

Stonewall Scotland

Questions

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

If yes, please outline these comments.:

1. Stonewall Scotland warmly welcomes that the draft Gender Recognition Reform (Scotland) Bill proposes to de-medicalise and streamline the current process for applying for legal gender recognition, replacing this with a more straight-forward, administrative process of statutory declaration, based on the principle of self-determination.

2. However, we do not support the Scottish Government's proposal that applicants must live in their 'acquired gender' for at least three months before applying for a gender recognition certificate.

Current context:

3. Under section 3 of the Gender Recognition Act 2004, applicants are currently required to submit a medical report detailing any treatment taken to modify their body, such as hormone treatment or surgery, and evidence of a medical diagnosis of 'gender dysphoria'. Trans communities have described this process as arduous, humiliating, and invasive.

4. Additionally, the requirements under section 2(1)(b) of the 2004 Act that the Gender Recognition Panel must be satisfied that the applicant has lived in the 'acquired gender' for a period of two years prior to the application means, in practice, that a body of evidence must be compiled as 'proof', including documents such as passports, payslips, and utility bills. This does not only place an administrative burden on applicants, but also a lengthy time delay on trans men and trans women being able to access legal gender recognition, who must wait two years after the paper trail of their gender identity begins to apply. Requirements for evidence can particularly disadvantage trans men and trans women who are homeless or fleeing domestic abuse and who may not therefore have access to the necessary documentation.

5. The Gender Recognition Panel, who the applicant will never meet, make a subjective decision based on the evidence compiled, as to whether the applicant should be granted legal gender recognition. In Stonewall's 2018 research, LGBT in Britain: Trans Report, respondents described the panel system as an "archaic, sexist and...deeply offensive, unnecessary gatekeeper".

6. The UK Government's National LGBT Survey (2018) of over 108,000 LGBT people across the UK found that just 12 per cent of trans respondents had a

Gender Recognition Certificate. Of those who did not, 93 per cent said they would be interested in getting one, with many stating that the process was too bureaucratic to engage with at present. It is clear therefore that due to the barriers in place to obtaining gender recognition under the current system, most trans people have not benefited from the provisions of the 2004 Act.

International context:

7. There is a strong mandate in international law for effective systems of legal gender recognition. Rulings by the European Court of Human Rights (ECtHR) have been clear that trans people have the right to legal recognition of their gender identity under Articles 8 (the right to respect for private and family life) and 12 (the right to marry) of the European Convention on Human Rights (ECHR).

8. The model of self-determination for gender recognition legislation is further supported by the Yogyakarta Principles on the application of existing international human rights law, such as the Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR), as it relates to LGBT equality. These principles were agreed by international human rights experts, including a former UN High Commissioner for Human Rights and UN Special Procedures, launched as a global charter at the United Nations Human Rights Council in 2007, and subsequently updated in 2017.

9. The Yogyakarta Principles maintain that UN member states should “take all necessary legislative, administrative and other measures to fully respect and legally recognise each person’s self-defined gender identity” and “ensure that procedures exist whereby all state-issued identity papers which indicate a person’s gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person’s profound self-defined gender identity” (Principle 3, The Right to recognition before the law).

10. Principle 31, The Right to Legal Recognition, recommends that states institute “a quick, transparent, and accessible mechanism that legally recognises and affirms each person’s self-defined gender identity” for which “no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be prerequisite to change one’s name, legal sex or gender”.

11. This aligns with Resolution 2048 of the Parliamentary Assembly of the Council of Europe, which called on member states to “develop quick, transparent and accessible procedures, based on self-determination” for legal gender recognition, to “abolish sterilisation and other compulsory medical treatment, as well as a mental health diagnosis” as requirements for obtaining legal recognition, “consider including a third gender option in identity documents for those who seek it”, and “ensure that the best interests of the child are a primary consideration in all decisions concerning children”.

12. As noted in the Scottish Government’s consultation paper, ‘Review of the Gender Recognition Act 2004’ (2017), Resolution 2048 expressed concerns that

requiring a medical diagnosis to access legal gender recognition is a breach of a person's right to respect for a private and family life under Article 8 of the ECHR.

13. In recent years, several Council of Europe member states have adopted a self-determination model for gender recognition legislation, including Denmark (2014), Malta (2015), Ireland (2015), Norway (2016), Belgium (2017), Portugal (2018), Luxembourg (2018), and Iceland (2019).

Proposals:

14. Stonewall Scotland strongly supports that the draft Gender Recognition Reform (Scotland) Bill would remove requirements to provide evidence of medical treatment and diagnosis, and of having lived in the 'acquired gender' for two years, in addition to abolishing the Gender Recognition Panel, which acts as an unnecessary gatekeeper to legal gender recognition. We welcome that this would be replaced with a system of self-determination, whereby applications would be determined objectively by the Registrar General for Scotland as to whether the statutory declaration made by the applicant met the necessary grounds for approval.

15. However, the requirement for applications made under section 8A(1) to include a statutory declaration that the applicant "has lived in the 'acquired gender' throughout the period of three months ending with the day on which the application was made" in order to be granted by the Registrar General, is in our view, wholly unnecessary. While we welcome that the time period that the applicant is required to have lived in the 'acquired gender' would be significantly reduced from two years to three months, there is no domestic or international evidence to suggest that a time period is necessary at all.

16. It would be inconsistent with the process used to change the name and/or gender on other forms of identification, such as passports and driving licenses, whereby applicants are not obliged to have lived in the 'acquired gender' for any defined period. For example, to update the gender marker on a driving license, applicants without a gender recognition certificate can simply provide a statutory declaration or deed poll that they have changed their gender (UK Government, "Identity Documents Needed for a Driving License Application", gov.uk).

17. The proposal would also be inconsistent with other uses of a statutory declaration, such as officially recording a change of name (Citizens Advice Scotland, "Changing Your Name", citizensadvice.org.uk), where there are no requirements to have been using that name for any defined time period. This includes instances where the change of name is related to a trans person's social transition.

