

# Response ID ANON-ETBC-GV3C-H

Submitted to **Review of the Gender Recognition Act 2004**

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## The Gender Recognition Act 2004

**1 The initial view of Scottish Government is that applicants for legal gender recognition should no longer need to produce medical evidence or evidence that they have lived in their acquired gender for a defined period. The Scottish Government proposes to bring forward legislation to introduce a self-declaratory system for legal gender recognition instead.**

Agree

**If you want, you can give reasons for your answer, or make comments. :**

Gendered Intelligence is in strong favour of legislating for a self-declaration system for gender recognition, in line with international best practice. The current system is paternalistic and intrusive, only permitting a person's gender identity to be legally bestowed upon them as though through altruism, rather than as an act of private and autonomous self-identification. A system of self-declaration moves away from the pathologising and medicalised one in place at the moment, and enables people to have their identities recognised with efficiency and, as importantly, dignity.

We would also raise concerns with the concept of "living in an acquired gender" as something that is both tangible and measurable by an external party (the Gender Recognition Panel). This panel effectively sits in judgment over whether a person's gender identity is sufficiently 'valid' or 'real' to warrant recognition, which seems an odious infringement on a person's right to self-identify. The Scottish Government must enable people to live freely in their chosen gender identity, whether binary or otherwise, without reinforcing strict ideas of what that should look like in practice. Gendered Intelligence includes all employees, clients and stakeholders by their self-declared gender identity, and would welcome this being rolled out more widely, both institutionally and government-wide.

A country requiring its citizens to seek medical treatments or diagnoses to gain legal recognition of their gender identity is in danger of breaching the European Convention on Human Rights' tenet of privacy, and as such it is right that the Scottish Government is looking to move away wholesale from this model and towards compliance of Resolution 2048 of the Parliamentary Assembly.

**2 Should applicants to the proposed gender recognition system in Scotland have to provide a statutory declaration confirming they know what they are doing and intend to live in their acquired gender until death?**

Yes

**If you want, you can give reasons for your answer or make comments.:**

Yes. Gendered Intelligence works closely with young trans people, and as such we know that people are already sure of their gender identities from an early age. However, making such a declaration remains important for several reasons. From a legal standpoint, providing a statutory declaration makes a person review and accept the seriousness and intended permanence of their statement, highlighting in turn the criminal offence of providing one in bad faith. On a personal level, providing such a declaration should be a liberatory experience for those seeking gender recognition and the act of preparing and disseminating it a radical exercise in autonomy and garnering societal acceptance.

Per section 3.29 of the Scottish Government's consultation response guidance, we highlight the importance of the process being free throughout, including ensuring free access to a notary public or justice of the peace where the need is clearly demonstrated. Providing the declaration must be an entirely free and accessible act, meaning that everyone regardless of means or ability is able to do so. This is particularly important for younger people who might be excluded from the process if it is costly, as legal gender recognition provides critical documentary evidence of permanent change. Schools are frequently prone to discount pupils' self-determined gender identities without formal documentation, so access to the self-determination process would be a key milestone in providing autonomy and complete, proper recognition for them.

We are also minded to state our opposition to a 'reflection period' as required in Belgium. The Scottish Government's own research into countries using self-declaration system (including Ireland, the population of which is similar in size to that of Scotland) has shown no evidence of false statements being made by applicants, so forcing people to delay the process to reflect appears to be both a red herring and an arbitrary hindrance. It should be noted that several countries which are leading the way by having successfully introduced a system of self-determination with regards to gender identity, including Ireland and Malta, have no such 'reflection period'.

Gendered Intelligence would like to raise issue with the term 'acquired gender' as though something taken on frivolously. We propose 'declared gender' be used throughout all further work commissioned by the Scottish Government around this consultation, to highlight that self-determination isn't to do with acquisition but rather affirmation of an already-defined gender identity.

**3 Should there be a limit on the number of times a person can get legal gender recognition?**

No

**If you want, you can give reasons for your answer or make comments.:**

No. Whilst people seeking out legal gender recognition are certain of their identities, we must allow legal space for possible recourse where divergence and exception exists. Where a system of self-declaration is in place, we're minded to consider the importance of allowing people the freedom of self-identification through removing unnecessary burdens and hurdles. Gendered Intelligence seeks to promote understanding of the diversity of gender identity and expression that exists in society, including the reality of gender fluidity. We are advocates for the model of gender identity as existing on a spectrum, and as such could never endorse removing the freedom to slide freely along that.

