

Equal Recognition: Review of the Gender Recognition Act 2004

Detailed guidance on all the consultation questions

This guide aims to help you complete your online consultation response question by question. It is designed so that you can complete the consultation even if you choose not to read the full Scottish Government consultation paper.

The **full consultation paper** and the **online consultation portal** for submitting your response are both at:

<https://consult.gov.scot/family-law/review-of-the-gender-recognition-act-2004/>

The consultation is open until 5pm on Thursday 1st March 2018.

You don't need to live in Scotland, responses are accepted from anywhere in the world.

You can respond as an individual or as a representative of any size of group or organisation. You can tell the Scottish Government to keep your response confidential and/or anonymous.

For some questions, the Scottish Government sets out a specific proposal, and asks whether or not you agree. For others, it asks your opinion on a topic, or sets out a range of options without indicating a preference. We have tried to make this clear for each question in this guidance.

It is fine to skip any questions you are not interested in.

Whether you're an organisation or an individual, if you want to talk to us about how to ensure your consultation response can be most effective, please get in touch. We are also happy to help you with any accessibility requirements so that you can respond:

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Question 1: Self-declaration

The Scottish Government is proposing that Scotland should adopt a self-declaration system for legal gender recognition. Question 1 asks you if you agree with the government's position.

We **AGREE** with the government's proposal because moving to a self-declaration system would bring Scotland in line with international best practice, and remove the need for intrusive, dehumanising and humiliating evidence when applying for legal gender recognition. You can read more information about why moving to a self-declaration system matters at www.equalrecognition.scot/self-declaration

- If you are a trans person, you may want to leave a comment explaining why a move to self-declaration matters to you.
- If you are an ally, you may want to leave a comment explaining why you feel trans people shouldn't need to provide evidence to have their identities recognised.
- If you are an organisation, you may want to leave a comment explaining that you already include trans people on the basis of their self-declared gender identity, and that you welcome gender recognition law being brought in line with your practice.

Question 2: Requiring a statutory declaration

The Scottish Government is proposing that applicants to a new self-declaration system for legal gender recognition should have to provide a statutory declaration confirming they know what they are doing and intend to live in their acquired gender until death. (A statutory declaration is a legal written statement of fact which is signed in front of an authorised witness such as a Justice of the Peace or a solicitor.) Question 2 asks if you agree with the government's position.

We think that **YES** a statutory declaration should be required, as requiring that a person provide a statutory declaration will mean people don't make an application without thinking through the consequences of their decision, and will ensure that it would be a criminal offence to deliberately make a false application.

Question 3: Limits to number of applications

The Scottish Government is asking in Question 3 whether there should be a limit to the number of times a person can get legal gender recognition.

We think there should be **NO** limit. It is already the case that changing your legal gender is not an irreversible decision, and this should continue. Similarly to a marriage, although you would make the application with the intent of the decision being permanent, the law would allow for the possibility that circumstances change. If somebody's decision did change, they should be able to apply in the same way again to have their legal gender changed again.

Question 4: Who should the process be open to

The Scottish Government is considering whether the new system of legal gender recognition should be open: (A) only to people whose birth or adoption was registered in Scotland, or those who are resident in Scotland, or if (B) it should be open to everyone. Question 4 asks who you think the process should be open to.

We think the process should be open **TO EVERYONE** (which is option **B**). This would mean that asylum seekers would be able to access the legal gender recognition process. It would also mean trans people planning to visit Scotland for a while would be able to ensure their gender is recognised while they are here. It may also provide an option for trans people who live in other parts of the UK to have their gender legally recognised using self-declaration.

Question 5: Legal recognition for 16 and 17 year olds

The Scottish Government is proposing that 16 and 17 year olds should be able to apply for legal gender recognition through the same process as people who are 18 and over. Question 5 asks if you agree with the government's position.

