



# Gender recognition reform: Unanswered questions

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## 1. What are the legal effects of a GRC?

The Scottish Government has not explained on what basis it believes that a Gender Recognition Certificate (GRC) confers no new rights, has no implications for other people, or why its position differs to the UK Government.

The Ministry of Justice's [transgender prisoner policy](#) treats male prisoners with a GRC as if they were biological females. A [judicial review](#) heard by the High Court in England last year acknowledged the harms of this policy to female prisoners but nonetheless upheld it.

The [judgment](#) in a 2021 judicial review in the High Court of Northern Ireland stated: "*I accept the [UK government's] submission that the legal change in a person's gender is a significant and formal change in their status with potentially far-reaching consequences for them and for others, including the State.*"

## 2. What is meant by 'living in the acquired gender'?

The Scottish Government insists that a requirement to 'live in the acquired gender' is a safeguarding mechanism, but refuses to state what it means to 'live as a woman' or 'live as a man'. In meetings with [us](#) and women's groups, the Cabinet Secretary stated that changing the sex marker on a driving licence might be regarded as evidence. But it is not clear whether even that would be checked at the time of application.

## 3. How will a false declaration be demonstrated?

As a further safeguard, a false declaration will constitute a criminal offence, punishable up to 2 years imprisonment. But this looks impossible to prove. The Scottish Government has only [offered](#) scenarios of a person "boasting" they had made a false declaration, or a spouse or partner giving (unspecified) evidence that this was the case.

## 4. How will self-declaration affect sex discrimination cases?

To make a sex discrimination claim a woman needs to demonstrate she has experienced less favourable treatment compared with an equivalent male. If a male changes legal sex, he cannot be used as a [comparator](#). The Scottish Government estimates a ten-fold increase in the number of applicants but has not undertaken any analysis to establish the potential impact on sex discrimination claims.

## 5. What are the cross-border effects?

Changing sex in law will be open to anyone who is 'ordinarily resident' in Scotland and/or born in Scotland. The Scottish Government has [stated](#) 'there is no requirement to be resident for a fixed period of time'. This opens up self-declaration to applicants from elsewhere in the UK, based on an unspecified short stay in Scotland. The process will also be open to all students attending a Scottish university. Scottish-born prisoners housed in the prison estate in England and Wales may be eligible.

It is unclear if a GRC granted in Scotland, which will be granted at a much lower threshold compared to England and Wales, will have the same effect UK-wide as one granted under the current system.

## 6. How will the Scottish Government monitor the impact of self-declaration?

In September 2021, the Scottish Government issued guidance to all Scottish public authorities, advising them to only collect data on biological sex in exceptional circumstances. This bolstered existing data collection practices by some public authorities, including Police Scotland, who [recently told](#) the Criminal Justice Committee it adopted a self-declaration position in 2019 'to prepare for the Gender Recognition Reform Act'. This means it will not be possible to monitor the impact of self-declaration, where these could be measured through changes in participation or behaviour, because public authority datasets no longer gather data on biological sex.

## 7. How will same-sex spaces be protected?

It is unclear how the Scottish Government will '[protect and uphold women's rights](#)'. As acknowledged by the Cabinet Secretary in meetings with [ourselves](#) and others, many public authorities and private organisations have moved ahead of legal reform and already put in place policies based on self-declaration, including the Scottish Prison Service and health authorities. Legal reform makes it even more unlikely that organisations will revert to setting boundaries based on physical sex, even when permitted.

The Scottish Government's [view](#) is that decision-making should fall to service providers, or will be directed by forthcoming guidance from the Equality and Human Rights Commission (EHRC). Either way, it has delegated all responsibility.

## 8. How can same-sex health care be guaranteed?

One of Scotland's largest NHS Boards [stated](#) in December 2018 that it cannot guarantee a female healthcare practitioner or carer for someone who requests one due to the privacy clause in Section 22 of the Gender Recognition Act.

## 9. What about evidence from other countries with self-declaration laws?

That other countries with similar laws to those proposed by the Scottish Government are experiencing problems, particularly in relation to prison accommodation, are [beyond doubt](#). This is not acknowledged by the Scottish Government.

## 10. What about the impact on social conventions?

It is [social convention](#) that keeps men out of women's spaces, not birth certificates. These conventions allow women to challenge obvious males in women-only spaces, and make men wary of breaching them. There is already evidence that these conventions are breaking down, for example, signage that advises to women not to challenge anyone who they think should not be in a female only space. Legislation that enshrines sex as self-declared can be expected to contribute to hesitancy on the part of women and junior staff to draw on this convention, and the willingness of some men to take advantage of that.

## 11. How many people will apply for a Gender Recognition Certificate?

There is no reliable estimate of the trans population, nor the anticipated number of applicants under a self-declaration model. The 2017 Scottish Government [consultation](#) estimated applications "in the range of 250 to 400 applications per year". It lowered this to 250 applications in the 2019 consultation without explanation. Since the application fee was lowered from £140 to £5 in 2021, the number of applications has doubled. The Scottish Government [has not taken](#) this into account.

## 12. Why has the Scottish Government not taken women's concerns or criticism seriously?

The Scottish Government has [failed](#) to "conscientiously take into account" any criticism of its proposals. It states that two consultations have taken place and that a majority favoured reform in the first, but framed the second consultation that made comparison over time impossible. It has not addressed the concerns in the consultations, and only published a summary report of the second. Fundamentally, it fails to understand that allowing a much wider group of people to change their sex in law, without any objective test or substantial safeguards, carries risks. Opening up the process to people *who are not currently eligible to change their sex in law* is not a simple administrative change.

## 13. Has the Scottish Government addressed concerns about reducing the age for obtaining a GRC?

The draft Gender Recognition Reform Bill proposed lowering the age at which an individual can apply for a GRC from 18 to 16 years old. In his [submission](#) to the 2019 consultation, the Children's Commissioner expressed concern that more research is needed to ensure 'safeguards' are in place before the legal age is lowered. There is no evidence to suggest the Scottish Government has undertaken such research.

## 14. Why has the Scottish Government not considered any alternative reform options?

The Scottish Government has [not explored](#) any alternatives to self-declaration, for example, reducing the administrative requirements whilst retaining a diagnosis of gender dysphoria.