experiencing domestic abuse, are particularly affected by burdensome and bureaucratic processes, and may face particular difficulty in establishing their status and gathering documentation. Engender supports proposals to de-medicalise and streamline the

³⁷ 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>

³⁸ 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* United Nations. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GBR/CO/8&Lang=En

requirements to obtain a Gender Recognition Certificate and replace them with an “equally serious but less onerous process” to obtain a GRC.³⁹

However, we have very few specific comments to make on the detail of the proposals themselves, as set in the consultation document, as they do not engage directly with our work. Our responses to the specific consultation questions are set out below.

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]

We do not see a period of 3 months as determinative of a person’s intention to “live in their acquired gender”, but recognise that for some people it could provide a sense of security that the individual has demonstrated some form of commitment and solemnity to the process of gender reassignment. The draft Bill provides for a statutory declaration which could include clear confirmation that the applicant fully understands the consequences of obtaining a Gender Recognition Certificate.

This would 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 reduce the potential difficulties in securing the necessary documents that could act as proof such as utility bills, especially if addressed to other members of the household.

Inconsistent terminology throughout the Gender Recognition Act has unhelpfully muddied the water with regards to the meanings of ‘sex’ and ‘gender’. Trans people seeking a Gender Recognition Certificate are seeking to change the sex stated on their birth certificate. We believe it would be helpful to ‘tidy up’ the language used in the Gender Recognition Act to provide clarity.

We would appreciate more guidance about how applicants can evidence that they “live in their acquired gender.” We have heard from trans women that panels making decisions about a person’s gender recognition rely 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 contribute to women’s oppression and marginalisation.

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.

³⁹ Scottish Government (2019) *Gender Recognition Reform (Scotland) Bill: consultation* Available at: <https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-consultation-scottish-government/>

It is time and culture specific and functions as a hierarchy. 'Sex' is the state of being either a woman or a man.⁴⁰

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 intention and commitment could be demonstrated in other ways (see our response to question 2).

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]

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.⁴¹ However, we also appreciate arguments that requiring a period of reflection is contrary to the principle that trans people know themselves and their identity is valid.

The statutory declaration proposed represents a legal process with criminal consequences for misuse with serious penalties attached.

We would seek to minimise the risk that trans people are seen to be engaged in a frivolous undertaking, and suggests that process must have the respect and dignity of trans people at its centre. We would however suggest that the severity of the process could be demonstrated in other ways that are less burdensome and bureaucratic.

The *EHRC*, for example, has recommended that a face-to-face meeting with a suitably qualified person take place before a GRC is granted.⁴² We would highlight that, should such a step be taken, particular regard would have to be paid to the additional costs of attending a meeting, that rights of appeal were clearly laid out and not overly resource intensive and that "suitably qualified" did not mean medicalisation or reinstating panels by the back door. Instead, this could be a role for registrars' offices, with a person appropriately trained in conjunction with organisations with expertise to accurately answer any questions that an individual may have.

⁴⁰ See the introduction section to this consultation response.

⁴¹ Scottish Government (2019) *Gender Recognition Reform (Scotland) Bill: consultation* Available at: <https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-consultation-scottish-government/>

⁴² *EHRC (2018) Response of the Equality and Human Rights Commission to the consultation: Reform of the Gender Recognition Act* Available at: <https://www.equalityhumanrights.com/sites/default/files/consultation-response-gender-recognition-act-18-october-2018.pdf>

We accordingly have no particular view on the most appropriate way for “reflection” to be demonstrated.

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

[Don't Know.]

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, must be fully considered.

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

[Yes.]

In our previous consultation response,⁴³ we raised specific concerns about changes to the Equality Act, confusion about data gathering and use across public bodies, and an additional area of concern that appears to relate to a small number of sex offenders and Scottish prisons.

We welcome the actions the Scottish Government has taken to address these concerns. This includes:

- The Chief Statistician’s Working Group on Sex and Gender in Data;
- Commitments from the Scottish Government that it will not seek changes to the Equality Act and relevant exceptions;
- Work to further review the relevant *Scottish Prison Service* and criminal justice agency policies to ensure that trans prisoners are housed in the most appropriate facilities for their own safety and wellbeing and that of other prisoners.

