

## ANNEX F: DRAFT BUSINESS AND REGULATORY IMPACT ASSESSMENT (BRIA)

### Title of Proposal

Draft Gender Recognition Reform (Scotland) Bill (“the draft Bill”)

### 1. Purpose and intended effect

- **Background**

1.1. The provisions of the Gender Recognition Act 2004 (“the GRA”) provide for trans men and women to apply for legal gender recognition on the basis of their “living in the other gender” or “having changed their gender under the law of a country or territory outside the United Kingdom”. The GRA describes the gender of a person who is living in the other gender or has changed their gender under the law outside of the UK, as their “acquired gender”.

1.2. The draft Bill, if implemented, would introduce a reformed process in Scotland by which a trans man or woman aged 16 and over who was born or adopted in Scotland<sup>92</sup> or was ordinarily resident here, could seek legal recognition of their acquired gender (“Scottish applications”). To achieve this, the draft Bill repeals and replaces certain provisions of the GRA for Scotland and makes connected consequential changes to other provisions of the GRA. This consultation includes both a draft Bill and draft Explanatory Notes for the Bill.

- **Objective**

1.3. The Scottish Government considers that the existing arrangements under the 2004 Act are too intrusive and onerous for applicants. The objective of the provisions of the draft Bill for Scottish applications is to remove the existing requirements under the 2004 Act for applicants under the standard and alternative track to provide medical evidence; provide documentary evidence of their having lived in their acquired gender for a minimum period of 2 years; and to have to submit their applications to the Gender Recognition Panel, a tribunal. The draft Bill replaces this with a scheme based on the use of statutory declarations, and also makes provisions for the recognition in Scotland of individuals who obtained gender recognition in another country or territory.

- **Rationale for Government intervention**

1.4 Adopting a new system for legal gender recognition in Scotland would require an Act of the Scottish Parliament.

<sup>92</sup> Or the subject of a parental order in Scotland.

## **2. Consultation**

- **Within Government**

2.1. The Scottish Government's Family Law team have worked with:

- the Equality Unit;
- Communities Analytical services;
- National Records of Scotland;
- The Scottish Public Pensions Agency (regarding any impacts in relation to public service pensions);
- The Scottish Courts and Tribunals Service; and
- The Scottish Legal Aid Board

- **Public Consultation**

2.2. This draft BRIA forms part of a public consultation on the draft Bill. The Scottish Government carried out a consultation from 9 November 2017 to 1 March 2018 ("the 2018 consultation") on proposals for reforming the GRA.<sup>93</sup> Chapter 7 of the independent analysis of responses<sup>94</sup> recorded comments made by consultees on the draft Impact Assessments included with this previous consultation. The Scottish Government has taken account of relevant comments when preparing this draft BRIA.

2.3. There are a number of policy changes since the 2018 consultation. In particular:

- The Scottish Government has decided not to extend legal gender recognition to those under 16. The Scottish Government does consider that those uncertain of their gender identity should be supported. The consultation also seeks views on whether the minimum age for applying for legal gender recognition should be reduced from 18 to 16.
- The Scottish Government has decided not to extend legal gender recognition at this stage to non-binary people. The Scottish Government considers that legal recognition of non-binary people would raise a number of issues in relation to areas such as registration, data, rights and responsibilities, changes to legislation, service delivery and costs. The Scottish Government is setting up a working group on non-binary people.

- **Business**

2.4 For the purposes of an earlier draft BRIA conducted in relation to the 2018 consultation,<sup>95</sup> we conducted interviews with representatives from a variety of organisations. More detail is in the 2018 draft BRIA.

<sup>93</sup> The previous consultation and related documents are at <https://consult.gov.scot/family-law/review-of-the-gender-recognition-act-2004/>

<sup>94</sup> The analysis of responses is at <https://www.gov.scot/publications/review-gender-recognition-act-2004-analysis-responses-public-consultation-exercise-report/pages/8/>

<sup>95</sup> The draft BRIA published with the 2018 consultation is at: <https://www.gov.scot/publications/review-gender-recognition-act-2004/pages/23/>.

2.5. While policy changes have occurred since the 2018 consultation, further interviews with business have not been required: the draft Bill continues to be based on the earlier proposal to adopt a statutory declaration-based system. In addition, what is changing is the way in which legal gender recognition is obtained: the rights and responsibilities are not changing.

