

# Comparing consultations on gender recognition reform and the impact on the operation of the Equality Act: who asked, who listened?

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## Introduction

On 17 January, the UK Government [issued](#) a [Section 35 order](#) under the Scotland Act 1998, preventing the Gender Recognition Reform (Scotland) Bill from proceeding to Royal Assent. The UK Government set out its arguments in a '[Statement of Reasons](#)', which focused principally on how reform would affect the operation of the Equality Act 2010 (EA2010) and the adverse impact on women and girls.

In response, Scotland's First Minister [said](#), *"If there had been these concerns, and I still don't understand the basis for these concerns about the interaction with the Equality Act, [they] would have been raised at a much, much earlier stage through some of the formal processes that are in existence."* Speaking to the BBC [she said](#), *"I have not heard any argument about the impact on the Equality Act that I find in any way persuasive or compelling, because the Act does not change the legal effect of a gender recognition certificate."*

That such concerns were raised with the Scottish Government (SG) is beyond doubt. We have documented our own extensive communications throughout the Bill process (see [here](#)). Following the First Minister's comments, the Equality and Human Rights Commission (EHRC) published a [statement](#) listing its previous correspondence with the Scottish Government (SG), dating back to January 2022.

Just as it is clear that the SG was aware of concerns in relation to the effects of the Bill on the operation of the EA2010, it is equally clear that the government chose not to listen. In this blog we look at the two SG consultations on gender recognition reform, published in 2017 and 2019, and the UK consultation, published in 2018, focusing on the interaction between the EA2010 and the Gender Recognition Act 2004. The analysis is structured chronologically and looks at the questions in each consultation, the independent analyses published by each government, and the respective government responses.

The analysis shows that circa 2017/2018 the two governments held similar positions in respect of the interaction between the 2004 and 2010 Acts. Both appeared not to foresee any significant concerns apropos a self-declaration model of gender recognition. However only the SG presented its view as definitive, putting it beyond question. By contrast, the UK Government consultation explicitly sought views on detailed aspects of the EA2010 and how its operation might be affected.

Not only did the SG avoid asking about any impacts on the EA2010, even when respondents had set out their concerns, these were flatly dismissed. As the First Minister bluntly told the BBC in September 2021: “while I appreciate that some of these views are very sincerely held, in my view, [they] are not valid.”

As we have [argued before](#), we think the SG approach to policy development and consultation here raises serious questions in relation to the ‘Gunning Principles’. These set out the tests public authorities should meet in order to undertake a lawful consultation. These include a requirement to ‘conscientiously’ consider the results of any consultation.

To the extent that the SG chose not to ask respondents about any interaction with the EA2010 in either consultation and further dismissed the concerns that were nonetheless documented in responses to both, it is difficult to see how this requirement has been met.

## **November 2017: 1st Scottish Government consultation**

The [first SG consultation](#) opened on 9 November 2017, closing on 1 March 2018. An accompanying [Q&A](#) stated: ‘To help develop well-informed policy and legislation, it is important that we receive responses reflecting the range of views held on this subject’. The SG’s own view was made clear in the Q&A. This indicated that women’s services were unlikely to be affected given that most services had introduced policies based on self-declaration, ahead of the law on legal gender recognition changing, and that reform would not change the exceptions in the EA2010. Amending the EA2010 directly was an impossibility anyway, given doing so here would be outside the Parliament’s “legislative competence”, as defined in the Scotland Act 1998.

That month Women’s Spaces Scotland (WSS, which was the forerunner of For Women Scotland) wrote to the SG requesting a meeting, which took place on 22 February 2018. The agenda listed ‘impact of reform on single-sex services and facilities’, among other items. WSS suggested it should be followed up with a roundtable, to be convened by SG. However the SG did not take this forward.

The 2017 SG [consultation paper](#) set out 16 questions, most with open and closed options. The first question, on the intention to remove the medical diagnosis of gender dysphoria, set out the SG view:

Q1. 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-declaration system for legal gender recognition instead.