With governments increasingly demanding gender markers only where explicitly required, the bureaucratic importance of such markers being asked for and/or

measured is set to dwindle. Gender identity is an acutely personal decision and series of acts, then, that the government has no place in limiting or hindering access to. There would appear to be no legal or moral reason as to why there should be a limit on the number of times a person can affirm their gender.

**4 If the Scottish Government takes forward legislation to adopt a self-declaration system for legal gender recognition, should this arrangement be open:**

B. to everyone?

**If you want, you can give reasons for your answer or make comments.:**

B - Self-declaration should be open to everyone, regardless of where they are from or their legal status. It is in the spirit of the proposed act to ensure inclusivity for all, including enabling access to asylum seekers and people visiting Scotland for an extended period, but not residing in it. As an organisation that works across the UK, Gendered Intelligence would advocate for there to be scope for rest-of-UK residents to have access to the Scottish model in the interim, in absence of a less intrusive process outwith Scotland.

**5 The Scottish Government proposes that people aged 16 and 17 should be able to apply for and obtain legal recognition of their acquired gender. Doyou agree or disagree?**

Agree

**If you want, you can give reasons for your answer or add comments.:**

Gendered Intelligence strongly agrees with the Scottish Government that 16 and 17 year olds should be able to obtain legal gender recognition without obstacle. At age 16, a person may already change their name, receive any medical or surgical treatment they desire and even get married with no permission or consent required from parents. It would be senseless to deny 16 and 17 year old citizens the right to have their gender affirmed and recognised by virtue of their not being 18, when their ability to capably give consent is already enshrined in Scots law.

**6 Which of the identified options for children under 16 do you most favour?**

Option 3 – parental application

**If you want, you can give reasons for your answer, add comments, or describe your preferred option if none of the options given reflects your views.:**

None of the options given ensure that all children are supported by the new process, but we propose several ways in which we can attempt to at least minimise the number of people who will fall through the gaps. Gendered Intelligence submits that parental application (option 3) is the most favourable of the options, but is only workable in conjunction with the caveat option of applications by capable children (option 5) when parental consent is not (or cannot be) granted.

Option 3 would appear to be best for children and their parents as it works under the assumption that young people have parental support in their decision to change legal gender identity. In cases where parental consent is not granted, there already exists the option under Scottish Law for children under 16 to make a case for their having decision-making capacity. We do not favour option 5 in and of itself, as it is potentially arduous, goes against the ethos of the proposed legislation which is one of creating ease of access to gender identity self-determination, and is potentially expensive. It also carries with it the risk of familial relationship dissolution by proxy.

We would be remiss to not carefully consider the balancing needs of gender-variant children with the forced prescription of a gender-variant identity upon a child without having vocalised any such intention, or who is simply playing around with gender norms and expectations as children are wont to do. It is important that a person with Parental Rights and Responsibilities does not let their possible conflation of separate praxes influence the child in making such a pivotal decision around self-declaration. This is particularly important when considering the safeguarding needs of younger children.

Gendered Intelligence concedes that our expertise is not centred on issues surrounding Children's Rights, but are minded to reinforce that young people and children's access to self-determination must be inalienable.

## **Marriage and Civil Partnership**

**7 Should it be possible to apply for and obtain legal gender recognition without any need for spousal consent?**

Not Answered

**If you want, you can give reasons for your answer or add comments.:**

We see no reason why spousal consent should factor into the obtainment of legal gender recognition. Obtaining legal gender recognition is an immensely personal act, not one which needs to be vetted by others. We should all be working to make the system more accessible, less intrusive and more self-affirming, rather than passing the onus of consent to another party. In permitting the concept of a 'spousal veto', we would only be discouraging true autonomy over a person's identity. An introduction of the concept to Scots law would be a bizarre and unnecessary kowtowing to conservatism, and would permit emotionally abusive spouses to deny trans people their current legal rights.