We also supported the inclusion of some form of recognition for non-binary people, and while we note that this is not included in the draft Bill, we welcome steps that Scottish Government is taking to reflect on possible changes to procedures and practices affecting non-binary people. As we have described elsewhere, the lack of data around the number and experiences of non-binary people means that it can be difficult to accurately determine the scale of their needs. This can have unintended consequences for women when it is coupled with weak gender analysis, for example

⁴³ National Women’s Organisations (2018) *Review of the Gender Recognition Act 2004: A Consultation - Scottish Women’s Sector Response* 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>

blanket provision of poorly designed gender-neutral toilets which undermine women's safety.⁴⁴

We further welcome the Scottish Government's position that the exceptions in Equality Act 2010 be retained and that further guidance on their scope for policymakers and service designers is being developed. The Equality Act defines gender reassignment as applying 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." There is no requirement for a person to have a gender recognition certificate as part of this definition.

The Equality Act provides for exception to the general prohibition of discrimination for service providers who provide single-sex services, such as violence against women services.⁴⁵ The exemptions allow for trans people to be excluded from such services where it is 'a proportionate means of achieving a legitimate aim'. **This applies regardless of whether that individual has or does not have a GRC and the proposed reforms will not change this.**⁴⁶

The draft Bill provides for clause 8C (1)(a)(iv), which includes the requirement that the applicant "intends to continue to live in the acquired gender permanently". We are mindful that this could be interpreted to preclude multiple applications. While cases of so-called "de-transition" are extremely rare,⁴⁷ the Bill must provide for the possibility that a person may subsequently come to a decision that the process was not the right one for them.

We also note the language at s.8B(2) that requires "the registrar shall provide such information as they consider appropriate." Similarly, S8U(1)(d) leaves much of the detail of the process to regulation, including fees, forms and information to be included. We would be concerned that without adequate safeguards such provisions could be used to increase the burden of application without proper consultation and review. This may increase its reliance on sexist assumptions about men and women's roles and behaviour.

⁴⁴ Engender, Scottish Women's Aid, Close the Gap, EQUATE Scotland, and Rape Crisis Scotland (2018) *Census (Amendment) (Scotland) Bill: Scottish Women's Sector Note* Available at:

<https://www.engender.org.uk/content/publications/Scottish-womens-sector-submission-to-the-Culture-Tourism-Europe-and-External-Affairs-Committee-on-the-census.pdf>

⁴⁵ Equality Act 2010, Schedule 3. Available at: <http://www.legislation.gov.uk/ukpga/2010/15/schedule/3>

⁴⁶ Busby, Nicole (2020) *On the Basis of Sex: Protection against Discrimination on the Grounds of Sex and Gender Reassignment under the Equality Act 2010* Engender. Available at: <https://www.engender.org.uk/content/publications/>

⁴⁷ 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>

5. Do you have any comments on the draft Impact Assessments?

[Yes.]

The draft equality impact assessment (EQIA) in Annex J touches on some of the critical issues around women's equality and rights that have been associated with reform of the Gender Recognition Act in the public discourse, and some that have been raised by Engender and other women's organisations. It lists a selection of evidence that has been considered in respect of these, but is not comprehensive.

There is also a more systematic review of issues around women's equality and rights in Chapter 5 of the consultation. If Chapter 5 did not exist, then the EQIA alone would be insufficient. It does not systematically engage with live questions about GRA reform and the Equality Act, and does not clearly set out the evidence that the Scottish Government has considered in coming to the conclusion that there is no negative impact on women's equality and rights.

We would also observe that the considerations outlined in Chapter 5 and the EQIA in this second consultation should have been adequately included in the EQIA of the first consultation.

FOR FURTHER INFORMATION

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ABOUT US

Engender is a membership organisation working on feminist agendas in Scotland and Europe, to increase women's power and influence and to make visible the impact of sexism on women, men and society. We provide support to individuals, organisations and institutions who seek to achieve gender equality and justice.