Do you agree or disagree with this proposal? Agree/Disagree/DK  
If you want, you can give reasons for your answer or add comments

The remaining questions asked about the retention of a statutory declaration, the number of times a person should be allowed to change their legal gender, who the process should be open to, the minimum age, whether arrangements should be put in place for under 16s, arrangements pertaining to spousal consent, marriage/civil partnerships and divorce, and recognition for those who had changed their legal gender in another country. The consultation also asked whether Scotland should take action to recognise non-binary people, with options ranging from a proposal for a Book of Non-Binary Identity, administered by the National Records of Scotland, to seeking an amendment to the EA2010 by the UK Government.

Two questions pertained to the EA2010, albeit indirectly. Question 10 asked about any necessary changes to section 22 (prohibition on disclosure of information). This section makes it a criminal offence to disclose that a person has a GRC or their biological sex, if someone has come into possession of that information in an official capacity. This affects the operation of the EA2010 in practice, because in many circumstances, it will leave staff unable to acknowledge the biological sex of a GRC holder, in contexts where this matter. For further background on section 22, see [here](#).

Question 15 asked for comments or evidence relevant to the partial Equality Impact Assessment (EQIA). This acknowledged ‘some women’s groups may have concerns on equality or societal grounds’ and highlighted the need ‘to consider carefully any points raised by consultees relating to the protected characteristics of sex (particularly in relation to women) and religion and belief’.

## **July 2018: UK consultation on GRA reform**

On 3 July 2018 the UK Government opened its [consultation](#) on gender recognition reform. It closed on 22 October 2018.

In contrast to the SG, the UK government proactively engaged with women’s groups from the outset, including those opposed to self-declaration, such as Fair Play for Women. This began with a period of pre-consultation engagement, which was underway by January 2018. A month ahead of the consultation opening, the UK Government stated it had ‘not yet decided whether or not to introduce a self-declaration model’ ([5 June 2018](#)). On 23 July 2018 a roundtable was held with 18 representatives from women’s groups and organisations, which covered the

interaction between the EA2010 and the 2004 Act, among other issues. An event exploring prisons/offender management was convened by the UK Government on 9 October 2018, just ahead of the consultation closing.

The consultation paper asked 22 main questions, with a mix of open and closed options. The interaction between the EA2010 and the 2004 Act accounted for more than a third (eight questions). The Ministerial Forward by Penny Mordaunt reiterated the exploratory nature of the exercise:

We also want to be clear that this is an explorative consultation and we do not have all the answers. That is why, as we consult, we are mindful of the need to engage with all perspectives. We particularly want to hear from women's groups who we know have expressed some concerns about the implications of our proposals. To be clear – this consultation focuses on the Gender Recognition Act; we are not proposing to amend the Equality Act 2010 and the protections contained within it. We do realise, however, that there are concerns about interactions between the two Acts and we want to use this consultation as a way of gathering these views.

The Executive Summary stated:

#### **The Equality Act 2010**

9. As we consult, the Government is mindful of how changing the requirements for a GRC might affect other areas of law and public services. We want to understand more about these relationships as part of the policy development process.

10. In particular, we are interested in the relationship between the GRA and the Equality Act 2010.... We know that concerns have been expressed about how any change to the GRA might have an impact upon these protections in the Equality Act and we want to find out more about this.

In respect of the current gender recognition process and the difficulties experienced by trans people, the government stated:

26. The Government is persuaded by these arguments. We want to make it easier for trans people to achieve legal recognition, and that is why we are consulting on the **best way** to achieve this. (Emphasis added)

Under the heading 'Gender Recognition and the Equality Act 2010', paragraph 110 set out the government position, which it then opened to question.

#### **The Government's position**

110. The Government does not intend to make any amendments to the existing exceptions in the Equality Act 2010 associated with the 'gender reassignment' protected characteristic. However, the Government recognises that concerns have been raised about the potential implications of reforming the GRA on the operation of these. As such, **the Government is keen to**

**collect evidence and opinion from all voices about the potential implications of GRA reform on the Equality Act in order to inform its decision making. In particular, the Government is interested on what having a GRC might mean for the exceptions in the Equality Act. We cover each of the exceptions separately below.** (Emphasis added)

Questions 12 to 18 asked for respondents' views on the impact on the exceptions in relation to sport, single and separate sex services, occupational requirements, communal accommodation, armed forces, marriage, and insurance. Question 19 asked about the impact on 'areas of law and public services other than the Equality Act 2010'.