18. We are additionally concerned that maintaining the requirement to have lived in the 'acquired gender' for a set time period could prompt the re-introduction of evidence requirements for applicants. We believe that the current drafting of the Bill could be used, contrary to its aims, to require the applicant to provide evidence of having lived in the 'acquired gender' for three months, rather than to simply declare that this is the case in the statutory declaration.

19. Section 8U(1)(d) would enable the Registrar General for Scotland to, by regulations, make further provisions relating to the information or evidence to be included in an application or notice of confirmation. Unless these regulations were to add to, omit or replace any part of the text of an Act, they would be subject to the negative procedure, and therefore reduced parliamentary scrutiny. If the application was not to comply with the requirements imposed by 'any regulations' made under section 8U(1)(d), the Registrar General would be obliged to reject it. This creates the possibility for requirements for evidence to be added at a later stage, contrary to the stated rationale and principles of the Bill.

20. This information and evidence would be in addition to that which is already required. For example, evidence must be provided of the dissolution or annulment of marriages and civil partnerships for applications under inserted section 8J, as well as evidence of the spouse or partner's death and the date on which it occurred for applications under section 8K. While such evidence is necessary to demonstrate that the applicant meets the conditions of section 8D to be issued a full certificate, we do not believe that information or evidence should be required to demonstrate that an applicant has lived in the 'acquired gender' for the period of three months, per section 8C(1)(a)(iii).

21. Looking overseas, Malta's Gender Identity, Gender Expression and Sex Characteristics Act 2015 explicitly states on its face that any evidence other than the declaratory public deed shall not be required. While a similar clause might be useful in this case, ultimately removing the requirement to have lived in the 'acquired gender' for three months, or any defined period, prior to application would be the most effective way to ensure that requirements for such evidence could not be introduced.

22. In any case, we would wish to seek assurances from the Scottish Government that any evidence requirements introduced by regulations under section 8U(1)(d) could not replicate the existing barriers to legal gender recognition faced by trans men and trans women in compiling and presenting evidence. Any decisions to introduce such information or evidence would be at odds with the Scottish Government's stated rationale and principles of reforming gender recognition legislation and, in our view, must be subject to a higher level of parliamentary scrutiny than the negative procedure.

23. Stonewall Scotland would therefore recommend that paragraph (a)(iii) is removed from section 8C(1) as inserted by section 4 of the draft Bill.

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

If yes, please outline these comments.:

24. Stonewall Scotland strongly opposes the Scottish Government's proposal that applicants must go through a period of reflection for at least three months following application before obtaining a gender recognition certificate.

25. In our view, the proposal that applicants must wait a further three months after the application is made and provide a further notice of confirmation that they wish to proceed before being granted a full or interim gender recognition certificate is not consistent with the principle of self-determination that must be at the centre of any new system of legal gender recognition. In a similar vein to the proposal discussed in Question 1, this would be out-of-step with the process for changing other forms of identity documentation, and with other uses of statutory declaration.

26. As discussed in our response to Question 1, a significant barrier to applying for a gender recognition certificate through the existing process is the length of time that it takes to complete the application process. To replace the current two-year delay with an arbitrary three-month period of reflection – in addition to the three months that it is suggested the applicant must have been living in their ‘acquired gender’ prior to the application – would only replace some of the bureaucracy and delay of the process which the Scottish Government seeks to streamline through the introduction of this Bill. Introducing a reflection period would simply reinforce the idea that trans people cannot be trusted to make decisions about their lives without some form of oversight and suggests that they have not already considered their decision and the implications of this at length.

27. The Scottish Government recognises in the consultation paper (p.15) that the current process under the 2004 Act has an “adverse impact on people applying for gender recognition” and seeks to replace this with an “equally serious but less onerous process.” In our view, the proposed reflection period would mean that the process, while significantly improved, would remain rather onerous for many people who would, in effect, face a six-month time delay in accessing legal gender recognition. Many trans men and trans women making applications under section 8A(1) are likely to have already been living in the ‘acquired gender’ for a long period of time and should not be required to further ‘reflect’ on their gender and experience delays in accessing legal gender recognition.

28. Obtaining a gender recognition certificate crucially brings the legal sex on a person’s birth certificate in line with the gender marker on other identification documents, thereby protecting their confidentiality and privacy. Issues can arise for trans people who do not have legal gender recognition when accessing public services and employment – for example, ‘right-to-work’ documents and tax records can reveal a person’s trans status to their employer without their consent. Furthermore, having a gender recognition certificate would allow trans people to marry, have their pension and insurance policies administered correctly, and ensure they are recognised in death in their correct gender.

29. In certain situations, the need to ensure that identity documentation is accurate, consistent and up to date can be particularly time sensitive. The proposed reflection period could delay those without legal gender recognition who would be seeking this in order to enter a marriage or civil partnership in the ‘acquired gender’. Likewise, this would have a considerably negative impact on trans people approaching end of life, who may urgently seek to apply for legal gender recognition to ensure that they will be recorded and remembered in the ‘acquired gender’ in death.

30. We recognise, as outlined in the consultation paper (p.24), that the Scottish Government has proposed a reflection period, in addition to other measures, in order to “enshrine in law the seriousness of the process” and ensure that “obtaining legal gender recognition would remain a serious step.” However, it is our view that the existing protections under Scottish law to guard against fraud are significant enough for decisions around applying not to be taken lightly. Under the Criminal Law (Consolidation) (Scotland) Act 1995, knowingly making a false statutory declaration is a criminal offence subject to up to two years imprisonment and/or a fine.

31. Additionally, we would deem this to be a sufficient disincentive to non-trans people who might seek to make a fraudulent application. In countries where a model of self-determination already exists, including Ireland, there is no evidence to suggest that the legislation has been misused with criminal intent. We believe that a model of self-determination, whereby a solemn statutory declaration would be made to a notary public or justice of the peace, taking in to account the criminal penalties that a fraudulent declaration could be liable to, would ensure that the process remains sufficiently serious.

