



REVIEW OF THE GENDER RECOGNITION ACT 2004: A CONSULTATION SCOTTISH WOMEN'S SECTOR RESPONSE, FEBRUARY 2018

SECTION ONE: INTRODUCTION

1. As a coalition of national women's equality and violence against women organisations, we welcome the opportunity to comment on the Scottish Government's proposals amending the Gender Recognition Act 2004 in Scotland.
2. Our organisations have a long history of deliberation on the interrelationship between trans equality and rights and women's equality and rights. Many of our organisations were involved in the 'T in Feminist' campaign, have worked on action research projects to identify barriers to service delivery for trans women, and have developed trans-inclusive violence against women services and specific support services targeted at LGBTI people. Trans women have added to our movements through their support, through volunteering, and as staff members of our organisations.
3. Our consultation response is based on our long experience of engaging with equality law and policy, and in service delivery at national¹ and local² level. It is also based on our many years of collaboration and dialogue with Scottish Trans Alliance, and other LGBTI national organisations, and on internal dialogue within our organisations and their memberships.
4. Despite decades of scholarship, we are still near the beginning of theorising sex, gender, gender identity and how they interrelate. These theoretical discussions are important to feminist analysis, and the gender lens that our

¹ Rape Crisis Scotland manages a national helpline for victim-survivors of sexual violence from all genders, as well as a national prevention programme in schools, and advocacy programme for victim-survivors who wish to make a complaint to Police Scotland. Scottish Women's Aid manages a national helpline around domestic abuse and forced marriage. Zero Tolerance delivers packages of training and support to employers and early years educators. Equate Scotland delivers a wide range of services to employers and individual women working or studying in STEM occupations. Close the Gap provides services to employers and trade unions. All of our organisations work in the policy advocacy space.

² Scottish Women's Aid and Rape Crisis Scotland support their networks of local centres and groups to provide support and advocacy services. This includes setting up local services, developing and implementing national service standards, and advocating for funding models and enabling policy and budget-setting.



collective work applies to policymaking in Scotland. They are also important to the work of LGBTI organisations, and their advocacy for the human rights of trans, non-binary, and intersex people.

5. That those important theoretical conversations are ongoing and unresolved does not affect our ambitions for trans equality, rights and safety, or for providing services that meet the needs of trans women who have experienced sex discrimination or men's violence.
6. We support the broad proposals set out in Scottish Government's Gender Recognition Act consultation document, and specifically:
 - a) That Scottish Government should bring forward legislation to introduce a self-declaration system for legal gender recognition, ending the current system's requirement for "medical evidence or evidence of having lived in their acquired gender for a defined period".
 - b) That Scotland should take action to recognize non-binary people.
7. In doing so, we are hopeful that Scotland will become a country where the conducive context that enables violence against trans women is dismantled and where all identities are respected and protected.
8. We have very few specific comments to make on the detail of the proposals themselves, as set out in parts three to five of the consultation document as they do not engage directly with our work. The proposals will benefit trans women, who will no longer be required to go through a process of seeking a Gender Recognition Certificate that appears to conflict with the right to privacy set out in article 8 of the European Convention on Human Rights³. Instead of formulating our own response to the detail of the proposals, we would commend for consideration Scottish Trans Alliance's submission,

³ Resolution 2048 of the Parliamentary Assembly of the Council of Europe resolution calls on all Member States to "develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards...and other similar documents."



which draws on the experience of trans women in Scotland, and that of the Children and Young People's Commissioner Scotland.

9. While we do not wish to respond in detail to the specific questions, which are outwith our areas of expertise and organisational focus, we would set out some consequential areas where we believe Scottish Government should engage with us to develop its thinking further. These are covered in parts six and seven of the consultation document, are discussed in section two of this document, and include:
- a) Proposed changes that Scottish Government will recommend to UK Government in respect of the Equality Act 2010 around the provision of protection for non-binary people; and
 - b) Confusion among public authorities and agencies about how they must and should gather gender-disaggregated data.
10. There is an additional area of concern that appears to relate to a small number of sex offenders. Evidence from The British Psychological Society to the Women and Equalities Committee of the UK Parliament has flagged its worry at the small number of men convicted of sexual offences who (in their words) “falsely claim to be transgender females” in order to secure parole, explain their offending, or get increased access to women and children once they have been released from prison⁴. They express concern that removing the medical assessment component of the gender recognition process will in some way enable this small group of perpetrators if mitigating action is not taken by criminal justice agencies. We have not been able to gather more detail about this evidence. In order to allay any concerns that may exist in Scotland we have agreed with Scottish Trans that a sub-group of violence against women organisations will pick this up with STA and the Scottish Prison Service to share any knowledge or insight that may support robust protocols for ensuring women's safety, including trans women's safety, within the criminal justice system and in the community. We believe that it is

⁴<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Women%20and%20Equalities/Transgender%20Equality/written/19471.html>



possible to balance the rights of individuals to self-determination with those of women with experience of the criminal justice system to safety and freedom from violence.