In relation to single and separate-sex services, the preamble reiterated that it would still be possible to exclude individuals with the protected characteristic of gender reassignment, providing this was a proportionate means of meeting a legitimate aim, and that a GRC would 'form part of a service provider's decision as to whether to provide a different, or even no service to a trans person' but would not be 'a complete answer'. This position was not however, put beyond doubt. Question 13(A) asked:

Do you think that the operation of the single-sex and separate-sex service exceptions in relation to gender reassignment in the Equality Act 2010 will be affected by changing the Gender Recognition Act? (Y/N)  
Please give reasons for your answer

Questions 13(B) to (D) asked about service providers' experiences, and whether they felt confident interpreting the exceptions, and for the views of trans people who had experienced domestic abuse or sexual assault on accessing support. It did not, however, ask about women's experiences. Nor did the consultation ask about how women would be affected in relation to sport (Q12 asked, 'Do you think that the participation of trans people in sport, as governed by the Equality Act 2010, will be affected by changing the Gender Recognition Act?').

An accompanying '[Pre-Consultation Equality Impact Assessment for the Gender Recognition Act 2004](#)' restated that no decision had yet been made on how to reform the 2004 Act, and the need to collect evidence in relation to the interaction between the 2004 and EA2010 Acts:

The consultation asks questions about how reform of the GRA will affect the operation of the Equality Act exceptions, to enable the Government **gather further evidence of the impact of any reform on women**. The consultation also asks about how reform of the GRA might impact on single sex service provision.

([Government Equalities Office, 2018: para. 20](#), emphasis added)

## November 2018: Analysis of 1st Scottish Government consultation

On 23 November 2018 the SG published an independent [report](#) on the 2017 consultation responses. The consultation secured 15,532 individual responses and 165 responses from organisations or groups. The report provided a numerical breakdown of the closed responses, and summarised people's views, based on the open-ended questions.

In respect of the key proposal to remove the requirement for a diagnosis of gender dysphoria, 60% of respondents agreed with the SG position. In relation to those who did not agree, the report explained that the 'two most frequently raised issues were closely associated and concerned: the potential impact on women's safety if their safe spaces are compromised (and) the risk of abuse of the proposed system, particularly in relation to safe spaces'.

The report expanded on these concerns over twenty-one paragraphs (2.15 to 2.36). Specific issues raised related to 'women's safety in spaces including single sex spaces such as toilets, changing rooms, hospital wards and refuges' (para. 2.16), sexual assault victims, prisons, all-women shortlists, public boards, employment quotas or awards, sport, healthcare, self-exclusion, and data.

As noted above, the 2017 consultation had asked whether any changes were needed to the s22 privacy exceptions, and if so, to describe these. Summarising the views of those who thought that further exceptions were needed, the report stated:

59. The most frequent suggestion was that there should be an additional requirement for disclosure with respect to access to women only spaces, sports, shortlists or employment quotas, with a number of respondents specifically referencing existing sex-based protections under the Equality Act 2010.

## June 2019: Scottish Government next steps

On 20 June 2019 the SG set out its next steps in a statement to the Scottish Parliament. The then Cabinet Secretary for Social Security and Older People Shirley-Anne Somerville announced that a draft Gender Recognition (Scotland) Bill would be published later in the year (2019), stating:

"The Bill will be formally introduced to Parliament only when there has **been a full consultation on the precise details contained within that draft bill.**"

([Shirley-Anne Somerville, 20 June 2019](#) emphasis added)

The announcement made clear that the SG was aware of concerns around the EA2010, but rebuffed these, asserting that reform would not affect the 'position' of the exceptions in the Act.

“One particular area of concern that has been raised about gender recognition reform - both during and since the consultation - is the impact it will have on the provision and protection of single sex or women only spaces and services.

Presiding Officer, it is vital to be clear on this important point. The Equality Act already allows trans people to be excluded, in some circumstances, from single sex services where that is proportionate and justifiable, including where a trans person has legal recognition. The Government’s proposals to reform the Act will not affect that position.” (Ibid.)

## **December 2019: 2nd Scottish Government consultation**

On 17 December 2019 the SG opened its draft Bill to [consultation](#). This ran until 17 March 2020. The Ministerial Forward made clear that the SG was aware of the concerns documented in the 2017 consultation but reiterated that the EA2010 would not be changed by reform.