32. The period of reflection intends to inform applicants about the implications of obtaining legal gender recognition and require them to further consider their decision before becoming in receipt of a full or interim gender recognition certificate. Under section 8B(2), the Registrar General must, upon giving notice to the applicant on receipt of application that the reflection period has begun, give the applicant information as to the effect of the issue of a gender recognition certificate. It is our view that such information could be made available, in advance of an application being made, so that the applicant is reliably informed as to the effect of the application, without a period of reflection being enforced.

33. While some other jurisdictions which use a self-determination process with a statutory declaration require an enforced period of reflection, such as Belgium (three to six months) and Denmark (six months), we are not aware of any evidence to suggest this has added any benefit. Furthermore, the inclusion of a reflection period within gender recognition laws have been criticised internationally. For example, when Denmark reformed gender recognition in 2014, Transgender Europe highlighted that: “The imposed delay in the procedure prevents trans people from changing their documents quickly when necessary – for example when applying for a job, travelling internationally or enrolling in education... the waiting period may also perpetuate misconceptions of trans people as being ‘confused’ about their gender, instead of encouraging them to change their documents quickly so they can participate fully and freely in all aspects of society” (Transgender Europe, “Historic Danish Gender Recognition Law comes into force”, tgeu.org).

34. Those jurisdictions where simpler, de-medicalised systems have been introduced, have seen no significant rate of people going through the process, changing their mind and then making further applications. For example, as the consultation paper notes (p.86), between September 2015 and August 2019, 517 applicants in Ireland have been issued with gender recognition certificates upon application. There have only been three instances where an applicant has re-considered and requested the revocation of the certificate, all of which have been granted. This represents less than 0.6 per cent of cases.

35. Under the 2004 Act, there is no restriction on the number of times a person can apply for legal gender recognition, and there is no proposal to introduce a cap under the draft Bill. It should continue to be possible that in the extremely rare situation whereby an individual who has received a gender recognition certificate deems it absolutely necessary to revoke this, to make an additional application to effectively rescind the certificate.

36. Stonewall Scotland would recommend that the 'reflection period' and 'notice of confirmation' should be removed from the Bill when introduced. The reformed system of gender recognition must not include an unnecessary, arbitrary reflection period which obstructs and delays applications and undermines the self-determination of trans people.

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

Yes

If you wish, please give reasons for your view.:

37. Stonewall Scotland strongly agrees that 16- and 17-year olds should be able to apply for legal gender recognition and welcomes that section 8A(1)(a) would reduce the minimum age at which a person could apply for legal gender recognition from 18 to 16. We strongly believe that this must be maintained within the Bill as introduced in order for reforms to gender recognition legislation to respond to the issues faced by young trans people and reflect international best practice.

38. The current restrictions placed on trans young people under the 2004 Act present inconsistencies with other rights afforded to 16- and 17-year olds in Scotland, such as the ability to marry, gain employment, enter into a legally binding contract, consent to medical treatment and surgery, and be held legally responsible for their actions. Lowering the minimum age at which a person can apply for legal gender recognition to 16 would provide greater consistency both with existing rights and with recent moves within Scotland to provide rights at a younger age, such as the right to vote in Scottish elections at 16.

39. Many trans people aged 16 and 17 years old in Scotland will be at a point of change in their lives, at school leaving age, and would wish to obtain a gender recognition certificate before progressing in to employment, entering higher or further education, or moving away from the parental home for the first time. As with older trans people, 16- and 17-year olds who are in or seeking employment would benefit from having legal gender recognition so that their 'right-to-work' documents and tax records could not inadvertently reveal their trans status to their employer without their consent. Furthermore, those seeking to enter a marriage or civil partnership, in line with their legal rights, would only be able to do so in the 'acquired gender' if a gender recognition certificate had been obtained.

40. Trans people aged 16 and 17 are already able to update other documentation in line with their identity of their own accord. For example, trans young people

are able to apply for a passport on their own behalf and officially record a change of name, both in line with the 'acquired gender'. This inconsistency means that, while trans young people can already make certain profound and long-lasting legal decisions about their identity, this does not extend to full legal gender recognition. It is vital that young trans people are able to apply for legal gender recognition to align their social and legal identities in order to maintain their privacy over their trans status. This is particularly pertinent at this time of life, where young people will be entering new communities, workplaces and education settings, and must be able to choose whether and if they reveal their trans status, rather than having it revealed without their consent. This is similar to the need for young lesbian, gay and bi people to have autonomy over whether and if they reveal their sexual orientation in these settings.

41. We welcome the Scottish Government's proposal for those aged 16 and 17 to apply for legal gender recognition through the same self-determination process with statutory declaration as those aged over 18.

42. Reducing the minimum age at which a person can apply for legal gender recognition to 16 would bring Scotland more closely aligned with international best practice. As evidenced in Appendix A of the draft Child Rights and Wellbeing Impact Assessment, trans young people are able to access legal gender recognition in many jurisdictions internationally, although the method through which to do so varies. In Norway, following the introduction of the Legal Gender Amendment Act in 2016, any person over the age of 16 can change their legal gender and name by way of filling in a short document and registering it with the local tax office.

43. We would not recommend a court order system such as that which is used in Ireland, as this would be inconsistent with how young people access other rights in Scotland, replicate some of the bureaucracy and gatekeeping that the 2004 Act currently provides, and further the narrative that trans young people do not know their own identities or what is best for themselves. However, following a review of the operation of the Gender Recognition Act 2015 in Ireland which recognised that this process was too onerous for those aged 16 and 17, the Minister for Employment Affairs and Social Protection intends to bring forward legislation to introduce a self-declaration model of legal gender recognition for 16- and 17-year olds, with parental consent and a simple revocation process (Department of Employment Affairs and Social Protection, "Gender Recognition Act 2015: Report to the Oireachtas under Section 7 of the Act", 2019).