11. There is also a concern, which has been expressed in a small number of articles and blog posts, that the Gender Recognition Act proposals will undermine the safety and dignity of women accessing women-only services. Rape crisis and women's aid services have been specifically cited as at risk in this regard. We provide reassurance on this point in section three.
12. We would note that equality impact assessment is a requirement placed on public authorities by the Scotland-specific regulations of the public sector equality duty⁵. This mainstreaming mechanism demands that public bodies, including Scottish Government, apply a gender lens to their policy development and assess the differential impact on men and women. They are then required to mitigate any unintended impact, or reconsider the design of their policy. Although our concerns with the proposals are around the consequential, it is unfortunate that the EQIA is of such poor quality (described in the consultation document as a 'partial EQIA') that its cursory list of domains of women's equality that may be affected does not engage with issues we consider to be important, as set out in section two, and potentially overstates others⁶. We would additionally note that no national women's organisations in Scotland were consulted around the development of the consultation paper.
13. As a final introductory point, while we understand that some of the language is contested or technical, the terms 'sex' and 'gender' are used interchangeably in the consultation document. This does not reflect either feminist analysis or the way in which those terms generally appear in

⁵ The requirements of the Scotland-specific duties are contained in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, which have been amended in 2015 and 2016.

⁶ For example, the EQIA suggests that the proposals in the Gender Recognition Act consultation around non-binary recognition may undermine the Gender Representation on Public Boards (Scotland) Act. In fact, Engender and Women 50:50, as principal civil society advocates of women's representation, worked with Equality Network and Scottish Trans Alliance to successfully advocate for a non-binary inclusive Bill.



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equality policy and law. In parts this has obscured the proposals in a way that seems unhelpful.

SECTION TWO: CONCERNS ABOUT CONSEQUENTIALS

14. We support the broad proposals set out in Scottish Government's Gender Recognition Act consultation document, and specifically:

- a) That Scottish Government should bring forward legislation to introduce a self-declaration system for legal gender recognition, ending the current system's requirement for "medical evidence or evidence of having lived in their acquired gender for a defined period".
- b) That Scotland should take action to recognize non-binary people.

15. While we welcome the steps that Scottish Government is proposing to take to protect the privacy and dignity of trans people, and to recognise non-binary people's identity, we have some concerns about the consequential of some of the detail of the proposals. We set these out in this section.

16. Part six of the consultation proposes making a recommendation to UK Government about amendments to the Equality Act 2010. However, this recommendation is not presented clearly, running the risk of ambiguous consultation responses. The notion of recommending amendments to the Equality Act 2010 is flagged in point 6.08 and then further explored in part seven, which is substantively a list of various options for non-binary recognition. Part seven does not provide a systematic description of the likely changes to the Equality Act 2010, but proposes different types of changes underneath its descriptions of possible kinds of non-binary recognition. It is not entirely clear to us why these specific options for non-binary recognition are linked with the possibilities for change to the Equality Act 2010 that are described underneath them. For example, Option 4 (recognition using the proposed self-declaration system) is followed by a statement in 7.28 that "there could be implications for other reserved areas that are gender specific such as maternity pay and leave" and a proposal to amend the Equality Act



around the protected characteristic of sex. Neither this analysis nor the proposal is repeated in Option 6 (seek amendment of the Equality Act 2010). In our view, this apparent mismatch between options for recognition and subsequent implications for changes to anti-discrimination law may make it challenging to discern what some consultation respondents think should happen to the Equality Act 2010.

17. We welcome the recommendation for legal protection for non-binary people within the existing protected characteristic of 'gender reassignment', which does not currently include them, and agree with the Equality and Human Rights Commission that the "gender reassignment protected characteristic must be broadened to include all people who face ill treatment as a result of their gender identity", as set out in section 7.34 (Option 6) of the consultation paper.
18. Section 7.28, however, notes that "the protected characteristics of 'sex' and 'sexual orientation' in the Equality Act 2010 recognise only two sexes", and proposes that "consequential changes required" are agreed with the UK Government. As above, there is no indication of the Scottish Government's thinking around what changes might be involved. This is of significant concern to us, because of the way that anti-discrimination law works. Under its current application, women have been discriminated against on the grounds of their sex if they have been treated less favourably than a comparator (and sometimes a hypothetical comparator) man in employment or in the provision of goods, facilities, and services⁷ (or vice versa).
19. This anti-discrimination protection is underpinned by European law⁸ and by a number of international obligations, including the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)⁹. CEDAW requires states party, including the UK:

⁷ This is a broad definition with many exceptions and caveats. An introductory guide to sex discrimination can be found here: <https://www.equalityhumanrights.com/en/advice-and-guidance/sex-discrimination>

⁸ <https://www.engender.org.uk/content/publications/The-EU-referendum-and-gender-equality.pdf>

⁹ <http://www.un.org/womenwatch/daw/cedaw/>



- a) to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;
- b) to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and
- c) to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

We consider it vital that Scottish Government works with women's equality organisations and anti-discrimination law experts with a focus on sex discrimination to develop its thinking on changes it might propose, considering:

- I. The implications for legal protection for women (and men) against sex discrimination, including any impact on existing case law;
- II. The alignment with international obligations to which the UK is a party; and
- III. How to communicate any changes in the law to employers, service providers, and relevant stakeholders in a Scottish context, to avoid action towards women's equality being undermined by confusion about what the protected characteristic of sex means.