We **AGREE** with the government's proposal, as we think that 16 and 17 year olds right to apply for legal gender recognition should reflect their rights in other aspects of their lives. 16 and 17 year olds can vote in elections, get married, and there is a general consensus in Scottish politics that 16 and 17 year olds have full legal capacity. You can read more information about why lowering the age at which people can get legal recognition of their gender is important at www.equalrecognition.scot/age

- If you are a trans young person, you may want to leave a comment explaining why lowering the age matters to you.
- If you are a trans person who wishes they were able to get legal gender recognition sooner, you may want to leave a comment explaining why lowering the age would have made things better for you.
- If you are a parent of a young trans person you may want to leave a comment explaining why lowering the age matters to you.
- If you are an organisation that supports young trans people, you may want to leave a comment explaining why lowering the age matters to you.

Question 6: Legal recognition for under 16s

The Scottish Government is asking which of five options is the best approach for legal gender recognition for under 16s.

- Option 1 – that legal gender recognition is not extended to people under 16.
- Option 2 – that legal gender recognition can be obtained by people under 16 via a court process. A child who was 12 or over, or a person with parental rights and responsibilities for a child, could make an application to the court. The court would make a ruling based on the child's welfare.
- Option 3 – that legal gender recognition can be obtained by people under 16 if people with parental rights and responsibilities for a child consent and make an application on their behalf. If there is more than one person with parental rights and responsibilities and they did not all consent, a court would make a decision based on the child's welfare.
- Option 4 – that legal gender recognition can be obtained by anyone who is 12 or over.
- Option 5 – that legal gender recognition can be obtained by any child who is capable of understanding the consequences of legal gender recognition. A child would need to be tested to see if they had the capacity to make the application, and this, rather than their age, would decide if they were able to obtain legal gender recognition.

Question 6 asks which one of these options you think is best.

We think that **OPTION 3 - PARENTAL APPLICATION** is the best approach, as it means that young trans people who are under 16 are able to obtain legal gender recognition using a straight-forward administrative framework. Parental application is already the method used to enable young trans people to change their name and gender marker on their passport, medical records and school database. However, we appreciate that we are not experts on children's rights, so are keen to support children's rights organisations who think there is a better approach to extending legal gender recognition to under 16. You can find out lots more information about why lowering the age at which people can get legal recognition of their gender is important at this section of our website.

- If you are a trans young person, you may want to leave a comment explaining why lowering the age matters to you.
- If you are a trans person who wishes they were able to get legal gender recognition sooner, you may want to leave a comment explaining why lowering the age would have made things better for you.
- If you are a parent of a young trans person you may want to leave a comment explaining why lowering the age matters to you.
- If you are an organisation that supports young trans people, you may want to leave a comment explaining why lowering the age matters to you.
- If you are an organisation or individual with expertise in children's rights, you may want to leave a comment explaining why lowering the age is important in respecting the human rights of children and young people. You may want to comment in detail on the options given and/or to propose a method which is not among those listed.

Question 7: Spousal veto

The Scottish Government is asking whether it should be possible to apply for and obtain legal gender recognition without any need for spousal consent. Question 7 asks what you think about this.

We think **YES** trans people should be able to get legal gender recognition without needing spousal consent. Obtaining legal gender recognition is a deeply personal and private decision, and allows an individual the right to have identity documents that reflect who they are. This should not be something that can be delayed or blocked by a spouse. Currently in Scotland, there is no need for spousal consent for legal gender recognition, so it would be a serious backwards step to begin requiring it. (During the passage of equal marriage legislation in Scotland we achieved an amendment which removed the need for spousal consent.)

- If you are a trans person, you may want to leave a comment explaining why requiring spousal consent is unacceptable to you.
- If you are the spouse or partner of a trans person, you may want to leave a comment explaining why you don't think it is fair for you to hold a veto power over their right to legal gender recognition.

Question 8: Civil partnership

The Scottish Government is asking whether or not a person who obtains legal gender recognition should be able to remain in a civil partnership. At the moment, civil partnerships are only available to same sex couples. If one spouse wants to obtain legal gender recognition whilst in a civil partnership, they either have to convert their civil partnership to a marriage, or dissolve their civil partnership.

Question 8 asks if there should be a change to this approach, so that people who obtain legal gender recognition can stay in their civil partnerships. This would mean there may be some mixed sex civil partnerships.