44. Enabling children and young people to access legal gender recognition will allow them to best access their rights under the United Nations Convention on the Rights of the Child (UNCRC). This is recognised within the draft Child Rights and Wellbeing Impact Assessment, as outlined in Annex G. Such rights in relation to access to gender recognition include Article 2 (the right to protection against all forms of discrimination), Article 3 (that the best interests of the child shall be a primary consideration in actions concerning them), Article 8 (the right to identity, including gender identity), Article 12 (the right to express views and for those views to be given due weight in accordance with their age and maturity) and Article 14 (the right to freedom of thought). Recognising and respecting trans children

and young people by extending legal gender recognition is particularly important as the Scottish Government seeks to implement the UNCRC and incorporate this into Scots law.

45. However, Article 1 of the UNCRC establishes that these rights apply to all children and young people under the age of 18, including those under 16. Furthermore, the Principle 31 of the Yogyakarta Principles (the right to legal recognition) maintains that there should be no minimum or maximum age to access legal recognition. Stonewall Scotland is disappointed that there are no provisions proposed in the draft Bill for younger trans people to access legal gender recognition. We would urge the Scottish Government to introduce a system of legal gender recognition for younger trans people under 16 based on parental or guardian consent when the Bill is formally introduced.

46. We propose that trans children and young people under 16 should be able to access legal gender recognition with consent from at least one parent or guardian with parental rights and responsibilities (PRRs). This would be consistent with other processes for changing identity documentation and accessing similar pathways – for example, parental consent is already required by under 16s to update passports and medical records, register a change of name, and gain access to many services.

47. This would be far from the first case where gender recognition for under 16s has been introduced. In Norway, children and young people between the ages of 6 and 16 years old can access the legal gender recognition process if at least one parent consents. In Malta, under 16s can access legal gender recognition through the court system, with consent and support from their parents or legal guardians – and parents and legal guardians can postpone the inclusion of a gender marker on a birth certificate until the child or young person determines their gender.

48. While parental consent is an imperfect model, we believe it to be the most appropriate in supporting children and young people under 16 to access their rights. In circumstances where a trans young person under 16 years old was refused consent for gender recognition by a parent or guardian, there should also be a process for them to apply for legal recognition in their best interests. The Children (Scotland) Act 1995 sets out how this process could be operated, regarding “the welfare of the child concerned as its paramount consideration”, taking account of the young person’s age and maturity, and giving them an opportunity to express their opinions and be heard. This would be a similar model to that under which Argentina’s Gender Identity Law 2012 operates, whereby a trans young person who is refused parental consent to access legal gender recognition would have the right to apply to the courts to access that process.

49. In cases where parental consent is lacking, we recognise that this would be a deeply distressing situation for the young person, who may be facing significant issues at home. It is likely that a young person denied parental consent to change their gender may not be able to present as their true gender at home, use a chosen name, or be addressed by their correct pronouns. These issues may well take greater precedence for them than legal recognition, and indeed may be an

issue of their own safety. The involvement of children and young people in judicial proceedings is a challenging and nuanced one, and careful consideration must be given as to how young people are supported through this. It is critical that young people who seek to change their legal gender, particularly those who lack parental consent, are able to access emotional support and guidance to help them through this period.

50. In summary, we strongly support the Scottish Government's proposal to reduce the minimum age at which a person can apply for legal gender recognition to 16, in line with a range of other rights afforded to 16- and 17-year olds. However, the Bill when introduced must also make provisions for younger trans people with parental consent, or through a court process for those without parental consent, to apply.

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

Yes

If yes, please outline these comments.:

51. Stonewall Scotland broadly supports the general principles and provisions of the draft Gender Recognition Reform (Scotland) Bill and believe that it would, if enacted, represent a crucial improvement in trans rights. However, in addition to the concerns outlined in our responses to Questions 1-3, there are several additional aspects of the Bill, and omissions from the Bill, that we wish to address. It is crucial that reforms to gender recognition legislation are admissible and beneficial for all trans people.

Non-Binary Recognition

52. Stonewall Scotland strongly believes that, for reforms to the 2004 Act to benefit the trans community at large, non-binary people – who do not identify exclusively as either men or women – should be able to access legal recognition of their non-binary gender, and that this should be through the same self-determination process with statutory declaration that trans men and trans women would be able to access.

53. While there is no authoritative data on the size of the trans and non-binary community in Scotland, it is understood that non-binary people account for a sizeable proportion of the trans population. For example, 51.7 per cent of the 14,000 trans respondents to the UK Government's 2018 National LGBT Survey identified as non-binary. The non-binary population was particularly large amongst younger age groups, accounting for 58 per cent and 58.4 per cent of the trans respondents within the 18-24 and 25-34 age categories, respectively (National LGBT Survey Research Report, Annex 3: Characteristics, gov.uk).

54. Stonewall Scotland believes that the provisions of the Bill should be extended to non-binary recognition, to ensure that the legislation best meets the needs of the trans community at large. In our responses to Questions 1-3, we have outlined the substantial benefits for trans men and trans women obtaining legal gender

recognition, which the Bill seeks to improve access to by de-medicalising and streamlining the process. Many of the same principles apply to the legal recognition of non-binary people, which is essential to improving legislative equality for this population, safeguarding their wellbeing, and improving social acceptance and understanding of non-binary identities. Steps taken to improve the process of recognition for binary trans people must also be available to non-binary people, who deserve the same level of recognition and respect.

55. The current lack of legal recognition and social awareness of non-binary identities contributes to disproportionately high levels of discrimination, violence and exclusion that non-binary people face in Scotland today. Our 2017 research with YouGov, *LGBT in Scotland: Hate Crime and Discrimination*, found that almost two in five non-binary people (38 per cent) experienced a hate crime or incident because of their sexual orientation and/or gender identity in the last year compared to one in five LGBT women (21 per cent) and LGBT men (17 per cent). Additionally, non-binary people are significantly more likely than both men and women to both experience personal online abuse: 28 per cent compared to eight per cent of LGBT men and seven per cent of LGBT women. It is clear that non-binary people face specific inequalities within society.