### **3. Options**

3.1 Option 1: no change

3.2 Option 2: take forward the draft Bill

#### **3.3 Sectors and groups affected**

3.4 We consider that the following groups or sectors are affected:

- Trans people who want to be legally recognised in the gender with which they identify and in which they live;
- Their spouses or civil partners;
- The Registrar General for Scotland (“RGS”) and National Records of Scotland (“NRS”) - who currently deal with updating the Gender Recognition Register and issue updated birth certificates to successful applicants for legal gender recognition under the GRA who were born or adopted in Scotland. Under the draft Bill NRS would receive, consider and process Scottish applications for gender recognition;
- Employers and business - who may engage with a transgender employee or customer, who is seeking to transition to an acquired gender or is living in their acquired gender and who may obtain legal gender recognition; and
- Pension providers (including businesses with their own employee pension schemes), and which schemes may have members who have changed their legal gender.

#### **Benefits and costs**

##### Option 1: no change

#### 3.5 Option 1- Benefits

Legal gender recognition would still be available using the existing GRA process. This may have the benefit of stability and there would be no need for further legislation.

#### 3.6 Option 1- Costs

3.6.1 No set up costs or running costs would be incurred. Applicants would still (in the majority of cases) have to provide medical evidence and evidence of their having lived in their acquired gender for a defined period ending with the date of their application. People aged 16 and 17 could not apply for legal gender recognition.

## Option 2: adopt a gender recognition scheme as per the draft Bill

### 3.7 Option 2- Benefits

3.7.1 This would meet the objective of removing intrusive requirements and streamlining the existing process. It would also allow people aged 16 and over to apply.

### 3.8. Option 2- Costs

#### *General*

3.8.1. Option 2 would not lead to significant costs. The possibility of legal gender recognition is already provided in the GRA. The majority of associated costs have been incurred with the introduction of the GRA. The Bill is not proposing changes to the rights and responsibilities arising as a result of gender recognition.

#### *Business*

3.8.2. In practice, businesses and the third sector must already recognise and respect transgender people who are living in, transitioning to live in, or intending to transition to live in, accordance with their gender identity whether or not they then obtain legal recognition under the GRA. This is because under the Equality Act 2010 it is unlawful, subject to limited exceptions, to discriminate against a person who has the protected characteristic of gender reassignment. Section 7(1) of the 2010 Act provides 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.”<sup>96</sup>

3.8.3. Overall, the organisations interviewed in preparation for the draft BRIA carried out for the 2018 consultation (for which see Part 4 of that draft BRIA)<sup>97</sup> took the view that there would be minimal costs for them, if Scotland adopted a system of legal gender recognition based on an applicant's statutory declaration. Two of those interviewed felt that smaller organisations might not have formulated a policy in relation to gender diverse employees and service users and that an increase in the numbers of people obtaining legal gender recognition might increase the likelihood that a business would encounter a transitioned or transitioning employee or customer. This may require such organisations to incur costs in formulating policies. However, these costs would not be the direct result of the adoption of Option 2.

#### *Costs for the Registrar General for Scotland (RGS)*

3.8.4 There would be costs relating to the need for the RGS to receive, consider and process Scottish applications if the draft Bill were enacted, replacing the Gender Recognition Panel in Scotland. (When the GRA came into effect, the UK

<sup>96</sup> Equality Act 2010, section 7: [www.legislation.gov.uk/ukpga/2010/15/section/7](http://www.legislation.gov.uk/ukpga/2010/15/section/7)

<sup>97</sup> The draft BRIA published with the 2018 consultation is at: <https://www.gov.scot/publications/review-gender-recognition-act-2004/pages/23/>.

Government indicated that the cost of establishing the Gender Recognition Panel would be £0.7 million<sup>98</sup>. No contribution has been sought from Scotland towards the running of the Gender Recognition Panel.)

3.8.5. There would be no capital costs in this area.

3.8.6. We estimate that there would be one-off set up costs associated with IT systems, application forms and for training and familiarisation events for staff dealing with applications. These costs are in the range of £300,000 to £350,000.