A previous consultation on reform showed a majority in support for our proposals but also some concerns. Consulting on the detail of a draft Bill and associated impact assessments will, I hope, clearly explain the need for reform and address those concerns... We are not proposing to change the Equality Act or the exceptions within it that protect single sex spaces and services.

Chapter 5 of the consultation paper, titled ‘The Impact of Gender Recognition Reform on Women’ stated:

5.01. The Scottish Government recognises there are concerns that have been raised about the potential impact of gender recognition reform on women. This Chapter addresses these concerns. The Scottish Government recognises the concerns must be fully considered.

5.03. The Scottish Government is clear that reforming the GRA does not diminish the rights of women...

In several places, the consultation paper cited the UK Government 2018 [consultation paper](#). For example, in relation to the exception for communal accommodation it stated:

5.41. As indicated above, the 2010 Act is generally a reserved matter for the UK Government. The UK Government’s consultation on reforming the GRA in England and Wales said in paragraph 121

“The Government’s view is that this provision would not be undermined by amendments to the legal recognition process set out in the GRA. Having a GRC will be a factor that organisations or accommodation providers will

consider when offering communal accommodation, but it is not the only factor.”

5.42. The 2010 Act exception for communal accommodation will not change following GRA reform.

Yet unlike the UK consultation, the SG did not ask respondents for their views, but instead treated its own view as definitive. Chapter 5 concluded as follows:

5.57 The Scottish Government has carefully considered whether moving to a statutory declaration-based system for obtaining legal gender recognition, as outlined in the draft Bill, would impact adversely on the rights of women.

5.58. The key question in this context is very much about whether a change in the system for obtaining legal gender recognition would adversely affect women’s rights. The Scottish Government has concluded that it would not.

5.59. In reaching this view, the Scottish Government has considered international experience....

Despite having previously promised a ‘full consultation on the precise details contained within that draft bill’ ([Shirley-Anne Somerville, 20 June 2019](#)), extraordinarily, the 2019 consultation did not elicit views on the main proposal in the Bill, namely the removal of the requirement for medical evidence. Instead, the consultation set out just five questions, shown in full below.

Q1. 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/No. If yes, please outline these comments.

Q2. 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/No. If yes, please outline these comments.

Q3. Should the minimum age at which a person can apply for legal gender recognition be reduced from 18 to 16? Yes/No/Don’t know. If you wish, please give reasons for your view.

Q4. Do you have any other comments on the provisions of the draft Bill?  
Yes/No. If yes, please outline these comments.

Q5. Do you have any comments on the draft Impact Assessments?  
Yes/No. If yes, please outline these comments

It is difficult to overstate the inadequacy of these questions as a vehicle for securing public views on the ‘precise details’ of a controversial area of reform. The open-ended, generic structure of the consultation also precluded any comparison with the 2017 consultation, which had allowed for quantitative analysis, with the exception of the question on age.

In relation to s22, the consultation paper appeared to acknowledge the concerns raised in the 2017 consultation, specifically whether s22 ‘could make it harder to use the general occupational requirement exception’ (see paras 5.30 to 5.31). The consultation paper further stated that before introducing the Bill to Parliament, the SG would consider whether further exceptions should be made and if SG guidance should be issued. Having flagged this as a possible area of concern, the consultation did not however ask respondents for their views. The matter next came to the fore at Stage 2 of the Bill, when MSPs expressed concerns about the chilling effects of the privacy provisions on service providers. In response the Cabinet Secretary stated:

*“It is vital that a person’s right to privacy is protected in that way. We are not amending section 22 of the 2004 act. We can make further exceptions by way of regulations, but only when an exception relates to devolved matters.”*

(Shona Robison, [SP OR col. 26](#))

MSPs who tried to put down amendments to s22 were informed by the parliamentary authorities that these were inadmissible. In other words, the technical design of the Bill chosen by the SG meant that it could not be used to amend this section of the GRA 2004, despite the issue having been raised as relevant in the first consultation paper.