56. By not recognising non-binary identities on birth certificates and other official documents, non-binary people must present documentation that is inconsistent with their lived identity. This can be distressing for many and contributes to the wider societal misunderstanding and lack of awareness of non-binary identities. Maintaining this approach is inconsistent with the principles of self-determination that underpin these proposed reforms.

57. When the Scottish Government previously consulted on reviewing the 2004 Act, the majority of respondents (62 per cent) agreed that Scotland should take action to recognise non-binary people, including 66 per cent of those resident in Scotland. We are therefore disappointed that the Scottish Government does not intend to extend legal gender recognition to non-binary people at this time – without this, reforms to Scotland's gender recognition legislation could not be seen as international best practice.

58. For example, in 2019, the Icelandic Parliament passed the Gender Autonomy Act, which when enforced, will enable people to access legal recognition of a third gender option – X. Furthermore, non-binary people in Malta can be recognised with an 'X' marker on their documentation, including passports, identity cards and residence permits.

59. Many countries around the world allow for the legal recognition of non-binary identities through 'X' markers in official documentation. For example, Australia, Canada, Denmark, India, Nepal, New Zealand and Pakistan all allow for 'X' markers in passports. The International Civil Aviation Organisation (a United Nations specialised agency) also recognises 'X' markers.

60. As referenced in our response to Question 1, the Council of Europe Resolution 2048 (2015) which called on member states to develop quick, transparent and

accessible procedures for legal gender recognition, also called on member states to “consider including a third gender option in identity documents for those who seek it.”

61. Stonewall Scotland does recognise that introducing non-binary recognition would be more complex than the proposed reforms to streamline the existing process for binary trans people. As referenced in the draft Business Regulatory Impact Assessment, “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.” To deliver full and comprehensive equal rights and protections for non-binary people in Scotland, we agree a range of measures must be introduced in order to improve access to public services, provide greater awareness and validation of these identities, and reduce stigma and discrimination. However, those measures, while beneficial to the non-binary population, would be insufficient if not ultimately supported by full legal gender recognition.

62. We look forward to becoming an active participant within the Scottish Government’s non-binary working group to explore reforms to procedures and practice around non-binary inclusion and recognition. In the absence of non-binary recognition in the Scottish Government’s current proposed reforms to gender recognition legislation, we anticipate that the non-binary working group should provide a pathway to achieving the necessary legal recognition of non-binary identities in the coming years, in addition to a wider package of essential reforms.

63. The Gender Recognition Act 2015 in Ireland did not make any provision for non-binary people or trans people under the age of 16. However, the legislation stipulated that the Irish Government would commence a review of the operation of this legislation within two years of its introduction. The initial report of the review found that the Act was operating successfully and recommended, following extensive legal analysis and consultation with relevant stakeholders, that legal recognition should be made available to non-binary people, and that an impact assessment of this may be considered. This impact assessment is now being taken forward by an interdepartmental group that will submit a report to government for consideration by the end of 2020. In the meantime, government departments and other public bodies will take positive steps to improve the position of non-binary people (Department of Employment Affairs and Social Protection, “Gender Recognition Act 2015: Report to the Oireachtas under Section 7 of the Act”, 2019). The Scottish Government may wish to replicate such a clause to ensure that there is a built-in period for the future consideration of legislative reforms on non-binary recognition.

Persons subject of a Scottish birth register entry or ordinarily resident in Scotland

64. Stonewall Scotland is content that applicants should meet the conditions in section 8A(2), to be the subject of a Scottish birth register entry or be ordinarily resident in Scotland, to be able to apply for a gender recognition certificate, provided that asylum seekers and refugees would meet these conditions, including while their application for the right to remain is ongoing.

65. Trans refugees or those seeking asylum in Scotland may be doing so to escape transphobic discrimination and violence in their country of origin, where they may not have had access to legal gender recognition. It is vital that all trans people seeking residency in Scotland are able to access legal recognition upon arrival in Scotland, whether they have legal gender recognition from their country of origin or not, to ensure they are afforded the same rights and provisions as any other person in Scotland.

66. In Malta, specific provisions are made for refugees under section 8 of their gender recognition legislation to amend the name and gender recorded in their asylum application form and protection certificate. We wish to seek clarification from the Scottish Government in relation to the eligibility of trans refugees and asylum seekers to apply to the Registrar General for Scotland for legal gender recognition in Scotland.

67. We are additionally aware that people who wish to move to Scotland may wish to have their gender legally recognised upon their arrival, and therefore wish to apply before they have become resident in Scotland, in part due to the three-month reflection period. Those seeking to move to Scotland may be comforted by the removal of the three-month reflection period, with the knowledge that they can access legal gender recognition promptly upon becoming ordinarily resident.
Issue of full and interim gender recognition certificates

68. Stonewall UK strongly opposes the 'spousal veto' in place under the 2004 Act as it applies in England and Wales, which gives unprecedented power to a trans person's spouse to block them from obtaining legal gender recognition.

69. Stonewall Scotland supported amendments to the Marriage and Civil Partnership (Scotland) Act 2014, which removed the requirement for spousal consent from applications under the 2004 Act as it applies in Scotland and ensured that applicants in Scotland could not ultimately be blocked by their partner from obtaining gender recognition.

70. However, we do hold reservations about the process under section 4E the 2004 Act as it currently applies in Scotland, and that which the draft Bill essentially proposes to continue, for trans people obtaining gender recognition where their partner does not wish the marriage or civil partnership to continue. The Registrar General would be required under section 8E(6) to grant an interim gender recognition certificate, as opposed to a full certificate, to applicants who are parties to a marriage or civil partnership but where the spouse or civil partner does not wish the marriage or civil partnership to continue after the issue of a full certificate. Within six months of the issue of the interim certificate, the applicant would be able to apply under section 8H to the sheriff for a full certificate, which the sheriff would be required to issue so long as circumstances had not changed.