We think **YES** they should be allowed to remain in their civil partnerships. One of the calls of our Equal Marriage campaign was that civil partnerships should be opened up to everyone, not just to same sex couples. This could be an important first step in changing government policy around civil partnerships.

- If you are a person who has had to convert your civil partnership to a marriage, or dissolve your civil partnership, because you or your spouse obtained legal gender recognition and you would have preferred to remain in your civil partnership, you may want to leave a comment explaining what this would have meant to you.
- If you think that civil partnerships should be open to all couples, you may want to leave a comment explaining why.

Question 9: Grounds for divorce

The Scottish Government is proposing that legal gender recognition should stop being a ground for divorce or dissolution. Question 9 asks if you agree with the government's position.

We think **YES** gender recognition should stop being a ground for divorce, as we think that it is unfairly stigmatising of trans people for there to be a specific grounds of divorce based on obtaining legal gender recognition.

- If you are a trans person, you may want to leave a comment explaining why you feel that legal gender recognition being a specific grounds for divorce is unacceptable.

Question 10: Prohibition on disclosure of information (section 22)

The Scottish Government is asking in Question 10 whether any changes are needed to Section 22 of the Gender Recognition Act, which protects people's privacy and governs the rules about disclosure of information about people who have a Gender Recognition Certificate.

We think **NO** changes needed – the existing exemptions seem sensible, and we think that there is no need to add any others. Upholding trans people's privacy is one of the key principles of a legal gender recognition process, and we think that any additional exemption may undermine this.

Question 11: Recognising legal gender recognition from other countries

The Scottish Government is asking if a person who already has legal gender recognition from another country should be automatically recognised in Scotland without having to make an application here. Question 11 asks what you think about this.

We think that **YES** a person who has gender recognition from another country should be automatically recognised in Scotland. At the moment, people with legal gender recognition from other countries have to make an application, often needing to provide translated evidence, or gain medical reports from doctors based in the UK even if they have been transitioned and legally recognised somewhere else for many years. As we hope that Scotland will move to a process of legal gender recognition that reflects international best practice, there would be no reason to not automatically accept legal gender recognition from other countries.

- If you are a trans person who has received legal gender recognition in another country, you may want to leave a comment explaining why recognising gender recognition from other countries matters to you.

Question 12: Non-binary recognition

The Scottish Government is asking, in Question 12, if Scotland should take any action to recognise non-binary people. This question does not ask if non-binary people should gain full legal gender recognition. It just asks if the government should do anything at all to improve the recognition of non-binary people in Scotland.

At the minute there is very little recognition for non-binary people in Scotland; as well as not having legal gender recognition, non-binary people are often routinely not recognised in service provision, on identity documents, and in employment.

We think **YES** action should be taken to recognise non-binary people in Scotland. Non-binary people's identities are just as valid as those of trans men and trans women, and it is vital that there are steps taken to ensure they are better recognised and included in society. You can read our research into the discrimination and exclusion non-binary people face at www.scottishtrans.org/non-binary and you can read more about why legal recognition for non-binary people matters at www.equalrecognition.scot/non-binary

- If you are a non-binary person, you may want to leave a comment explaining the impact of the current lack of recognition, both legal and otherwise, in Scotland.
- If you are an ally, you may want to leave a comment explaining the unjustness you feel in seeing non-binary friends, family members or partners not having recognition.
- If you are an organisation, you may want to leave a comment explaining how you recognise and include non-binary people in your service provision or work, and how you would like to see the government take the same approach.

Question 13: How to give recognition to non-binary people

The Scottish Government is putting forward six options for how increasing recognition of non-binary people might work. Unlike with other questions on the consultation you can select as many options to this answer as you would like to see happen.

