



Scottish Parliamentary Briefing Gender Recognition Reform (Scotland) Bill (GRRB) 16 December 2022

JustRight Scotland use the law to defend and extend people's rights. Our Scottish Just Law Centre focuses on using human rights and equalities laws to combat all forms of discrimination and has given written and oral evidence in relation to the Gender Recognition Reform (Scotland) Bill. Our Scottish Women's Rights Centre offers free and confidential legal advice and advocacy support to women survivors of gender-based violence across Scotland.

Why support the Gender Recognition Reform (Scotland) Bill (GRRB)?

The Gender Recognition Act was introduced in 2004 to enable trans people to gain legal recognition of their gender. Currently, trans people can apply for a Gender Recognition Certificate (GRC) after living in their acquired gender for a minimum of 2 years, obtaining a medical diagnosis of gender dysphoria and submitting an application to a panel for determination.

The effect of obtaining a GRC is that the holder can then obtain a reissued birth certificate with a sex marker (male or female) that reflects their gender identity. However, many trans people find the current process intrusive and dehumanising, undermining their right to live with dignity and personal autonomy. As a result, many trans people do not currently obtain GRCs – which places them at a significant disadvantage, causing barriers to accessing education or employment.

The GRRB introduces reforms that will remove the unnecessary and intrusive requirement to obtain a medical diagnosis or for examination of the application by a panel and reduce the mandatory time period for living in an acquired gender.

We support these reforms, because we have seen the detrimental impact on the lives of our clients – when they do not or cannot obtain a GRC because of these barriers – and we are motivated to prevent those harms for future generations of trans people.

We also support the reforms because they more closely align Scotland's gender recognition process with international human rights standards and best practice.

We believe that this should not be a race to the bottom, but instead we should foster a safe environment for trans people in Scotland to live true to themselves. This is not a blind leap, but instead follows in the legislative footsteps of countries like Argentina, Denmark, Malta, Norway, Belgium, Portugal, Luxembourg, and Ireland.

Why does the GRBB bring Scotland closer to international human rights standards and best practice?

Key international and domestic human rights institutions have supported the GRBB reforms, throughout the legislative process. They have regularly expressed that this legislation is necessary if Scotland is to avoid breaches of rights and align with international best practice.

Most recently, **UN Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity** issued a communication to the UK Government dated 13 December 2022¹, restating and amplifying his earlier evidence to the Committee at page 1:

“Within the United Nations Human Rights System there is consensus on the imperative of legal recognition of gender identity and on the related standard of self-identification; it is my opinion that the Bill brings the Scottish system closer to conformity with those standards and, therefore, is an act of compliance with obligations incumbent upon the State under international human rights law.”

The **Scottish Human Rights Commission** – whose core function as Scotland’s National Human Rights Institution is to advise on the compliance with international and regional human rights standards and best practices – released a briefing² on 7 December supporting the Bill.

Their key conclusion was that shortening the process for obtaining legal recognition, removing the requirement for a diagnosis of gender dysphoria, and abolishing the Gender Recognition Panel would allow Scotland to meet the best practice standards regarding the human right of trans people to have their gender lawfully recognised, allowing them to live a life true to themselves.

A country report³ by the **Commissioner for Human Rights of the Council of Europe on the United Kingdom** published in November 2022, following her recent visit to the UK, states at paragraph 56:

“the Commissioner notes that lowering barriers to legal gender recognition is key to the full realisation of trans people’s rights. In 2019,

¹ Communication of the UN Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity to the UK Government, in relation to the Gender Recognition Reform (Scotland) Bill 2022, 13 December 2022. <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27757>>

² Scottish Human Rights Commission, *Briefing on the Progress of the Gender Recognition Reform (Scotland) Bill*, 7 December 2022. <<https://www.scottishhumanrights.com/media/2379/20221207-briefing-on-progress-of-the-gender-recognition-reform-scotland-bill.pdf>>

³ Dunja Mijatović, *Commissioner for Human Rights of the Council of Europe: Report following her visit to the United Kingdom from 27 June to 1 July 2022*, 18 November 2022. <<https://rm.coe.int/report-on-the-visit-to-united-kingdom-from-27-june-to-1-july-2022-by-d/1680a952a5>>

the World Health Assembly approved the removal of trans issues from the list of mental illnesses in the World Health Organisation's International Classification of Diseases. It is increasingly recognised that maintaining a pathologising approach to legal gender recognition "leads to stigmatisation and the risk of human rights violations."