71. We recognise the process of applying to the sheriff that trans people in these circumstances must undertake to be unnecessarily convoluted. However, we ultimately welcome that section 8H will continue to ensure that the spouse of a trans person will be unable to directly prevent them from obtaining a full gender recognition certificate.

Time limits

72. Stonewall Scotland would like to seek clarification over the time limits imposed for applications made under sections 8J and 8K – that applications for a full certificate must be made within six months of the marriage or civil partnership being dissolved or annulled, and must be made within six months of the death of a spouse or civil partner, respectively.

73. In particular, we would like to seek further clarification over the process for applications where the six-month time limit has not been met – for example, in cases of grief and bereavement – and whether the applicant would have to make a re-application under section 8A(1) and be subject to a further three-month reflection period. Considering this, we recognise that it might be useful to lengthen this time period and provide reassurances to applicants facing such circumstances.

Gender recognition obtained outwith Scotland and issue of confirmatory GRCs

74. Stonewall Scotland welcomes, as outlined in section 8M, that trans people who have been issued with a full gender recognition certificate under the 2004 Act as it applies in England, Wales, or Northern Ireland would be treated in Scotland as the ‘acquired gender’.

75. Conversely, we would encourage the Scottish Government to work with the administrations across the rest of the United Kingdom to ensure that those who have had an application granted under the Act as it would apply in Scotland would continue to be recognised as the ‘acquired gender’ in England, Wales and Northern Ireland.

76. Stonewall Scotland additionally welcomes the provisions that have been made within the draft Bill for persons who have obtained overseas gender recognition. At present, those who have obtained gender recognition outwith the United Kingdom must make a further application under the ‘overseas route’ of the 2004 Act if the recognition was obtained in an ‘approved country or territory’, as detailed by the Gender Recognition (Approved Countries and Territories) Order 2011 (S.I. 2011/1630). This system is in place to ensure that trans people from overseas must meet similarly stringent requirements of the 2004 Act to be legally recognised in the United Kingdom. Not only does this system require trans people from overseas to re-apply for legal gender recognition, but it rules out those who have obtained gender recognition from countries and territories with more progressive gender recognition laws, such as Ireland, from applying through the overseas route.

77. If Scotland moves to a more progressive system of self-determination, this would in effect remove the requirement for an overseas stream. Under the self-determination system in Malta, decisions made about a person’s gender identity that are determined by a competent foreign country or authority are automatically recognised with no further process required.

78. We welcome that the insertion of section 8N would enable those who have obtained overseas gender recognition to be regarded as the ‘acquired gender’ in

Scotland, without having to re-apply, and that paragraph 16 of the schedule introduced by section 15 would revoke the 2011 Order. This will ensure that a greater number of those who have obtained gender recognition outwith the United Kingdom will be automatically legally recognised in Scotland.

79. However, we do recognise that under current proposals, trans young people under 16 and non-binary people who had obtained legal gender recognition overseas would not be recognised in the 'acquired gender' in Scotland as this would be "manifestly contrary to public policy," as per section 8N(2). While we understand that the provisions for recognising those obtaining gender recognition in Scotland should not be subordinate to those who have obtained gender recognition overseas, we are disappointed that the proposed reforms falling short of international best practice has required the inclusion of this clause within the draft Bill.

80. We have some reservations around the insertion of section 8O, which outlines a process through which those with overseas gender recognition could apply to the Registrar General for a confirmatory gender recognition certificate. Section 8N would apply whether or not a person had been issued with a confirmatory gender recognition certificate under section 8O, yet the consultation paper (p.75) outlines that while there would be no obligation to apply for a confirmatory certificate, it "may be helpful to put the matter beyond doubt." We would wish to seek further clarification from the Scottish Government regarding the 'doubt' that there may be of the recognition in Scotland of those with overseas gender recognition under the proposed new system.

Revocation of certificate on application to the sheriff

81. Stonewall Scotland is concerned that section 8S, which would enable a 'person who has an interest in a gender recognition certificate' to apply to the sheriff to have the certificate revoked on the grounds of the applicant being incapable of understanding the effect of obtaining the certificate or incapable of making the application, may discriminate against trans people who may be deemed not to have the legal capacity to make decisions about their lives.

82. While the consultation paper (p.76) gives the Registrar General as an example of a person who would have a genuine interest in a gender recognition certificate, we would wish to seek clarification over which other parties may be able to make an application to the sheriff under section 8S, such as family members who are not supportive of the applicant's decision to transition and obtain legal gender recognition.

Further provisions about applications to Registrar General for Scotland

83. As referenced in our response to Question 1, Stonewall Scotland holds caution around the information or evidence to be included in applications that could be determined by regulations made under section 8U by the Registrar General, and the level of parliamentary scrutiny that this would be subject to. We are similarly concerned that the Registrar General would be able to, by regulations under section 8U(1)(b), make provision about the fees payable in connection with an

application for a gender recognition certificate, a full certificate, or a confirmatory certificate.

84. We welcome the reassurance within the consultation paper (p.27) that there would be a consultation on the level of any fee should the Bill be enacted, despite being subject to the negative procedure. Furthermore, that, if there was to be a fee, it would be likely to be “considerably lower” than the current fee of £140 under the 2004 Act as there will not need to be a tribunal as part of the process. The current fee is significantly greater than comparable costs, for example, to buy a short or full birth certificate when registering a birth or order a copy of an existing birth, death or marriage certificate (£11).

85. Despite this, it is our view that the Scottish Government should absorb the costs of the gender recognition system and not impose a fee on applicants, so that trans people are not effectively priced out of accessing legal gender recognition. We are acutely aware that current £140 fee is prohibitive to many trans people across the UK in applying for legal gender recognition. The UK Government’s National LGBT Survey (2018) found that of the 93 per cent of trans men and trans women who were interested in getting a gender recognition certificate but had not yet applied for one, one in three (34 per cent) cited that the process was too expensive. The application fee would be additional to the other costs to trans people associated with gender recognition and transition, such as updating other forms of identification and accessing private healthcare.