## **September 2020: UK Government response and publication of consultation report**

On 22 September 2020, the UK Government announced that it did not intend to change the criteria for legal gender recognition, putting England and Wales on a different track to Scotland. Elizabeth Truss, then Minister for Women and Equalities, stated *“it is the Government’s view that the balance struck in [the GRA] is correct, in that there are proper checks and balances in the system and also support for people who want to change their legal sex.”* She acknowledged the need to improve the process and experience transgender people have when applying for a GRC, and that the Government would introduce an online application process and reduce the fee from £140 to £5. Since implementation of these changes, the number of GRC applicants under the 2004 Act has [increased significantly](#).

At the same time, the Government Equalities Office published an independent [Analysis Report of Consultation Responses](#). The UK consultation received over 100,000 submissions. An online form organised by Stonewall accounted for 39% of submissions. The Fair Play for Women online form accounted for a further 18% of submissions, and the pro-reform group ‘Level Up’ accounted for 7% of submissions ([King et al. 2021: 21](#)). The analysis showed that nearly two-thirds (64.1%) of respondents believed the requirement for the diagnosis of gender dysphoria should be removed, and just over a third (35.9%) thought that it should be retained.

Looking at the effects of reform on the EA2010 and other areas of law, 60% thought that the operation of the single-sex and separate-sex service exceptions in relation to

gender reassignment would not be affected, whilst 40% thought there would be an impact (N=86,540). Based on the open-ended responses to the same question, the report documented similar concerns to those raised in the first SG consultation. These related variously to the availability, accessibility, and safety of spaces for women, domestic violence support services, toilets, healthcare spaces, prisons, the operation of small organisations, and the relationship between the Gender Recognition Act and the EA2010 Act more broadly.

Q13(b) asked 'If you provide a single or separate sex service, do you feel confident in interpreting the Equality Act 2010 with regard to these exemptions?'. Of those who responded (N=8,770) 56.5% stated that they did not feel confident. Reasons included pressure or fear around using the exceptions, a lack of understanding over the exceptions, and pressure from funders to be trans inclusive.

## SNP Manifesto 2021 and Programme for Government.

The SG paused its work on reform during the pandemic. In April 2021, ahead of the Scottish Parliament elections, the SNP [manifesto](#) promised a deliberative process for the final stage of GRA reform. In contrast to the detailed proposal included in the 2016 SNP manifesto, in 2021 the manifesto stopped short of committing to a self-declaration model.

'In the next parliament we will work with trans people, women, equality groups, legal and human rights experts **to identify the best and most effective way to improve and simplify the process** by which a trans person can obtain legal recognition – so that the trauma associated with that process is reduced.' ([SNP Manifesto 2021: 33](#), emphasis added)

The position shifted in the Programme for Government 2021-22, published in September 2021, which stated:

'Within the next year we will bring forward the Gender Recognition Reform (Scotland) Bill, removing the current medical requirements and reducing the time that applicants for gender recognition need to have lived in their acquired gender from two years to three months.

[A fairer, greener Scotland: Programme for Government 2021-22: 50](#)

For further detail on these developments see this [blog](#).

## September 2021: Analysis of second SG consultation

On 2 September 2021 the SG published an [independent analysis](#) of the 2019 consultation responses. As documented [here](#), SG delayed publication for more than three months, having stated on 17 May 2021 that the report would be published 'shortly'.

The consultation secured 17,058 submissions. The structure of the questions prevented automated quantitative analysis, so this is unavailable for all but the small number (N=251) of organisational responses, which divided just over half in favour of moving to self-declaration, around four out of ten against and the rest giving no opinion or having an unclear view.

In respect of all those responses broadly opposed to reform, the Executive Summary states:

'A serious concern expressed by many respondents broadly opposed to a statutory declaration-based system was the **likely impact on women and girls**. It was often argued that the consultation paper fails to explain how abuses of a statutory declaration-based system will be prevented. There were particular concerns that the removal of the requirement for a diagnosis of gender dysphoria will make the system open to abuse, allowing predatory men to access women's safe spaces. It was also argued that women's sex-based rights will be compromised, with potential effects on women's sport, medical services, rights to equal pay and women only shortlists' (2022: iii, emphasis in original)

The following selected extracts relate specifically to the impacts on the operation of the EA2010.