*The Parliamentary Assembly of the Council of Europe (PACE) has called on member states to "develop quick, transparent and accessible procedures, based on self-determination". The UN Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity has also recommended that legal gender recognition should be based on self-determination, be a simple administrative process, and not require applicants to fulfil abusive requirements, including medical certification. **The Commissioner considers that, from a human rights perspective, self-determination models for legal gender recognition represent a best practice, and the introduction of such a model in the UK would therefore constitute an important step forward.***

The Commissioner notes that the number of Council of Europe member states that have eliminated the requirement to provide medical certificates or diagnoses for legal gender recognition has more than doubled since 2018, with nine having adopted such models, and proposals pending in other member states. To the Commissioner's best knowledge, there is no evidence of these self-determination procedures being misused or leading to issues in relation to the rights of others."

The **Commissioner also raised concerns regarding narratives that represent trans people as a threat to others in society** and calls on authorities to take action to counter these narratives and promote inclusion.

We restate our concern, based in our legal casework, that the current process for legal gender recognition in Scotland consists of unnecessary requirements that are intrusive, and undermine dignity and autonomy in relation to one of the most intimate areas of a person's private life – and are deeply stigmatising. People who cannot or will not apply for a GRC, will face barriers in living full lives in Scotland. Further, this stigma connects to the concerns highlighted by the Commissioner about the link between transphobia and violence.

We remind parliamentarians that it is estimated that around 0.5% of the population in Scotland are trans,⁴ yet they experience a disproportionate amount of hate crime – with the Crown Office reporting transgender hate crime to be up 87% for 2021-22 compared to 2020-21.⁵ We believe that stigma that goes unchallenged breeds discrimination and violence.

⁴ Scottish Government, *Gender Recognition Reform (Scotland) Bill: equality impact assessment*, 3 March 2022. <<https://www.gov.scot/publications/gender-recognition-reform-scotland-bill-equality-impact-assessment/pages/3/>>

⁵ Crown Office & Procurator Fiscal Service, *Hate Crime in Scotland, 2021-2022*, 14 June 2022. <<https://www.copfs.gov.uk/media/d3jnt5t2/hate-crime-2021-22-publication-final.pdf>>

We highlight the **Yogyakarta Principles and the Yogyakarta+10 Principles** – in particular, Principle 31 which encourages a self-identification approach to gender recognition.⁶ Although the Yogyakarta principles are not binding in and of themselves, they are an articulation of existing *binding* human rights standards as applied to sexual orientation and gender identity. They were developed and unanimously adopted by a group of international human rights experts, including experts on discrimination and violence against women and girls. They represent international best practice. We discussed this in more detail both in our written evidence⁷ and our oral evidence to the Equalities, Human Rights and Civil Justice Committee of the Scottish Parliament.⁸

Does the Scottish Parliament have the powers to pass the GRRB?

Yes. The proposed reforms sit firmly within powers devolved to the Scottish Parliament and can be exercised in a way that is no different to the powers to register a marriage that has taken place in Scotland, or a declaration to legally change your name, following adoption, marriage or divorce.

A good example of this is the Scots Law regarding the use of deed poll, whereby Scots law allows a person whose birth or adoption was registered in Scotland to make use of deed poll to change their name.⁹ This deed poll will be accepted by all UK government departments, even though the changes are permissible in England and Wales.

It is key to understand that the proposed Bill only sets out the process for applying for a GRC. It is already possible to change some key legal documents – such as passports, driving licenses – without a GRC.

Does the GRRB change the Equality Act definition of a woman?

No. The GRRB only makes necessary changes to the ability for trans people to apply for a GRC. It **does not change the Equality Act definition of a woman**¹⁰ and it does not alter the exceptions that allow service providers to exclude trans people from single sex spaces where necessary and proportionate to do so, including trans people with

⁶ The Yogyakarta Principles plus 10, Principle 31, 2017 <http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf>

⁷ JustRight Scotland and Amnesty International Scotland, *The Gender Recognition Reform (Scotland) Bill Written Evidence to the Equalities, Human Rights and Civil Justice Committee of the Scottish Parliament*, May 2022. <<https://www.justrightscotland.org.uk/wp-content/uploads/2022/05/AIUK-and-JRS-EHRCJ-Committee-response-re-GRA-reform-Final-3.pdf>>

⁸ The Scottish Parliament, *Equalities, Human Rights and Civil Justice Committee: Session 6* (col. 50 onwards), 31 May 2022. <<https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13796>>

⁹ Deed Poll Office, *Changing the name on your birth certificate (Scotland)*. <<https://deedpolloffice.com/change-name/changing-your-birth-certificate/scotland>>

¹⁰ *Equality Act 2010* <https://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf>

GRCs. Indeed, the Bill as amended explicitly notes on its face that it does not alter the Equality Act.