86. This was illustrated by a trans person who told Stonewall: “I came out as trans three years ago, but I haven’t applied for a Gender Recognition Certificate. The application fee is £140. That’s three months’ council tax for me. As a GRC application can be rejected without the right of appeal, I can’t risk losing that amount of money. Nobody should have to choose between putting food on the table and legal gender recognition. It costs nothing to change a driving licence.”

87. While the reassurances in the consultation paper from the Scottish Government are welcome, it is necessary to ensure that an excessive fee could not be imposed upon applicants in future. Therefore, if section 8U(1)(b) is to remain, it may be advisable to include on the face of the Bill that any fees to be payable should not be in excess of a certain fee.

Continuity of marriage or civil partnership

88. Stonewall Scotland agrees that the continuity of marriage or civil partnership should not be affected by the issuing of a full gender recognition certificate. Section 11E reflects that, should the Civil Partnership (Scotland) Bill currently before the Scottish Parliament be enacted to extend civil partnerships to different sex couples, the barriers to legal gender recognition within the 2004 Act with respect to civil partnership will no longer be necessary. Stonewall Scotland supports this Bill and hopes that it is enacted by parliament so that being party to a civil partnership would cease to be an absolute barrier to gender recognition.

Offence of making false declaration or application

89. Stonewall Scotland does not support that inserted section 22A(1) would create an additional offence for knowingly making a statutory declaration in relation to an application for gender recognition that is false in a material particular. We recognise that the Scottish Government wishes to ensure that applying for gender recognition remains a serious and solemn legal process. However, it is already a criminal offence under the Criminal Law (Consolidation) (Scotland) Act 1995 to knowingly make a false statutory declaration. Stonewall Scotland agrees that this should continue to be an offence, as we believe this provides an appropriate disincentive to people who might seek to make a fraudulent claim and ensures that people do not make repeated applications lightly. We do not believe that it is necessary to introduce an additional offence specific to gender recognition that would not have a materially different affect to section 44(2)(a) of the 1995 Act.

90. However, Stonewall Scotland does not oppose the insertion of section 22A(2), which creates an offence for including any other information that is false in a material particular in an application for a gender recognition certificate, full certificate, confirmatory certificate, or notice of confirmation. In this case, we are not aware of the existence of a broader offence not specific to gender recognition.
Commencement

91. As trans people who have felt unable to access legal gender recognition under the 2004 Act are likely to be keen to access the new process as soon as possible, we would be keen to ensure that the new system is introduced at the earliest possible opportunity and is not delayed by commencement being subject to regulations made by Scottish Ministers. The Scottish Government may wish to consider placing a maximum date of commencement on the face of the Bill to ensure that the establishment of the new system remains a high priority after the Bill is enacted.

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

Yes

If yes, please outline these comments.:

Draft Child Rights and Wellbeing Impact Assessment

92. Stonewall Scotland supports the evidence presented within the draft Child Rights and Wellbeing Impact Assessment (CRWIA) to substantiate the Scottish Government's proposal to extend legal gender recognition to 16- and 17-year olds. We welcome the recognition that the policy would be expected to impact children's rights under several articles of the UNCRC, including those noted in our response to Question 3. We also welcome the recognition that many jurisdictions already offer trans young people the opportunity to change their legally recognised gender.

93. This impact on children's rights is a strong basis for reducing the minimum age at which a person can apply for recognition. However, the UNCRC applies equally to children of all ages, not only to those aged 16 and above. We do not believe that the draft CRWIA has provided sufficient evidence to justify the Scottish Government's

decision not to extend gender recognition to under 16s. While it points to evidence within the partial CRWIA completed for the 2018 consultation as being considered in relation to this decision, this evidence largely focuses on whether children experiencing some incongruence with their assigned gender would continue to experience this into adulthood, rather than focusing on children and young people who are confident of their gender.

94. When referencing the policy changes that have occurred since the 2018 consultation, the consultation paper somewhat conflates trans children and young people under 16 with those uncertain of their gender identity and suggests that in the absence of legal gender recognition for under 16s, support is necessary for those uncertain of their gender (for example, p.22, p.91 and p.150). We agree that support is necessary for trans and gender non-conforming children and young people, including those who are uncertain of their gender. However, we would not encourage people who are uncertain of their gender identity to apply for legal gender recognition in any case.

95. Some trans children and young people will be confident in their gender and have been living in the 'acquired gender' for a significant time period at home and at school, with the support of their parent(s) or guardian(s). In such circumstances, trans children and young people aged under 16 should be able to make applications for legal gender recognition to align their social and legal identities in a similar vein to those aged 16 and above.

96. Our response to Question 3 further outlines Stonewall Scotland's views on proposals to reduce the minimum age at which people can apply for gender recognition to 16, and the decision taken not to make provisions for those under 16.
Draft Fairer Scotland Duty Assessment

97. The draft Fairer Scotland Duty Assessment recognises that there is a body of evidence to suggest that the trans population may experience a greater level of socio-economic disadvantage when compared with the general population, and with the application fee likely to be reduced, it assesses that the policy will have a broadly positive impact on these inequalities.

98. Regardless of whether generalisations can be made from the research cited to the trans population as a whole, there will be trans people on low incomes who will be unable to afford an application fee of any level, in addition to the other costs associated with transition and gender recognition, and who should not be effectively 'priced out' of applying for legal gender recognition.

99. As referenced in our response to Question 4, the current cost is prohibitive to many trans people making applications under the existing system, and we would recommend that the Scottish Government proceed with Option A, for the Registrar General not to charge a fee.

Draft Data Protection Impact Assessment

100. Stonewall Scotland is content the draft Data Protection Impact Assessment does not foresee any potential data protection issues relating to the introduction

of a new system of applying for gender recognition, with the Registrar General's staff that will be processing applications to be bound by section 22 of the 2004 Act from disclosing 'protected information' about an application acquired in an 'official capacity'. It is crucial that the privacy and dignity of trans people is protected and such personal and sensitive information as an applicant's trans status and history is not compromised.