2.28 It was often argued that the consultation paper fails to address the interaction between self-declaration of gender and protection of single-sex spaces under the Equality Act (2010) and, specifically, that there is a lack of clarity on the operation of single-sex exemptions. It was also suggested that, as it would be impossible to know whether an individual has a GRC, in reality users of single-sex spaces could not challenge anyone who claims to be entitled to use them.

7.19 It was suggested that the EQIA does not engage systematically with questions on the implications of reform of the 2004 Act for operation of the Equality Act and does not clearly set out the evidence that the Scottish Government has considered in coming to the conclusion that there is no negative impact on women's equality and rights.

7.31 With respect to operation of the single-sex exemptions available under paragraph 28 of schedule 3 of the Equality Act it was argued that, once a person has changed their birth certificate, there is no way for an organisation to distinguish between those who were or were not born female. Further, it

was suggested that organisations may worry about their right to ask if a person holds a GRC, and it was noted that it will not be an offence for a person to make a misleading statement about their own GRC status.

7.32 A requirement that organisations in receipt of Government funding (for example through the Equally Safe Fund) must have trans inclusion policies in place was suggested to have implications in that: It may fetter the discretion of funding recipients to invoke single-sex exceptions under the Equality Act 2010...

7.35 There was also a concern that evidence from several Women's Organisations about the potential for women's self-exclusion from specialist and mainstream women-only spaces and services, should they include trans women, has been overlooked.

7.36 A number of examples were given of situations where women may self exclude rather than share a space with a male bodied person....

This [blog](#) provides more detail on the consultation design and the views documented in the report.

## **2 March 2022: Publication of Gender Recognition Reform (Scotland) Bill**

On 2 March 2022 the SG published the Gender Recognition Reform (Scotland) Bill. Despite the concerns documented in the 2017 and 2019 consultation report, both the Bill and EQIA (in relation to the protected characteristic of sex) remained largely unchanged from 2019, suggesting that Ministers had not taken the by now well-rehearsed concerns about reform into account (see further [here](#)). The [Policy Memorandum](#) to the Bill noted some of the concerns raised in the two consultations; but contained no detailed response explaining why these points had been rejected, and none was published elsewhere.

Between May and December 2021, the SG only met with groups supportive of reform. It took no initiative to engage with any groups with concerns or questions until shamed into offering meetings by critical press coverage, early in January 2022. Short meetings were held with Ministers and officials between January and March, although these were too late to influence policy making. An Fol response shows that the Bill papers were passed to the Presiding Officer on 2 February. Internal government approval needs mean all major decisions will have been finalised several weeks before that. For further details on the SG engagement process see [here](#).

In February 2022 a group of women's groups, including ourselves, asked the Scottish Government to convene a roundtable to bring together people with different views. The Scottish Government declined to do so.

## Conclusion

When public bodies consult, they must do so fairly, in accordance with the 'Gunning principles', which is derived from the case of *R v Brent London Borough Council ex pte Gunning* (1985) LGR168. The Gunning Principles set out legal standards for public authorities to follow, to meet their legal duties that any consultation is fair, and describe the following requirements as essential:

First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposals to permit of intelligent consideration and response. Third...adequate time must be given for consideration and response and finally fourth, that the product of consultation must be conscientiously taken into account..."

As an example of this, in *Binder & Ors v Secretary of State for Work and Pensions* [2022] EWHC 105 (Admin) the High Court ruled that a disability survey undertaken by the UK Government was unlawful as it failed to provide sufficient information on the strategy under consideration to allow for meaningful responses. The Gunning Principles are referred to in the [Scottish Government Consultation Good Practice Guide](#), along with '11 principles set out by the UK Government [that] include and expand on the Gunning principles.'

There is scant evidence to show that the SG took the results of its consultations conscientiously into account, whilst its pro-active engagement with external stakeholders showed a clear pattern of bias. The Bill and, in our view, the demonstrably inaccurate and incomplete EQIA, remained more or less unchanged from 2019. Instead, the SG appeared to treat its own view as unassailable.

Whilst acknowledging that concerns existed in relation to the interaction between the 2004 and the EA2010, neither consultation paper actively inquired about this. When concerns were nonetheless documented in the two independent consultation reports, the SG did not engage with these. Section 22 was asked about in the 2017 consultation, acknowledged but not asked about in the 2019 consultation, and then during the passage of the Bill declared as outside the scope of the Bill to address in any way. In 2019, the SG did not consult on the main plank of reform, namely the introduction of a model based on self-declaration, nor did it seek to collect quantitative data on respondents' views.