This week, the Court of Session confirmed the position in Scots law, in giving judgment in *The Petition of For Women Scotland for Judicial Review*.¹¹ The Court affirmed what has been clear to most – including the Equality and Human Rights Commission – a trans woman with a GRC is a woman under the sex characteristic of the Equality Act. This is a consequence of the existing Gender Recognition Act 2004 (GRA) and was well understood when the Equality Act was passed.

What is also clear is that a trans woman with a GRC is also covered by the gender reassignment characteristic. Therefore, the exceptions in the Equality Act allowing single sex service providers to exclude trans people where necessary and proportionate to do so continue to apply. Whether a trans person has a GRC or not does not change the operation of these provisions of the Equality Act.

How does the GRRB affect protections for women survivors of gender-based violence in Scotland?

Many organisations that have been at the heart of working to stop gender-based violence against women and girls in Scotland have been trans inclusive for decades and support the GRRB.

Advancing the rights of women and girls and of trans people goes hand in hand. This is evident from the support for the reforms from women and girls' organisations in Scotland – such as Scottish Women's Aid,¹² Rape Crisis Scotland,¹³ Engender.¹⁴

This support has been reaffirmed in a recent letter issued in response to an intervention by the UN Special Rapporteur on Violence against Women and Girls - jointly drafted and signed by Engender, Scottish Women's Right Centre, Scottish Women's Aid, Amnesty International Scotland, and Rape Crisis Scotland.¹⁵

In particular, the letter points out that **safeguarding measures are embedded within the GRRB** – which sets out who can apply for a GRC, how to make an application and

¹¹ *The Petition of For Women Scotland for Judicial Review*, [2022] CSOH 90, 13 December 2022. <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022csoh90.pdf?sfvrsn=8eee302c_1>

¹² Scottish Women's Aid, *Scottish Women's Aid submission to the Equalities, Human Rights and Civil Justice Committee on the Gender Recognition Reform (Scotland) Bill*, May 2022, 13 May 2022. <<https://womensaid.scot/wp-content/uploads/2022/05/SWA-GRR-submission-130522.pdf>>

¹³ Rape Crisis Scotland, *Rape Crisis Scotland response to the call for evidence from the UK Women and Equalities Committee*, November 2020. <<https://committees.parliament.uk/writtenevidence/17359/pdf/>>

¹⁴ Engender, *Engender Parliamentary Briefing: Stage 1 Debate: Gender Recognition Reform (Scotland) Bill*, 27 October 2022. <<https://www.engender.org.uk/content/publications/Engender-Briefing-on-the-GRR-Bill-Stage-1-Debate.pdf>>

¹⁵ Cat Murphy, Emma Hutton, Katy Mathieson, Marsha Scott, Naomi McAuliffe, Sandy Brindley, *Joint Letter of Response to Reem Alsalem*, 29 November 2022. <<https://www.justrightscotland.org.uk/wp-content/uploads/2022/11/Letter-to-UNSR-on-VAWG.pdf>>

on what grounds an application is to be granted. The GRRB also provides for appeals or reviews of decisions as well as revocations for GRCs and offences in relation to false statutory declarations, as well as the creation of a new offence of fraudulently obtaining a GRC.

Finally, the letter highlights that **the single sex exemptions in the Equality Act are not affected by the GRA (as currently drafted), nor will they be affected by the reforms introduced by the GRRB.** Service providers will still continue to conduct individualised risk assessments and, to our minds, the law will continue to operate as it should to promote and protect all of our rights.

Summary

We believe the path to the realisation of human rights for women and trans people are deeply interconnected. We must dismantle the systems that perpetuate violence rather than pit the rights of one against another.

As such, we support the Bill and urge parliamentarians to vote in favour of the legislation.