3.8.7. Running costs will primarily depend on the numbers of applicants. Only a small number of respondents commented specifically on the contents of the BRIA published as part of the 2018 consultation. Some respondents expressed concerns about the Scottish Government's estimate of costs. The predominant view was that the potential number of applicants had been under estimated. However, others considered the estimates appropriate.

3.8.8 Based on international evidence (outlined in more detail below), the Scottish Government considers that the draft Bill, if enacted, is likely to lead to an overall increase in the number of successful applications.

3.8.9. The Republic of Ireland has a slightly smaller population than Scotland.<sup>99</sup> Between September 2015 (when their new arrangements started) and August 2019, a total of 517 people had obtained recognition under Ireland's Gender Recognition Act 2015.<sup>100</sup> This is an average of 129 applicants for each year of operation.

3.8.10. Denmark has a similar size population to Scotland.<sup>101</sup> Denmark received an average of 279 applications per year in the first two years of operation of a reformed process for gender recognition based on an applicant's declaration.

3.8.11. Norway, which has a population of 5.23 million has experienced a higher initial uptake than Denmark or the Republic of Ireland. In the first eight months of operation<sup>102</sup> there, 706 applications were received.

3.8.12. In the light of this information, we consider it reasonable to estimate that the numbers of Scottish applications would be around 250 applications per year. Currently, around 30 people per year who were born or adopted in Scotland obtain legal recognition of their acquired gender under the GRA. There are no statistics available for applicants resident in Scotland who apply under the current arrangements.

<sup>98</sup> As set out in the Legislative Consent motion for the Gender Recognition Bill 2004 at <http://www.gov.scot/About/Government/Sewel/SessionTwo/GenderRecognition>.

<sup>99</sup> About half a million fewer than Scotland- see <http://countrymeters.info/en/Ireland/>

<sup>100</sup> Source is the Department of Employment Affairs and Social Protection Client Identity Service

<sup>101</sup> Denmark's population in 2016 was estimated to be 5,748,769 per <https://countryeconomy.com/demography/population/denmark>. . Scotland's population in 2015 was estimated to be 5,373,000 per <https://www.nrscotland.gov.uk/news/2016/scotlands-population-at-its-highest-ever>.

<sup>102</sup> From 1 July 2016 to 20 March 2017.

3.8.13. Based on this estimate of application numbers, we anticipate that the running costs would be up to £150,000 per year. These costings assume that applications would be handled by a team of 3 staff with support from other existing RGS staff. (In Ireland, applications are handled by 4 staff in the Client Identity Service which is part of the Department of Employment Affairs and Social Protection. These staff do not work solely on gender recognition applications.)

3.8.14. Running costs could potentially be offset if a fee were charged for making an application for legal gender recognition. The draft Bill makes provision for the RGS, with the consent of the Scottish Ministers, to provide for application fees but no decision has been taken on the future use of such a power. Any proposal to do so would be subject to a full and careful separate consultation including about the level of any such fees.

#### *Costs to the Scottish Courts and Tribunals Service*

3.8.15. We consider that any costs for the Scottish Courts and Tribunals Service, would be minimal. There may be more people making statutory declarations for the purposes of gender recognition before a Justice of the Peace if the scheme envisaged by the draft Bill should be implemented.

3.8.16. In addition, under the draft Bill:

- a person who divorces, or whose civil partnership is dissolved, on the basis of the issue of an interim GRC can be granted a full GRC by the court [this reflects the current arrangements]
- a person who has an interim GRC can in certain circumstances apply to the sheriff for a full GRC [this reflects the current arrangements]
- an applicant who has been refused a full GRC by the RGS could, after the application has been reviewed, appeal to the sheriff court. [Based on current experience, the expected number of appeals is very low. There has been one appeal heard in the Court of Session.]
- if there is evidence a GRC has been obtained by fraud, an application could be made to the sheriff court or the Court of Session for the GRC to be quashed. Such applications are expected to be very rare.

3.8.17. In such cases, court fees can be charged although in some cases, fee exemptions may be applied.

#### *Costs to the Scottish Legal Aid Board*

3.8.18. The impacts for the Scottish Legal Aid Board are considered at section 6.

#### *Costs in relation to pensions*

3.8.19. Pension policy is a reserved matter to the UK Government, although there are some executive devolved powers in relation to pension policy for certain public

service schemes in Scotland.<sup>103</sup> A change of legal gender has the potential to affect pension rights. However, we consider that the impacts of the adoption of Option 2 from the perspective of a successful applicant's pension rights or of their survivor's pension rights are now minimal.