- Option 1 – that the Scottish Government and Scottish public bodies review all administrative forms, and ensure that where possible they ask questions about gender in ways that are inclusive of non-binary people.
- Option 2 – that National Records of Scotland creates a ‘Book of Non-Binary Identity’ in which you could have your name entered. This would have no effect on your legal gender. The Scottish Government doesn’t favour this option as it does not advance the recognition of non-binary people.
- Option 3 – that the Scottish Government seeks changes to some identity documents, such as passports and driving licenses.
- Option 4 – that non-binary people have access to full legal gender recognition, under the same new proposed system of self-declaration, using a statutory declaration.
- Option 5 – that there is an incremental approach to recognising non-binary people. The Scottish Government would commit to doing this gradually, by implementing Options 1-3, and researching further the needs and implications of recognising non-binary people.
- Option 6 – seek updates to the Equality Act. This would involve updating the protected characteristic of gender reassignment to gender identity, to ensure fuller and more explicit protection of all transgender people, which may particularly benefit non-binary people.

Question 13 asks which of these options you would like to see happen for furthering recognition of non-binary people.

We think that **OPTIONS 1, 3, 4 and 6** are the best options for non-binary people. We think that non-binary people should have access to the same legal gender recognition process as trans men and trans women. For all of the reasons that the Scottish Government accepts and recognises that trans men and women should be able to have their gender legally recognised, it should follow that if they consider

non-binary people's identities to be as legitimate and valid, that they should also have access to an equal legal gender recognition process. That is why option 4 should be selected. You can read more about why legal recognition for non-binary people matters.

Options 1 and 3 will ensure that non-binary people can complete forms in a way that is respectful and true to their gender identity, and have identity documents that reflect this.

We also think that updating the Equality Act is an important legislative step for improving the rights of all transgender people, not just non-binary people. We think the government has not explained this option very clearly in the consultation paper. Despite this, we still think that option 6 is an important step.

We don't favour option 2 for the same reason as the Scottish Government – it is merely symbolic and doesn't materially change the recognition of non-binary people.

We don't favour option 5 because we want to see full legal gender recognition of non-binary people as a result of this reform.

- If you are a non-binary person, you may want to leave a comment explaining the impact of the current lack of recognition, both legal and otherwise, in Scotland.
- If you are an ally, you may want to leave a comment explaining the unjustness you feel in seeing non-binary friends, family members or partners not having recognition.
- If you are an organisation, you may want to leave a comment explaining how you recognise and include non-binary people in your service provision or work, and how you would like to see legal gender recognition take the same approach.
- If you are an organisation specialising in human rights, you may want to leave a comment explaining why non-binary people should be entitled to the same fundamental right to have their identities recognised as men and women.

Question 14: Consequential legal impacts of non-binary recognition

The Scottish Government is asking if you know of any other areas of devolved law (law that the Scottish Government has powers over) that will be impacted by legally recognising non-binary people. The Scottish Government outlines a number of consequential changes that would be needed to other areas of law if non-binary people are recognised. These include:

- Family law (particularly around parentage)
- Marriage law
- Registration law
- Criminal law where there are gender specific offences
- Rights for victims of crime – e.g. being able to specify the gender of their police interviewer

Question 14 asks if you know of any others. The ones outlined by the government include all of the areas of devolved law that we are aware of. If you do know of any others, we'd love for you to get in touch and discuss this with us as well as submitting a response to the consultation.

Question 15: Comments on the impact assessments

In the annexes of the full consultation paper, the Scottish Government has included the impact assessments that it has partially carried out:

- Annex L - Partial Business and Regulatory Impact Assessment
- Annex M - Partial Child Rights and Wellbeing Impact Assessment
- Annex N - Partial Equality Impact Assessment
- Annex O - Partial Privacy Impact Assessment

Question 15 asks you if you have any comments about, or evidence relevant to, these four impact assessments.

Question 16: Any further comments about Gender Recognition Act reform

Question 16 provides you with space to make any comments that didn't fit under the other question topics.

- If there are any further aspects of the gender recognition application process that you wish to see improved, you might want to explain your views here.
- If you are a trans person who has decided to wait until the Gender Recognition Act is reformed before applying for legal recognition, you might want to explain why here.
- If problems with the current gender recognition process have had any negative practical or emotional impact on you, then you could describe that here.
- You might want to tell the Scottish Government if you have been affected in any way by recent anti-trans media coverage, comments or behaviour.

The **full consultation paper** and the **online consultation portal** for submitting your response are both at:

<https://consult.gov.scot/family-law/review-of-the-gender-recognition-act-2004/>

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