Despite this, in public, the SG continues to place weight on its two consultations. A recent sharply worded letter from Shona Robison to Alister Jack, Secretary of State for Scotland, stated:

The Gender Recognition Reform (Scotland) Bill has been years in the making, has involved input from tens of thousands of organisations and individuals through public consultation, extensive evidence-taking and consideration by the Scottish Parliament's Equalities, Human Rights and Civil Justice Committee, and significant joint working from MSPs of all parties. ([Shona Robison](#) 21 January 2023)

In the same letter, the Cabinet Secretary stated:

I will also note that the positions of the UK and Scottish Governments were broadly consistent, with each proposing similar reforms, until September 2020 when the UK Government announced it would not take forward the proposed reforms set out in its 2018 consultation, despite 64% of respondents agreeing that the requirement for a diagnosis of gender dysphoria should be removed.

The reference to 64% support for removing the requirement for a diagnosis of gender dysphoria is of course now dated, and as with any consultation is not a representative population sample. Like any government, the UK government was entitled, indeed duty bound, to do more than count the responses, and to look also at the substantive arguments made. As noted above, the SG avoided collecting comparable data in its second consultation. The closest comparable recent exercise here is the [call for views](#) by the Scottish Parliament Equalities, Human Rights and Civil Justice Committee in May 2022, in which 59% of respondents disagreed with the overall purpose of the Bill; 38% agreed; and 3% indicated that they did not know (N=10,800). These results are closer than the 2018 UK or 2017-18 SG consultation figures to representative public opinion polling, which has repeatedly shown that reform based on self-declaration has minority support. Arguing that reform should reflect majority support, whether in the population or in consultations, raises difficult questions for the SG, quite aside from that consultations are required to be more than a numbers game.

The SG has recently argued that the UK Government ought to have used its earlier consultations to raise its concerns. If the SG treatment of concerns repeatedly raised by its own citizens in its own consultations provides any guide to how seriously the UK making the same arguments would have been taken, then it is difficult to see what difference such interventions would have made.

The same disagreement would presumably still have taken place, only this time potentially against a backdrop of complaint about attempted UK government interference in internal SG and Scottish Parliament processes, outside the framework put in place by the Scotland Act. Indeed, the exceptionally hostile, resentful, and intransigent tone of the SG's public responses to the EHRC throughout 2022 is worth noting here, as is the EHRC's decision last week to re-

publish all its past correspondence with the SG on this. The EHRC was making essentially the same points of substance about the interaction with the Equality Act, and saw its arguments repeatedly dismissed as incomprehensible or wrong. That provides a reasonable indication, we think, of how an earlier UK government intervention on this point would have been received.

## Useful links

For an overview of the events discussed here and other developments in both countries up to September 2021, prior to publication of the Scottish Bill, see this [House of Common briefing](#).

For details on the Section 35 order, see:

[Section 35 of the Scotland Act and vetoing devolved legislation](#). House of Commons Library.

Selected consultation documents:

[Review of the Gender Recognition Act 2004: consultation](#). Scottish Government. November 2017

[Reform of the Gender Recognition Act–Government Consultation](#). UK Government. July 2018

[Pre-Consultation Equality Impact Assessment for the Gender Recognition Act 2004](#). UK Government. July 2018

[Review of the Gender Recognition Act 2004. Analysis of responses to the public consultation exercise](#). Scottish Government. November 2018

[Gender Recognition Reform \(Scotland\) Bill: A consultation by the Scottish Government](#). December 2019

[Proposals to reform the Gender Recognition Act 2004 Factsheet. Scottish Government](#). December 2019

King et al. [Gender Recognition Act Analysis of consultation responses](#). Government Equalities Office. September 2020

[Gender Recognition Reform \(Scotland\) Bill: Analysis of responses to the public consultation exercise](#). Scottish Government. September 2021

[Gender Recognition Reform \(Scotland\) Bill](#) (as introduced).

Gender Recognition Reform (Scotland) Bill. [Policy memorandum](#)