3.8.20. The state pension age has now equalised for men and women. Consequently, gender recognition no longer has the potential to affect whether a person who is legally recognised in their acquired gender becomes entitled to the state pension at an earlier stage or later stage.

3.8.21. However, a change of legal gender can affect rights to occupational pensions. Historically, men and women have been treated differently for pension purposes, as have widowers, surviving civil partners and same-sex spouses in respect of survivor rights in pensions.

3.8.22. In some cases, where a member changes their legal gender from male to female, there are protections for their surviving female spouse to ensure that they do not lose entitlement as a result of their spouse's decision to change their legal gender.<sup>104</sup>

3.8.23. As stated above, historically survivors in same sex marriages and civil partnership have been treated differently for pension purposes and currently, because mixed sex civil partnerships cannot be registered in Scotland, a civil partner who wishes to obtain gender recognition may need to agree with their civil partner to convert their civil partnership to a marriage or dissolve the civil partnership. This will change if the Civil Partnership (Scotland) Bill currently being considered by the Scottish Parliament is enacted. That Bill will allow for the registration of mixed sex civil partnerships in Scotland.

3.8.24. In the Supreme Court decision in *Walker v Innospec Limited* [2017] UKSC 47<sup>105</sup> the court dis-applied an exception in the Equality Act 2010 which allowed defined-benefit occupational pension schemes to restrict access to survivors' benefits, for survivors of a civil partnership or same-sex marriage, to benefits based on accruals from December 2005 onwards. As a consequence, changes are now being introduced to public service pension schemes. These changes align pensions paid for survivors of same sex marriages and civil partnerships with those paid to widows (i.e. female survivors of mixed sex marriages): in these cases, the member's full service is used to determine entitlement. The existing restriction of only using service from 1988 onwards for widowers (i.e. male survivors of mixed sex marriages) continues to apply. The UK Government has announced that it intends to align

<sup>103</sup> Information on these public sector schemes is available at the Scottish Public Pension Agency's website: <http://www.sppa.gov.uk/>.

<sup>104</sup> There is further information on this in guidance to applicants for gender recognition on the impact of legal recognition for pensions and benefits the Department for Work and Pensions at: <https://www.gov.uk/government/publications/gender-recognition-how-pensions-and-benefits-may-be-affected>.

<sup>105</sup> The judgement and a summary can be accessed at <https://www.supremecourt.uk/cases/uksc-2016-0090.html>

survivor benefits for mixed sex civil partners with those that are available for survivors of mixed sex marriages.<sup>106</sup>

3.8.25. Private sector schemes are responsible for ensuring that they are compliant with the Walker judgment. Based on evidence from the interviews we undertook for the draft BRIA in relation to the 2018 consultation, it seems many schemes already either make no difference in their terms or nonetheless decided to treat civil partners and spouses (whether they are in same sex or mixed sex marriages), in the same way. This is confirmed by information available from the UK Government.<sup>107</sup>

3.8.26. The draft Bill if enacted would allow an applicant in any marriage or civil partnership to remain in that marriage or civil partnership in certain circumstances. What is changing is the way in which legal gender recognition is obtained: the rights and responsibilities are not changing.

### **Competition Assessment**

4.1. The proposals will not limit, either directly or indirectly, the number or range of suppliers.

4.2. The proposals will not limit the ability of suppliers to compete nor will they reduce supplier's incentives to compete vigorously.

### **Test run of business forms**

4.3. There are no new forms for business proposed. If the draft Bill is subsequently enacted, there would be new application forms and template statutory declarations to be completed, but these will not impact on business.