101. However, we are concerned that the Scottish Government is considering whether further exceptions to section 22 should be made by an Order under section 22(6) of the 2004 Act (p.33, p.136). Section 22 exists to protect trans people's privacy and contributes directly to the safety and wellbeing of those who have acquired legal gender recognition. We would be open to discussions about whether the implementation and enforcement of section 22 can be improved, but do not believe additional exceptions are required at this time. We believe that the exceptions in the Act cover all reasonable requirements for the disclosure of information. Any additional exemptions may contravene Article 8 of the ECHR – the right to respect for a private and family life – and could place the applicant's safety at risk. Any special category data information that has been obtained in an official capacity should remain undisclosed as far as is possible.

102. Stonewall Scotland would be open to the Scottish Government's alternative suggestion to issue guidance on section 22 (p.33, p.136). From our engagement with employers and service providers, coupled with the fact that there have been no recorded cases of a successful prosecution under section 22, we understand that the awareness of the provisions of section 22 is limited. Practical guidance for employers, employees, public services and service users, in addition to prosecutors, may be useful.

Draft Equality Impact Assessment

103. On the protected characteristic of age, Stonewall Scotland welcomes that the draft Equality Impact Assessment (EQIA) foresees a positive impact on advancing equality of opportunity for older people, in particular those who are longer term transitioned and may not have access to the evidence required to apply to the Gender Recognition Panel.

104. This could be particularly pertinent with regards to the requirement for evidence to be provided by a registered medical professional practising in the field of gender dysphoria. Although the Panel may accept medical reports from professionals not on the approved 'List of Specialists in the Field of Gender Dysphoria' (HM Courts and Tribunals Service, gov.uk), longer term transitioned people who received a diagnosis prior to the enactment of the 2004 Act may have greater difficulty in meeting the medical evidence requirements.

105. Additionally, as referenced in our response to Question 2, trans people who are approaching end of life may wish to obtain legal gender recognition to ensure their gender is correctly recorded on their death certificate. This could be understood to be of particular benefit to older trans people.

106. Our response to Question 3 and comments on the draft CRWIA under Question 5 further outlines Stonewall Scotland's views on the impact of the policy on young people with reference to the protected characteristic of age.

107. On the protected characteristic of disability, Stonewall Scotland welcomes that the draft EQIA recognises the positive impact that having legal gender recognition with consistent documentation in the 'acquired gender' could have on a trans person's mental health, and expects the policy to have a positive impact in this regard.

108. The evidence cited in the draft EQIA on the mental health issues commonly experienced within the trans population is consistent with the findings of Stonewall and YouGov research on health inequalities (Stonewall Scotland, LGBT in Scotland: Health Report, 2019) that trans people were disproportionately affected by mental health issues. For example, seven in ten trans people (72 per cent) surveyed reported that they had experienced depression in the last year, compared to half of LGBT people (49 per cent). According to the Scottish Health Survey 2017, one in ten (11 per cent) adults in the general population in Scotland reported experiencing two or more symptoms of depression in the previous year. Similarly, three in ten trans people (31 per cent) have self-harmed in the last year, compared to 13 per cent of LGB people who aren't trans. According to the Scottish Health Survey 2017, 6 per cent of adults in Scotland have self-harmed at some point in their lives.

109. While the mental health inequalities faced by the trans population are not solely related to legal gender recognition, we recognise that being able to access this without being subject to a distressing, humiliating process should boost wellbeing. This was illustrated by one trans person who told Stonewall: "That's distressing as I'm engaged and want to get married as a woman. Right now, I can't do that. A big part of my life is on hold because of some arbitrary time limit. And it's draining knowing my documentation has the wrong details. It would be such a boost to my mental health if all that was cleared up."

110. However, we do have concerns that there is no clarification as to the relevance of the evidence cited with regards to the prevalence of autistic spectrum conditions within the trans population. All trans people, including those with autism, should be equally able to access the benefits of the policy.

111. The EQIA further notes that the Scottish Government "will consider further the need for clear and straightforward guidance for people with learning disabilities" (p.180). We agree that the information given by the Registrar General under section 8B(2) as to the effect of the issue of a gender recognition certificate should be made available in an accessible format for all applicants.

112. On the protected characteristic of gender reassignment, we are uncertain as to the relevance of the evidence cited as to the level of regret associated with transitioning, particularly the evidence on regrets associated with medical interventions. Reforming the 2004 Act would have no impact on access to medical interventions. Furthermore, in the extremely rare situation that an individual who has received a gender recognition certificate no longer wishes to have legal recognition

in that gender, they should be able to make an additional application to effectively rescind the certificate.

113. Additionally, the draft EQIA expects the policy to positively impact on trans people as this will 'enable trans people to obtain legal rights without having to go through an intrusive system'. We would like to note that this will only be the case for trans men and trans women, and not non-binary people, who will continue to be unable to access legal recognition of their gender. Therefore, the policy cannot be said to have a positive impact in advancing equality of opportunity for the whole trans community, although it is a welcome step forward.

114. On the protected characteristic of sex, Stonewall Scotland welcomes that the Scottish Government does not expect the policy to impact on men and women in different ways or have any negative implications for women.

115. Access to single-sex services is not dependent on having a gender recognition certificate. Under the Equality Act 2010, trans men and trans women are already supported to access single-sex facilities aligned with their gender identity (except in restricted circumstances where a service can demonstrate that not doing so constitutes a 'proportionate means of achieving a legitimate aim'), regardless of whether or not they have a gender recognition certificate. This means, for example, that trans women are legally supported to use women-only services, including domestic violence refuges, changing rooms and toilets (except in restricted circumstances). Therefore, reforming the 2004 Act to enable trans men and trans women to more easily obtain a gender recognition certificate would have no effects on access to women-only spaces, as this is not a pre-requisite to access such spaces. The Scottish Government does not propose any amendments to the single-sex or gender reassignment exceptions to the 2010 Act.