20. Gender-disaggregated data is a vital component of work to advance women's equality and to tackle violence against women. All of our organisations advocate for more data to be gender-disaggregated so that we can track indicators of women's inequality over time. Many of our organisations have engaged with public bodies over the last year that have interpreted their new cognizance of non-binary identities as precluding asking staff members or service users about their sex. This is in breach of their requirements as part of the Scottish-specific regulations of the public sector equality duty, and imperils robust equality impact assessment and gender-sensitive policymaking. We are committed to working with Scottish Trans Alliance and other LGBTI organisations to share appropriate practice about data in the course of our work, but call on Scottish Government to include this issue in



its forthcoming review of the public sector equality duty. It would also be helpful for Scottish Government to engage with the Equality and Human Rights Commission on the production of clear and concise guidance that spoke to this question.

SECTION THREE: CONCERNS ABOUT WOMEN ONLY SPACE

21. We support the broad proposals set out in Scottish Government's Gender Recognition Act consultation document, and specifically:

- a) That Scottish Government should bring forward legislation to introduce a self-declaration system for legal gender recognition, ending the current system's requirement for "medical evidence or evidence of having lived in their acquired gender for a defined period".
- b) That Scotland should take action to recognize non-binary people.

22. We are aware, from some media coverage and blog posts, that there is speculation that the proposals in Scottish Government's proposals may somehow undermine violence against women service delivery organisations' capacity to meet women's needs. We are pleased to have the opportunity to clarify this point here.

23. The proposals set out by Scottish Government are entirely around the process for changing an individual's sex on their birth certificate. As we are not aware that any women's organisation or group currently in our networks requires sight of a birth certificate in order to grant access to services or membership, this will have no impact on our services or work. All access to membership and services is based on self-identification. This will continue.

24. All violence against women organisations that receive Scottish Government funding provide trans-inclusive services. The requirement for trans inclusion plans has been in place for six years, and has not given rise to any concerns or challenges of which we are currently aware.



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25. Rape crisis and women's aid services prioritise women's safety, confidentiality, privacy, dignity, and wellbeing above all else. Over decades of practice, services have developed ways of managing any risk to individual women's wellbeing that may arise from interacting with other service users. All of our organisations have processes in place to respond to the small numbers of perpetrators and so-called men's rights activists who attempt to disrupt services or women-only space, or harass or hurt service users or women participating in our events.
26. This discussion has thrown up some misconceptions about what it is like to access violence against women support and advocacy services, and our organisations will be thinking about ways we can share more information about how rape crisis and women's aid does its work.
27. We will also look in detail at any future proposals that impose legal requirements on violence against women services to change our practice. The proposals within the consultation do not make any such imposition, but we will be discussing this on an ongoing basis with Scottish Government and with regulators of our activity in Scotland.

RECOMMENDATIONS

28. We therefore recommend that:
- a) Scottish Government works with women's equality organisations and anti-discrimination law experts with a focus on gender to develop its thinking on changes it might propose to the Equality Act 2010;
 - b) Scottish Government includes gender-disaggregated data in its forthcoming review of the performance of the public sector equality duty; and
 - c) Scottish Government engages with the Equality and Human Rights Commission on the production of clear and concise guidance that spoke to this question.



For further information please contact Emma Ritch, Executive Director, Engender (emma.ritch@engender.org.uk 0131 558 9596)

ABOUT US

Close the Gap

Close the Gap works in Scotland on women's labour market participation. We work strategically with policymakers, employers and employees to influence and enable action that will address the causes of women's inequality at work.

Engender

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

Equate Scotland

Equate Scotland is the national expert on gender equality in science, engineering, technology and the built environment, we work with academia, industry and women working in and studying these sectors, to improve their recruitment, retention and progression. We focus on challenging and changing cultures across STEM.

Rape Crisis Scotland

Rape Crisis Scotland works to improve support for survivors of sexual violence and campaigns to change attitudes. We run a daily helpline from 6pm-Midnight for anyone affected by sexual violence, and we support 16 locally-based rape crisis services across Scotland.

Scottish Women's Aid

Scottish Women's Aid (SWA) is the lead organisation in Scotland working towards the prevention of domestic abuse and plays a vital role in campaigning and lobbying for effective responses to domestic abuse. SWA is the umbrella organisation for 36 local Women's Aid organisations across Scotland; they provide practical and emotional support to women, children and young people who experience domestic abuse. The



services offered by our members include crisis intervention, advocacy, counselling, outreach and follow-on support and temporary refuge accommodation

Zero Tolerance

Zero Tolerance has been working for 25 years to tackle the social attitudes and values that permit violence against women and girls to occur. We take a practical, evidence-based approach to challenging this violence and promoting change.