### **5. Digital Impact Test**

5.1. The draft Bill makes provision for the RGS to determine, by way of regulations and with the consent of Scottish Ministers, the form and manner in which an application is to be made. There are no current proposals for the draft Bill that elements of the new process would be done by means of electronic communication. However, the policy is to enable the electronic submission of applications, should this be desirable in future. Sections 8, 9 and 15 of the Electronic Communications Act 2000 already enable, in relation to devolved matters, the Scottish Ministers to make an order to modify the provisions of any enactment or subordinate legislation. The

<sup>106</sup> At

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/815741/Civil\\_Partnerships\\_-\\_Next\\_Steps\\_and\\_Consultation\\_on\\_Conversion.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815741/Civil_Partnerships_-_Next_Steps_and_Consultation_on_Conversion.pdf)

Paragraphs 73 and 78

<sup>107</sup> Paragraph 10 of the Executive Summary in the UK Government "Review of Survivor Benefits in Occupational Pension Schemes at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/323874/survivor-benefits-in-occupational-pension-schemes.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/323874/survivor-benefits-in-occupational-pension-schemes.pdf) indicated that 27% of private pension schemes had a difference in the way survivor benefits between mixed sex spouses and civil partners were calculated.



arrangements in the draft Bill do not prevent the use of online digital methods of communication.

## **6. Legal Aid Impact Test**

6.1. There could potentially be costs for the Scottish Legal Aid Board if the draft Bill were implemented, but any cost implications would be minimal.

6.2. For example, the removal of any requirements for medical evidence or documentary evidence of the applicant having lived in their acquired gender throughout a defined period prior to the application date would reduce any potential requirement for an applicant to consult a solicitor, as part of the process of preparing their application. This should minimise the number of applicants who seek legal advice and use legal aid advice and assistance.

6.3. The draft Bill also provides that an applicant who disputes a decision of the RGS, for example, to refuse an application on the basis it does not comply with the statutory requirements, must firstly ask the RGS to review that decision. After review, they could raise an appeal in the sheriff court in certain circumstances. Currently, an appeal against a decision of the Gender Recognition Panel requires to be raised in the Court of Session in Scotland.

6.4. Removing the necessity for medical evidence or documentary evidence demonstrating that an applicant has lived in their acquired gender for the required period should also reduce the possibilities for an application to be refused, and thereby reduce the likelihood of appeals. The number of appeals under the 2004 Act is very low in any event. There have been two appeals against Gender Recognition Panel decisions, one of which was to the Court of Session in Scotland (the other was in England).

## **7. Enforcement, sanctions and monitoring**

### **Enforcement and sanctions**

7.1. The draft Bill provides for a new offence of making a false statutory declaration in association with an application for recognition and a new offence of making a false application. The penalties on conviction for either offence are the same as for the current offence of making a false statutory declaration more generally.<sup>108</sup> On conviction on indictment a person would be liable to imprisonment for a term not exceeding two years or a fine, or both. On summary conviction, the penalty is a maximum prison term of 12 months, or a fine up to the statutory maximum (£10,000) or both.

<sup>108</sup> Section 44(2) of the Criminal Law (Consolidation)(Scotland) Act 1995 at <https://www.legislation.gov.uk/ukpga/1995/39/section/44>.

7.2. The draft Bill will allow a sheriff to revoke a GRC where the application was fraudulent or on the grounds of an applicant's incapacity, where for example they were not capable of understanding the effect of obtaining the certificate.

### Monitoring

7.3. The draft Bill makes no provision on the publication of statistics about applications under the GRA. Such statistics are currently published quarterly.<sup>109</sup> We do not propose that this should change.

## 8. Implementation and delivery plan

8.1. The consultation on the draft Bill will influence decisions about next steps and the content of legislation that the Scottish Government introduces in the Scottish Parliament.

8.2. If a Bill should be introduced, this BRIA would be finalised, taking account of points made by consultees. The final version of the BRIA would be published.

### Post-implementation review

8.3. If a Bill is enacted, such legislation would be reviewed within 10 years.

## 9. Summary and recommendation

### Summary of costs of implementing the draft Bill

9.1. Estimated costs have been based on around 250 applications per year being received.

Cost	Estimate
Start-up costs (including IT systems, application forms, staff training, and preparation of guidance for applicants)	£300,000 to £350,000
Administration costs	Up to £150,000 per annum

<sup>109</sup> These can be found at <https://www.gov.uk/government/collections/tribunals-statistics>.

**Declaration and publication**

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

**Signed:****Date:****Scottish Government Contact point:**

THIS WILL BE COMPLETED AFTER THIS CONSULTATION AND VIEWS HAVE BEEN OBTAINED FROM CONSULTEES

**The Scottish Government  
December 2019**