**8 Civil partnership is only available to same sex couples. This means that the civil partners cannot remain in their civil partnership if one of them wishesto obtain a full Gender Recognition Certificate.**

Yes

**If you want, you can give reasons for your answer or add comments.:**

Notwithstanding the plummeting rates of civil partnerships since the introduction of equal marriage in Scotland (accounting for just 6% of "same-sex" partnerships in Scotland now, according to National Records of Scotland), it would appear to be an insidious invasion of privacy to demand someone either dissolve their decidedly lifelong commitment, or force them to have it converted into a contract they did not originally enter (i.e. marriage). Changes to the legislation on civil

partnerships seems likely in the near future, meaning opposite-sex couples will have the right to enter into one in the coming years. It would be counterintuitive for the Scottish Government to be creating legislation now that is only set to become outdated very soon.

In addition, Gendered Intelligence notes that giving formal notice for a wedding necessitates providing a “sex” on the form. This strikes us as an irrelevance with marriage being equalised for all citizens regardless of sex or gender identity, as well as forcing non-binary people to feign a binary identity to ensure legal recognition and inclusion.

## **9 Should legal gender recognition stop being a ground of divorce or dissolution?**

Yes

### **If you want, you can give reasons for your answer or add comments.:**

Yes. Gender recognition should not be an exceptional ground for divorce, as this unduly stigmatises and marks trans people as ‘other’. Gender recognition being a ground for divorce suggests that the person seeking it has committed an act which warrants some sort of automatic ‘get-out clause’ as punitive measure. Ending legal gender recognition as a ground of divorce will help end the opprobrium that often goes hand in hand with societal views of gender recognition, and should be enacted by the Scottish Government as soon as possible.

## **Other aspects of the 2004 Act**

## **10 Are any changes to section 22 (prohibition on disclosure of information) necessary?**

Yes

### **If you answered Yes, describe the changes you consider are needed.:**

Section 22 needs urgent reform regarding subsection (4)(c). In its current form this section allows protected information to be disclosed if a person’s Gender Recognition Certificate status is unknown. We recommend this loophole be closed, so that arbitrary ‘outing’ or disclosure of someone’s protected information is an offence, regardless of perceived certificate status. It is not for anyone else to disclose another person’s gender identity or status, especially with regards to the Scottish Government’s proposed changes to the Act meaning certificate status will have less relevance.

## **11 Should a person who has been recognised in their acquired gender under the law of another jurisdiction be automatically recognised in Scotland without having to make an application?**

Yes

### **If you want, you can give reasons for your answer or add comments.:**

Yes. Gendered Intelligence’s view on this is aligned with that of the Scottish Government – that this should happen automatically, with public policy exceptions. Exceptions must be rigorously adjudicated, so as to not discount serious concerns about the process of gender acquisition in another jurisdiction, whilst recognising that bureaucratic demands (e.g. translation into English) can delay or hinder a person’s right to self-determination.

The act of having to reapply for an already established legal gender could cause significant and unnecessary distress to the applicant and it is right that the Scottish Government is taking steps to address and avoid this.

## **Non-binary people**

## **12 Should Scotland take action to recognise non-binary people?**

Yes

### **If you answered No, and if you want, you can give reasons for your answer.:**

Yes. We work with a wide range of trans and gender diverse people, with as much as a third of this group identifying as non-binary. Gendered Intelligence is firmly of the opinion that ignoring non-binary people in this review would be tantamount to legitimising continued discrimination through tacit inaction.

Scotland has a reputation as one of the most progressive countries when it comes to the rights of its LGBTI population, and it should not and cannot languish when it comes to the rights of non-binary people. The Scottish Government must make strides towards full, sensible and autonomous recognition of non-binary people so that they are able to live their lives fully without impediment or exclusion.

## **13 If you answered Yes to Question 12, which of the identified options to give recognition to non-binary people do you support? You can select more than one option.**

Option 1: Changes to administrative forms, Option 3: Limited document changes, Option 4: Full recognition using proposed self-declaration system, Option 6: Amendment of the Equality Act 2010

### **If you want, you can give reasons for your answer, add comments or, if you think none of Options 1 to 6 is suitable, describe your preferred option.:**

We recognise that in order for non-binary people to receive the legal recognition they deserve, a sea change of legislation has to be brought into place. It is no minor feat but the following proposed changes need to be made collaboratively and synergistically if non-binary people are to be afforded the same rights as their fellow citizens.

We propose option 1 – changes to administrative forms – as an easy win for the Scottish Government, something that can be near-immediately brought into force. The UK Government has recently announced changes to its information gathering so as to “only ask about gender or sex if you can’t deliver your service without this information”. This is a desirable change but doesn’t go far enough towards non-binary inclusion. We would welcome the immediate inclusion of

'non-binary' as an option on all official documentation from the Scottish Government, with a commitment to not backtrack to an "unspecified" option as the UK government has done. Explicit mention and recognition of 'non-binary' as a valid gender identity is an important step in wider legitimisation, and one which the Scottish Government would be remiss to exclude.

Option 3 – limited identity document and record changes – will ensure that non-binary people have access to identity documents which ring true with their gender identity, rather than forcing them to reduce this to working within the binary framework. Several countries permit citizens to have 'x' as their sex marker on passports already – Gendered Intelligence would welcome a similar move in Scotland, whilst recognising the logistical difficulties of divergence from the UK-wide system. We would recommend that the Scottish Government presses for wider change and recognition of non-binary rights across the UK, through actively lobbying the UK Government to fulfil its overdue commitments per the Women and Equalities Select Committee's Report on Transgender Equality.

Option 4 – recognition using proposed self-declaration system – is another instance where the Scottish Government needs to enact larger changes to its legislation to enable recognition of a new legal sex. The Scottish Government is making clear commitment to trans men and women for them to be allowed legal gender recognition through self-declaration, and this must be extended to non-binary people to ensure full protection for all trans people, whether they identify within a binary system of gender or not.

Option 6 – seek amendment of the Equality Act 2010. Whilst the Gender Recognition Act 2004 has been devolved to Scotland, the Equality Act 2010 remains reserves to legislative change in Westminster. It is pivotal for the Scottish Government to be actively lobbying for amendment of the act to include further discourses surrounding non-binary people, removing them from a legalistic limbo wherein their rights cannot be fully recognised by the Scottish Government whilst working under the auspices of the superseding UK-wide act.

**14 At paragraph 7.26. and in Annex J we have identified the consequential legal impacts if non-binary people could obtain legal gender recognition using the proposed self-declaration system.**

No

**If you answered Yes, describe the impacts you have identified.:**

## **Conclusion**

**15 Do you have any comments about, or evidence relevant to:**

No

**If you answered Yes, add your comments or evidence.:**

**16 Do you have any further comments about the review of the Gender Recognition Act 2004?**

Not Answered

**If you answered Yes, add your comments.:**

When the Gender Recognition Act 2004 was brought into force, it was a ground-breaking piece of legislation, allowing trans and gender diverse people to have their realities legally recognised. It has since become outdated and outmoded compared to other systems in place across the world, especially with regards to how it negates the lived experiences of non-binary people. The gaps in the Act through which certain people continue to fall have become too apparent to ignore.

The Scottish Government's commitment to the Yogyakarta Principles is considered and timely within the Government's grander view of becoming a thought leader in inclusivity. With self-identification now viewed as the global paragon when it comes to trans rights, it is right and proper that Scotland joins Denmark, Columbia, Malta, the Netherlands, Sweden et al, in helping alleviate burden and stigma from its minority citizens.

This review is well placed to ensure Scotland leads at the forefront of increased trans rights and recognition of non-binary people, leading in turn, we would hope, to greater UK-wide changes being implemented.

## **About You**

**What is your name?**

**Name:**

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**Are you responding as an individual or an organisation?**

Organisation

**What is your organisation?**

**Organisation:**

Gendered Intelligence

**If you are responding as an organisation and want to tell us more about your organisation's purpose and its aims and objectives, you can do so here.**

**If you are responding to this consultation as an organisation and want to tell us more about your organisation's purpose and its aims and objectives, please do that here.:**

Gendered Intelligence is a not-for-profit Community Interest Company, established in 2008.

Our mission is to increase understandings of gender diversity through creative ways.

Our vision is of a world where people are no longer constrained by narrow perceptions and expectations of gender, and where diverse gender expressions are visible and valued.

We work with the trans community and those who impact on trans lives; we particularly specialise in supporting young trans people aged 8-25.

**Where are you resident?**

Rest of the UK

**The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:**

Publish response with name

**We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?**

Yes

**Evaluation**

**Please help us improve our consultations by answering the questions below. (Responses to the evaluation will not be published.)**

**Matrix 1 - How satisfied were you with this consultation?:**

Very satisfied

**Please enter comments here.:**

**Matrix 1 - How would you rate your satisfaction with using this platform (Citizen Space) to respond to this consultation?:**

Very satisfied

**Please enter comments here.:**